





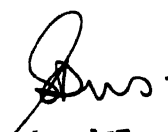








The Marriage women's  
Property Act, 1874, Act. 3  
1774

  
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# THE MARRIAGE AND DIVORCE ACT.

## INDEX.

Figures which are marked in thick types at the end of each line indicate the pages of the book.

### A

*Abandonment*, must continue for two years or upwards to constitute desertion, *M—Q*, 98.

*Abatement of suit*, for dissolution of marriage, *K—M*, 58

*Absence*, Suit for a decree of dissolution in case of, among Parsis—In case of, for seven years, *S* 29, 513

*Absence on business*, is no desertion, *F*, 230.

*Accessory*, Connivance, how differs from being, *J*, 106, 107.

Duty of Judge to satisfy himself that petitioner is not, *K*, 107

Meaning, *II*, 106.

Connivance and being, to distinguished, *E*, 109

*Accessory before the fact*, Party conniving need not be, *W—Y*, 108

*Access to children*. See CHILDREN.

See CUSTODY OF CHILDREN.

Interim orders regarding custody of children and, 348—350

Orders as to, 350—352\*

Cases where application for, were refused, *R—B*, 351, 352

Practice and procedure in making orders as to custody of children and, *P*, 352—359.

Act XXIX of 1839 (Dower), 411—424

Act XXI of 1850 (Caste Disabilities Removal), 425—449

Act V of 1852 (Marriage by Registrar), 879—886.

Act XV of 1856 (Hindu Widow's Re-marriage), 461—492

Act XXXI of 1851 (English Law—Fines, and Common Recoveries), 910, 911.

Act XXV of 1864 (Marriage of Christians), 887—892

Act V of 1865 (Indian Marriage), 893—909

Act XV of 1865 (Parsee Marriage and Divorce), 493—536

Act XXI of 1866 (Native Converts' Marriage Dissolution), 645—659

*Act I of 1869*, Loss of caste—Succession under Oudh Estates, *N*, 441

Act IV of 1869 (Marriage and Divorce), 1—409.

*Act IV of 1869*, Code of Civil Procedure to apply to proceedings under Divorce, *S*, 45, 359.

Procedure under the Divorce, 359—394

Divorce, not applicable to Mahomedan converts to Christianity, *J*, 440.

Act III of 1872 (Special Marriage), 537—560.

*Act III of 1872*, Re-marriage, if to be as Hindu—Re-marrying under,—Forfeiture, if effected, *O, P*, 464, 465.

Act XV of 1872 (Indian Christian Marriage), 561—640.

Act III of 1874 (Married Women's Property), 661—680.

Act XII of 1880 (Kazis), 681—694.

*Act III of 1872—(Concluded).*

Act VI of 1886 (Births, Deaths and Marriages Registration), **695—757.**

Act XVI of 1890 (Births, Deaths and Marriages Registration Act), (1886) Amendment, **759—760.**

Act II of 1892 (Marriage Validation), **641—644.**

Act XIV of 1903 (Foreign Marriage), **763—766.**

Act VII of 1909 (Anand Marriage), **767, 768.**

Act IX of 1911 (Births, Deaths and Marriages Registration Amendment), **761, 762.**

*Bengal Acts*, Ben. Act I of 1876 (Bengal Muhammadan Marriages and Divorces Registration), **769—792**

*Madras Acts*, Act IV of 1896 (Malabar Marriage), **793—830.**

*Adjournment*, Practice as to, *H*, **33.**

Where deception is not proved to have been for two years or upwards—Practice—and withdrawal of suit, *J—J*, **209.**

Power to adjourn cases under Divorce Act, *S* **54, 379.**

Costs of, *W*, **379.**

Provisions of the Code of Civil Procedure regarding, *V—Y*, **379, 380.**

Sufficient cause for which, have been granted, *Z—D*, **380.**

Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—for a year—Interview—*S*. 15, **650**, Procedure on expiration of, —Interrogation of respondent—Decree, *S*. 16, **550.**

*Administration*, Effect of Divorce on widow's right to administer estate, *F*, **178.**

to wife dying after a judicial separation or protection order—English law, *Z—D*, **178, 179.**

*Administrators*, Non-survival of right to sue for divorce to executors or, *E, F*, **179.**

*Admission*, See *CONFESSION*.

See *CO-RESPONDENT*.

Decree based merely on, and without recording evidence, *R—T*, **98.**

Decree for dissolution not to be made on mere—, *P*, **127**

*Adoption*, See *HINDU LAW—ADOPTION*.

Relationship by, *D, E*, **201.**

Loss of caste—Right to give son in, *X—Z*, **447.**

among Parsis—Will—Evidence, *X—Z*, **496.**

different forms of, in Malabar, *K—P*, **810.**

*Adulterer*, to be co-respondent in suits for dissolution of marriage, *S*. 11, **99.**

Reason for making alleged, a co-respondent, *C*, **100.**

Husband not compelled to charge every, *J*, **101.**

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged, to intervene, *A, B*, **102,**

Every allegation of adultery involves "an alleged," *C*, **102.**

Where, is absent abroad—Practice, *L* **103.**

Petitioner knowing the name of the, even when wife is leading the life of a prostitute—Co-respondent, *T, U*, **104.**

Petitioner being unable to obtain evidence against, *A—C*, **105**

Name of alleged, not known—Effect, *V, W*, **105.**

Name being known after filing petition—Practice, *Z*, **105.**

Where identity of—Is lost through neglect—, *D*, **106.**

Husband may claim damages from, *S*. 34, **262.**

Damages and costs against —, **262—271.**

Damages against,—Measure of damages, **263—271**; Circumstances which tend to reduce, **267**; Those which tend to enhance them, **268.**

**Adulterer—(Concluded).**

Order as to the payment and disposition of damages against, 268—270.

Practice in claiming damages against, 270.

Claim for damages against, without claiming dissolution or judicial separation, *F—I*, 270.

Power to order, to pay costs, *S*, 35, 271.

**Adulteress**, Reason for making alleged, a co-respondent, *D*, 100.

**Adultery**, Bigamy with, *S*, 3, 44.

Reasons why divorce cannot be granted for simple, of husband, *T—W*, 56.

Wife's ante-nuptial incontinence cannot be pleaded in defence of wife's—, *G*, 58.

Decree of judicial separation granted on ground of cruelty—Divorce on ground of subsequent, *U*, 59.

Decree for judicial separation granted on ground of husband's—Divorce on ground of subsequent cruelty, *V*, 59.

what is, *W*, 59.

must have been actually committed for purposes of relief, *Y*, 59.

Respondent and co-respondent—One may be found guilty of, and the other not, *A—C*, 60.

Consummation of marriage not necessary to constitute, *D*, 60.

Evidence of—, 60—62.

Wife's, no excuse for rape by husband, *C*, 66.

Charge of, and of the birth of the child, if cruelty, *V*, 75.

Condoned, and desertion—Revival of, *L*, 80.

Condoned, revived by undue familiarities with stranger, *D*, 80.

Revival of condoned cruelty by and condoned by subsequent cruelty, *Z*, 80.

Charge of, with persons, of whom some are known and some unknown—Practice, *J*, 101.

Every allegation of, involves "an alleged adulterer," *C*, 102.

Connivance of, with *A* bars relief in respect of—, with *B*, *I—K*, 109.

Cruelty and,—Revival of one by the other, *X*, 118.

Court refusing relief on ground of petitioner's—Such refusal no bar to Court's granting relief on subsequent proceeding, *M*, *N*, 130.

Reference to previous records in proof of petitioner's, *O*, 131.

Discretion in case of petitioner's—, Cases where the discretion has been exercised in favour of the petitioner, *L—E*, 132.

Petitioner's—, *Z*, 132.

Evidence of, *G*, 133, *R—T*, 277.

See ALSO EVIDENCE.

Cases where petitioner's was excused and decree made in petitioner's favour—

Where the—, is committed in ignorance of fact—Where the—, is committed in ignorance of law, 134—136.

Where the—, is committed in consequence of the violence and threats of the husband, petitioner's, is excused and decree passed for dissolution, *R*, *S*, 135.

When the—, is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's—is excused and a decree passed for dissolution, 135, 136.

Conduct of petitioner conducting to—Just and reasonable cause for desertion—Drunkenness of wife, *S*, 143.

And cruelty, 152, 153.

Proof of, *K*, *N*, 377, 378.

Effect of incontinency or second marriage on right to dower, *X—Y*, 420



*Adultery*—(Concluded).

Suit for divorce or Judicial separation among Parsis—On ground of wife's,—On ground of husband's, &c, S. 30, 513—522.

Of Parsi petitioner—Effect, *Z—B*, 519, 520.

Petitioner's cruelty or, to bar suit under Act XXI of 1866, S. 25, 653.

*Adultery coupled with desertion*, Bigamy coupled with adultery—What are, *M*, 515, 516.

*Affidavit*, See EVIDENCE.

To dispense with co-respondent—Practice as to, *P—R*, 101.

In support of motion to dispense with co-respondent, *I, J*, 103.

In support of the petition for restitution of conjugal rights, contents of—English law and Practice, *T—W*, 238.

Mode of taking evidence in cases under the Divorce Act, S. 51, 371.

Provisions of the Code of Civil Procedure relating to, *J—L*, 371.

Suit for dissolution of marriage—Practice, *M, N*, 371.

Inter alienations, alterations, or erasures in body of, *Z*, 375.

use of, in matrimonial matters, 371—376.

*Affinity*, See CONSANGUINITY.

See PROHIBITED DEGREES.

Prohibited degrees of consanguinity or, contemplated by the law—English law and Indian, *E—J*, 63

Mere carnal connection with a woman is, *Q*, 199.

to wife's kindred, *R*, 199.

to husband's kindred, *S*, 199.

between kindred of husband and kindred of wife, *T*, 200

Consanguinity and,—English Law—Consanguinity and, before 5 & 6 Will, 4 c. 54, S. 2, *G—J*, 575.

*Age*, of parties—How affects right to relief, *A, B*, 182.

*Agreement*, Power of Court to make provision for children not affected by, between parties, *P*, 206.

not to bar dower may be enforced, S. 11, 423.

*Alimony*, see ALIMONY PENDENTE LITE.

see Alimony permanent.

Power to award, where there is plea to jurisdiction, *Q*, 50

Right of wife to apply for, general rule as to—It is not material whether she applies as petitioner or respondent, *J, A*, 272.

Grant of, discretionary with Court, *B*, 273.

Object of, *Y—A*, 273.

Felony and imprisonment if bar to an application for—*B—D*, 275.

Suspension of payment of, *H*, 277.

Applicant (wife) found guilty in first trial—in second trial, *U, V*, 277.

Jurisdiction questioned, no bar to grant of, *G, H*, 278.

Question of domicile being in dispute if a bar to grant of, *I*, 278.

Independent support of wife, a bar to grant, *J*, 278.

The husband's means being small, a bar to granting, *O, P*, 278.

Marriage null and void on the face of petition and answer—Effect on, *Q*, 278.

Bigamous marriage No, *R*, 278

Guardian *ad litem*, not liable for, *A*, 279.

Application to make decree absolute—Arrears of, *B*, 279.

No application would lie for a small sum pending petition for, *S*, 279

is purely personal allowance to wife—No power of alienation, *T—V*, 279.

Present distress of wife no ground for urgency in granting, *W—X*, 279.

*Alimony*—(Concluded).

- Power to order permanent, S. 37, 293.
- Power to order monthly or weekly payments, S. 37, 294.
- Power of Court to order permanent, after decree absolute, *J—L*, 295, 296.
- Permanent, before decree absolute, *M*, 296.
- not assignable, *O*, 296.
- Period from which permanent, commences, *P*, 296.
- Where wife undergoes sentence of penal servitude, *Q*, 296.
- Costs, *W*, 296.
- Conditions on wife in granting permanent, *X*, 296.
- Charge on husband's property for, *B—D*, 297.
- Four ways in which distinct sums of money may be secured to the wife—Practice of English Courts, *E*, 297, 298.
- Permanent allowance after decree of judicial separation and dissolution of marriage—Difference in English Law, *F—J*, 298.
- Difference between, granted after judicial separation or after divorce, *K—N*, 298, 299.
- Bankruptcy of the husband, effect of on, *O*, 299.
- Children to maintain—Effect of, in fixing, *J—O*, 303.
- Injunction to restrain husband from making away with property, *I*, *J*, 303.
- Permanent, for a guilty wife, 306—308.
- Amount of permanent, ordered to a guilty wife, *Y—A*, 307, 308.
- Judicial separation on ground of wife's cruelty, *C*, 308.
- Security from husband for payment of permanent, *H*, 308.
- Enforcing payment of permanent, 308, 309.
- Order by consent for, *K*, 309.
- Arrears of, promise to release, *M*, *N*, 309.
- Covenant as to, *X*, *Y*, 310.
- Court may direct payment of, to wife or to her trustee, S. 38, 311.
- Order to pay, to solicitor, *B—D*, 311.
- Permanent, among Parsis, S. 34, 321.
- Payment of, to wife or her trustee among Parsis, S. 35, 322.
- Parsi Marriage and Divorce Act XV of 1865—Charge on husband's immoveable property—Widow—Distributive share, *I—J*, 322.
- Power of Court to award, under Act XXI of 1866, S. 28, 354.
- Bequest of savings of, *J*, 367.

*Alimony pendente lite*—See *Alimony*.

See *Alimony permanent*

- Effect of protection order upon, *S*, 232.
- S. 36, 271, 272.
- Jurisdiction—Application after decree *nisi*, *C—E*, 273.
- And *alimony permanent*—Difference, *S—X*, 273.
- From what time payable, *F, G*, 273, 274.
- Until what time payable, *H*, *I*, 274.
- When payable—Ecclesiastical Courts, practice of, *J*, 274.
- Question of, disposed of at first hearing of the suit, *K*, 274.
- Facts to be established before, can be granted—Practice of Ecclesiastical Courts, *L—T*, 274, 275.
- Wife's conviction for felony, no bar to granting *A*, 275.
- Neglecting to apply promptly for, Effect, *E*, 275.
- Nature of suit not to affect wife's right to, *U*, *V*, 275.
- Plea as to jurisdiction no bar to grant, *W*, 275.
- Decree *nisi* for dissolution, no bar to ordering, *X*, 275.

***Alimony pendente lite*—(Concluded).**

Appeal, no bar to, *Y, Z, 275.*

Wife's guilt, how affects her right to, *275—277.*

Protection order no bar to application for, *F, 277.*

Amount to be awarded as, *280—286.*

Mode of determining husband's means for the purpose of awarding, *286-a-289.*

Enforcing order for, *289, 290.*

Practice and procedure regarding the grant of, *290—293.*

Non-payment of, effect of, *X, 293.*

Permanent alimony larger in amount than *H, I, 303.*

Absence of means—Reference to Registrar—Practice, *H, 305*

Among Parsis, *S. 33, 320.*

***Alimony permanent.* See Alimony See Alimony pendente lite**

Points to be considered by the Court in granting, *299—301.*

Points to be considered in fixing, *R—T, 301.*

Amount of permanent alimony—No fixed rule as to amount of permanent alimony—Generally left to discretion of Court—General rule as to one-third—But liable to variation—Circumstances where permanent alimony has been fixed at less than one-third, *302—306.*

Permanent alimony not to exceed one half of joint income, *G, 303.*

Permanent alimony larger in amount than alimony *pendente lite, H, I, 303*

Amount of—Estimation of husband's income, *X—I—A, 304*

Varying orders regarding, *309, 310.*

Alimony *pendente lite* and alimony permanent—Difference, *S—X, 273 R, 272.*

***Aliyasanthana Law, See Malabar Law.***

See Marumakkathayam Law

Marumakkathayam Law and,—Nature of family governed by such Law—Classes governed by Marumakkathayam, *D, E, 799, 800.*

Classes governed by the, *F, 800.*

***Aliyasanthana Marriage, See Malabar Marriage***

how differs from Marumakkathayam marriage, *H, I, 800.*

***Alteration of Jurisdiction, Power to alter territorial jurisdiction of District Courts, S. 18, 310.******Alterations, Interalienations, or erasures in body of affidavit, Z, 375.******Amendments. See Practice and Procedure, App. VI.***

of petition for dissolution into one for judicial separation, *T, U, 128.*

Opportunity to be given to petitioner to amend petition in certain cases, *V, 128.*

of answer by adding a cross-prayer, *G—H, 153.*

of petition as to claim for damages—Addition of co-respondent, *C, D, 270.*

of Marriage Act, *713, 714.*

The Births, Deaths and Marriages Registrations Acts XVI of 1886, 1890, *759, 760.*

The Births, Deaths and Marriages Registration Act, 1911, *761, 762.*

***American authorities, value of, Y—B, 8, 9.******Anand marriage, Validity of, S. 2, 767.******Anand Marriage Act, Act VII of 1909, 767, 768.******And, Meaning, V—X, 10, 11.***

Case where, is to be read as "or," *B, 152.*

***Anglican, S. 3, 870.******Annuity, Covenant in separation deed to pay, A, 310.******Ante-nuptial debts, Husband not liable for wife's, S. 9, 679.***

- Ante-nuptial settlement*,—Inquiry into existence of ante-nuptial or post-nuptial settlements, S. 40, 315.
- Any person, A—C*, 184.
- Appeal*, Co-respondents' right to be heard in, *M*, 104.  
 From decree *nisi*, provisions as to, *U—1*, 155.  
 No bar to alimony *pendente lite*, *Y. Z*, 278.  
 Enforcement of, and appeals from, orders and decrees under the Divorce Act, S. 55, 381.  
 filed after time—Cause of delay, *X—B*, 382  
 Provisions of the Code of Civil Procedure relating to, to the King in Council and principles and practice governing the same, 383 - 394.  
 to High Court under Parsi Marriage Act, S. 42, 528  
 No, under Act XXI of 1866, but Judge may state case raising question whether conversion has dissolved marriage, S. 29, 655, Case to state necessary facts and documents, and suit to be stayed, S. 30, 655; Case to be decided by three Judges, S. 31, 655.  
 Refusal to register to be recorded under Bengal Act I of 1876, S. 20, 777; against refusal to register, S. 21, 777.
- Appeal to Queen in Council*, under Divorce Act, S. 56, 383
- Application of the Act*, Act applies only to marriages recognized as such by Christian Law, *B*, 24
- Apportionment of damages*, General principles as to, *U—B*, 313, 314.  
 Variation of order regarding, of damages, *T*, 313.  
 Examples as to, *Q—S*, 268, 269.
- Armenians*, Applicability of the Dower Act to,—English Law of dower if introduced in this country, *C—M*, 412, 413.
- Army*. Registration of Births, Deaths and Marriages Act, 1879, 843, 844.
- Arrears*, of alimony, promise to release, *M, N*, 309.
- Aswad*, ceremony of, what is, *C*, 499.
- Assault*, Conviction for indecent, no bar to suit for dissolution on ground of rape, *D*, 66.
- Assignment of dower*, *G—I*, 418
- Attempt*,—to commit sodomy or bestiality, *J—K*, 66.
- Bail*, Discretion of Judge to admit to, or not of persons charged under Sati Regulation, S. 4, 837.
- Bankruptcy*, of the husband, effect of on alimony, *O*, 299.
- Bar of suit*, for criminal conversation under Divorce Act, S. 61, 398.
- Barring dower*, Dower may be barred by a declaration in a deed, S. 6, 422—or by a declaration in the husband's will, S. 7, 422.  
 Devise of real estate to the widow shall bar her dower. S. 9, 422.  
 Bequest of personal estate to the widow shall not bar her dower. S. 10, 423.  
 Agreement not to bar dower may be enforced, S. 11, 423.  
 Equitable, by contract, *U, V*, 420.
- Bar to decree*, for divorce *a mensa et toro*, S. 22, 206.
- Bar to marriage*, Prior marriage, *a, W*, 572.  
 Insanity, if—, *X, Y*, 572.
- Bar to relief*, Delay as,—Reason of the rule, *W—B*, 138, 139.  
 Nature of the delay contemplated as being—, *C—G*, 139  
 Cruelty of petitioner as *a*, in suits for dissolution of marriage, 141, 142.  
 Reason of the rule as to desertion being a discretionary. *P—R*, 142, 143.

*Bar to relief*—(Concluded).

Petitioner's desertion a, in suits for dissolution of marriage, 142, 145.

Willful neglect of petitioner a, in suits for dissolution of marriage, 145.

Misconduct of petitioner a, in suits for dissolution of marriage, 146—150.

*Bar to suit*, Petitioner's cruelty or adultery to bar suit under Act XXI of 1866, S. 25, 683.

Male petitioner's co-habitation with one of several wives to bar suit under Act XXI of 1866, S. 26, 654.

*Bengal*, Muhammadan Marriages and Divorces Registration Act, I of 1876, 769—792.

*Bengal Sati Regulation*, 1829, Reg. XVII of 1929, 831—833.

*Bequest*, of personal estate to the widow shall not bar her dower, S. 10, 423.

*Bestiality*, ground for dissolution of marriage, 66, 67.

*Betrothal*, Specific performance of contract of, if can be granted, *F*, 459, 460.

What is—Legal effects of betrothal in Hindu Law, *X—E*, 458, 459.

*Bigamous marriage*, No alimony, *R*, 278.

*Bigamy*, proof of, for purposes of Criminal Law and Divorce proceedings, *P—Q*, 64.

Proof of, *R*, 64

When second marriage is void for consanguinity, *S*, 64.

When second marriage has not been formally celebrated, *T*, 64.

Taking place abroad, *U*, 65.

Adultery not presumed from, *V*, 65

Condoned, revival of, *Z*, 118.

As grounds of decree of nullity of marriage, S. 19, 189.

Or consanguinity, effect on marriage, *G—L*, 199.

• Punishment for, among Parsis, S. 5, 503.

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsee Marriage Act, not punishable, *R*, 504.

Second marriage contracted by a Parsi husband while first wife was living, prior to the passing of this Act, *N—U*, 516, 517.

Punishment for, under Special Marriage Act, S. 16, 562.

*Bigamy coupled with adultery*, What is, *M*, 515, 516.

*Bigamy with adultery*, S. 3, 44.

What is, *K, L*, 64

English Law, *M, N*, 64.

Proof of adultery and bigamy with same woman necessary, *O*, 64.

*Bill*, Forms in which, came before Council if guide in construction of Acts, *B*, 14.

History of the Divorce bill as to jurisdiction based on residence, *C*, 32.

*Births*, General Registry offices of, Deaths and marriages, 703—705.

Persons whose, and deaths are registrable, S. 11, 705, 706.

Registration of, and deaths, 705—713

Duty of Registrar to register, and deaths of which notice is given, S. 19, 709.

Persons authorized to give notice of, S. 20, 709, 710.

Entry of, or death to be signed by person giving notice, S. 22, 710, 711.

Grant of certificate of registration of, or death, S. 23, 711.

Exceptional provision for registration of certain, and deaths, S. 26, 712.

Correction of entry in register of, or deaths, S. 28, 713.

The Deaths and Marriages Registration Act, XVI of 1886, Amendment Act, 1890, 759, 760.

Deaths and Marriages Registration (Amendment) Act, 1911, 761, 762.

Registration of, Deaths and Marriages Army Act, 1879, 843, 844.

*Blind man*, Affidavit by blind or illiterate deponents, *A*, 373, 376.

*Books*, Government to provide seal and, under Bengal Act I of 1876, S. 5, 773.

*Brahmo Marriage*, History of the Special Marriage Act—Reasons for passing of the Act, 540—545.

Principle on which Special Marriage Act is based is one of religious toleration, *L*, *M*, 545, 546.

Conditions upon which marriages under, Act may be celebrated, *S* 2, 546.

One of the parties to intended marriage to give notice to Registrar under Special Marriage Act, *S* 4, 547; Notice to be filed and copy entered in the Marriage Notice Book, *S* 5, 547; Objection to marriage, *S* 6, 548; Procedure on receipt of objection—Objector may file suit, *S* 7, 548; Certificate of filing of suit to be lodged with Registrar, *S* 8, 548; Court may fine when objection not reasonable, *S* 9, 549.

Marriage how to be solemnized under Special Marriage Act—Place where marriage may be solemnized, *Ss* 11, 12, 550.

Rules and orders made under Act III of 1872, (Special Marriage)—General, 556, Bengal, 557; Bombay, 557, 559; *U. P.* 559, 560; Punjab, 560.

*Brahmo Marriage Act*, The Special Marriage Act, 1872, 537—560.

*British India*, *S* 2, 497.

Court in which suits to be brought under Parsi Marriage Act—When defendant has left, *S* 26, 511.

*British subjects*, abroad marriage of—English Law, *X—A*, 578, 579.

*Brothel*, Wife living in a, *R*, 104.

*Brothers*, Marriage between two, and two sisters not void, *U*, 200.

*Buddhism*, Conversion of Christian to, Effect of, *J*, 27, 28.

*Buddhist Law*, *Restitution of conjugal rights*, Provisions of Buddhist law relating to suits for restitution of conjugal rights, 254.

*Burden of proof*, in suits for dissolution of marriage, *X*, 99.

in suits for nullity of marriage, *G*, 182.

as to lucid interval Opinion of Lord Thurlow, *B*, 573.

*Canon Law*, *compensatio criminum* doctrine of—Above doctrine not applicable under Indian Divorce Act, *II—J*, 133.

*Carelessness*, Mere, is not neglect or misconduct, *R*, 145.

*Caste*, See Conversion.

Loss of, No forfeiture of rights of property, *P*, 430.

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of, to cease to be enforced, *S* 1, 441.

Loss of, Succession under Oudh Estates Act I of 1869, *N*, 441.

Act XXI of 1850 intended to prevent the forfeiture of rights of others than those who are put out of, on account of their renouncing or being excluded from religion—Case-law on the point reviewed *V, W*, 443, 444.

Degradation from, No ground of exclusion from inheritance, *K*, 445.

Exclusion from, for intrigue—Effect on civil rights, *U*, 447.

Loss of,—Hindu convert to Mahomedanism—Succession, *V*, 447.

Loss of,—Right to give son in adoption, *X—Z*, 447.

Hindu Law—Loss of,—Effect on right of guardianship of father, *B—I*, 447, 448.

Hindu Law—Loss of—Right of guardianship of mother, *J—L*, 448, 449.

Widow re-marrying according to custom of her, if forfeits her rights, 465—470.

*Caste Disabilities Removal Act*, XXI of 1850, 425—449.

*Ceremony*, Constituting valid marriage to have same effect on widow's marriage, *S* 6, 475.

*Asirvad*, of, what is, *C*, 499.

Form and, of marriage—English Law, *F*, 577.

*Ceremony—* (Concluded).

if essential in Sambandham, *C*, 807.

among Nambudri Brahmins, *F*, 809.

*Certificate*, and registry of marriages under Parsee Marriage Act, S. 6, 504.

Penalty for omitting to subscribe and attest, under Parsi Marriage Act, S. 11, 507.

Penalty for not registering, under Parsi Marriage Act, S. 13, 507.

to be sent monthly to Registrar-General, S. 55, 606.

Officers to whom Registrars in Native States shall send, S. 56, 606.

Registrars to ascertain that notice and, are understood by Native Christians, S. 57, 606.

On what conditions marriages of Native Christians may be certified, S. 60, 607.

Grant of, of marriage of Native Christians, S. 61, 609.

Forbidding by false personation issue of, by marriage Registrar—Penalty, S. 67, 612.

Issuing, or marrying without publication of notice—Penalty, S. 71, 617

Issuing, against authorized prohibition—Penalty, S. 71, 618.

Issuing, after expiry of notice, or in case of minor, within fourteen days, after notice, or against authorized prohibition—Penalty. S. 72, 618

Issuing, or marrying, without publishing notice, or after expiry of, Issuing for, or solemnizing, marriage with minor within fourteen days after notice—Issuing, authorizidly forbidden—Penalty, S. 73, 618, 6 9

Unlicensed person granting, pretending to be licensed—Penalty, S. 74, 619, 620. of certain marriages to be sent for Secretary of State, S. 81, 622.

Grant of, of registration of birth or death, S. 23, 711

Transmission of certified copies of certificates in marriage register to Registrar General of Births Deaths and Marriages, S. 31 714.

Person objecting to registration of Sambandam may file a suit in a Civil Court, S. 9, 818—Registration to be delayed pending final disposal of suit, if, of institution is lodged with Registrar, S. 10, 819.

Registrar to enter, of marriage in "The Marriage, Book", under Malabar Marriage Act, S. 12, 820

*Certificate of marriage*, under Special Marriage Act, S. 13, 551.

Licensing of persons to grant, between Native Christians under Christian Marriage Act, S. 9, 581

*Certified copy*. See copy.

Transmission of certificates in marriage register to Registrar General of Births, Deaths and Marriages, S. 8, A 505

Transmission of, of entries in marriage certificate book to the Registrar-General of Births, Deaths and Marriages under Special Marriage Act, S. 13-A, 551.

of entry in marriage register, etc., to be evidence, S. 80, 621.

Duty of Registrars as to sending, of entries in register books to Registrar-General, S. 24, 711.

Transmission of, of entries in marriage certificate book to the Registrar-General of Births, deaths and marriages, S. 29, 713, S. 31, 714.

Searches of lists prepared by Commissioners and grant of, of entries, S. 35, 716.

*Chadar Andasi* Marriage by, between a Khatri and a Khatrin widow—Legitimacy of children of such marriage, S. 457.

*Chapel*, The solemnization of marriage must be in an established Church or public, or other registered building, unless by special licence *U*, 576

*Charge*, on husband's property for alimony, *B—D*, 297.

Priority to partial estates, and speciality debts, S. 5, 422.

*Charge—(Concluded).*

Parsi Marriage and Divorce Act, XV of 1865—Alimony on husband's immoveable property—Widow—Distributive share, *I—J*, 522.

*Charge of adultery*, and of the birth of the child, if cruelty, *V*, 75.

*Chief executive officer*, Power to invest, with powers of Local Government under Parsi Marriage Act, *S* 52, 531.

*Chief Justice*, *S* 2, 497.

*Chief Matrimonial Courts*, Parsees, *S* 16, 509.

*Child*, Cruelty to, if cruelty to wife, *X*, 75, 76.

Cruelty to, if cruelty to mother, *R*, 78.

Prayer for custody of, of void marriage, *M*, 191.

Nullity suit, provision for,—English Law and Practice, *L—O*, 206.

Power of Court to make provision for, not affected by agreement between parties, *P*, 206.

Necessaries procured for maintenance of, *M—Q*, 226, 227.

To maintain—Effect of, in fixing alimony, *J—O*, 303.

Power to order settlement of wife's property for benefit of husband and, *S* 39, 311, 312.

Interest of infant, protected in matters of variation of settlements—Interests of infant, sometimes adversely affected—Unborn children's interests, *Q—V*, 333.

Power to make orders as to custody of, in suit for separation, *S* 41, 337—Power to make such orders after decree, *S* 42, 357, 338.

Custody of, 337—359.

Power to make orders as to custody of, in suits for dissolution of nullity, *S* 43, 338.

Power to make such orders after decree or confirmation, *S* 44, 338.

Who may intervene in petition for custody of, *D—L*, 340, 341.

Interest of, primarily cared for in making orders as to custody of, *M—O*, 341.

Of the, of the parties under Parsi Marriage Act, 529, 530.

Settlement of wife's property for benefit of, under Parsi Marriage Act, *S* 45, 530.

Law to apply to issue of marriages under Special Marriage Act, *S* 18, 552.

Dissolution of marriage not to affect status or right of, under Act XXI of 1886, *S* 27, 555.

*S* 2, 809.

Maintenance of wife and,—Malabar Marriage Act, *S* 17, 821, 822.

Guardianship of minor wife and, *S* 18, 823.

*Children of annulled marriage*, status of, *S* 21, 204.

*Christian*, See Native Christians.

Marriage between, and non-Christian—Law applicable to, *O—R*, 25, 26.

Conversion of, to Buddhism—Effect of, *J*, 27, 28.

Indian Marriage Act, 1872, 561, 640.

*S* 3, 571.

Marriage of Act XXV of 1864, 887—892.

*Christianity*, Profession of, by petitioner at time of presenting petition under Divorce Act necessary, *Y*, 23.

Respondent's religion, not material, *B*, 24.

Hindu convert to—Application of the Divorce Act—Conflict of rulings between Madras and Calcutta High Courts, *S—W*, 26.

Conversion to, or from, does not affect liabilities incurred by previous marriage, *K—N*, 28.

Divorce Act, (IV of 1869,) not applicable to Mahomedan converts to, *J*, 440.

Suits for restitution of conjugal rights by a Mahomedan convert to, *K*, 440.



*Christian marriage*, what is, *C-E*, 24.

Conversion, effect of, on, *C-E*, 27.

"Marriage"—Refers to, *O, P*, 39.

Relief provided for by Divorce Act only applies to, *Q-U*, 197.

*Christian religion*, Petitioner's, should also be proved in Matrimonial Suits, *W*, 99.

*Church*, English Minister refusing to perform ceremony of second marriage should permit use of his, *S*, 99, 396.

*S*, 3, 570.

The solemnization of marriage must be in an established, or public chapel or other registered building, unless by special licence, *U*, 576.

*Church of England*, *S*, 3, 570.

Persons authorized to solemnize marriage other than Clergy of Churches of England, Scotland or Rome—Solemnizing marriage with minor within fourteen days after notice—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Church of Rome*, *S*, 3, 570.

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome)—Issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Church of Scotland*, *S*, 3, 570.

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Civ. Pro. Code*, Provisions of the, as to enforcement of decrees for restitution of conjugal rights, *B-D*, 238, 239.

Code of Civil Procedure to apply to proceedings under the Divorce Act, IV of 1869, *S*, 45, 359.

Provision of the, with regard to suits by or against minors and persons of unsound mind, 363 - 366

Provisions of the Code of the Civil Procedure regarding adjournments, *V*, 379, 380.

Provisions of the Code of Civil Procedure relating to appeals to the King in Council and principles and practice governing the same, *P*, 383-394

Applied to proceedings under Parsi Marriage Act, *S*, 40, 528.

Applied to proceedings under Act XXI of 1866, *S*, 22, 633.

*Clergy*, Persons authorized to solemnize marriage (other than of Churches of England Scotland or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorized forbidden—Penalty, *S*, 73, 618, 619.

*Clergyman*, English, not compelled to solemnize marriages of persons divorced of adultery, *S*, 58, 395.

*Closed doors*, Power to close doors in proceedings under the Divorce Act, *S*, 58, 378.

Suits with under Parsi Marriage Act, *S*, 38, 527.

*Co habitation*, Resumption of, after decree for judicial separation—Effect, *Y*, 228.

Male petitioner's with one of several wives to bar suit under Act XXI of 1866, 26, 634.

*Collusion, Danger of, to be guarded against delay, U, 99.*

In suit for dissolution, Court to be satisfied of absence of connivance, etc., S, 12, 106.

Dismissal of petition for dissolution on ground of, etc., S, 13, 121.

Principle on which, is discouraged, B—D, 122.

Object of the provision against, E, 122.

What is, in Divorce Courts, Y—A, 122.

122—126.

in one suit does not bar relief in another suit, F, 123.

in presentation of petition for dissolution—English and Indian Law, G, 123.

No, between respondents, J, 123

Parties concurring to get up evidence of the case, if, I, M, 123.

What amounts to, 124, 125.

What does not amount to, 125, 126.

Effect, R, 126.

Decrees for dissolution to be nisi, S, 16, 153, 154.

Sec. 175.

Suppression of facts not sufficient to establish counter-charge may be, K, 175.

Stamp on petition under Divorce Act—Petition to state absence of, or connivance—Statements to be verified, S, 47, 360.

*Commissioners, Appointment of, to examine registers—Act VI of 1886, S, 33, 715 ; Duties of, S, 34, 715, 716.*

*Commission for examination of witness, Judge to order commission to issue for examination of exempted persons, S, 20, 652*

*Communications during marriage, privileged, F, 377.*

*Compensatio criminum, doctrine of. Canon Law—Above doctrine not applicable under Indian Divorce Act, H—J, 133.*

*Compounding of suits, for dissolution marriage, H, I, 58.*

*Compromise, Agreement to, suits for dissolution of marriage, J, 58. of suit, practice as to, G, 208*

*Condition precedent, to an offer of condonation, L, 117*

*Condonation, Condoned adultery and desertion—Revival of, A, 80.*

Revival of condoned cruelty by subsequent cruelty, B, 80.

Acts that would revive condoned offences, C, 80.

Condoned adultery revived by undue familiarities with stranger, D, 80.

Harsh treatment revives condoned cruelty, E, 80.

Revival of former acts of cruelty by subsequent threats, F, 80.

Habitual unkindness revives condoned cruelty, G, 80.

Revival of condoned cruelty by adultery and condoned adultery by subsequent cruelty, Z, 80.

Connivance and, distinguished, Z—B, 108.

Connivance if criminal—is often noble, C—D, 109.

what constitutes, F—P, 114, 115.

114—120.

implies knowledge of the offence condoned, Q, R, 115.

Mere desire to condone is not, S, 115

Principle of the doctrine of, T, 115.

Motive for, U, 115.

by wife, and, by husband—Difference, V—Z, 115, 116.

is question of fact, A, 116.

Evidence of, B—D, 116.

**Condonation—(Concluded).**

need not be specially pleaded, *E*, 116.

Of wife's adultery—Effect on husband's claim for damages against co-respondent, *F*, *G*, 116.

Always assumed to be conditional, *H*, *I*, 116.

Presumed to be conditional, 116, 117.

May be expressly made conditional, *J*, *K*, 117.

Condition precedent to an offer of, *L*, 117.

What amounts to, 118, 119.

What does not amount to, 119, 120.

Matters of discretionary bar being condoned—Effect, *P—R*, 131.

Counter charge against petitioner, if barred by, *F*, 133.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Cruelty condoned—Effect, *D*, *E*, 141, 142.

*Condoned offence, revival of*, See Revival.

*Conduct*, Of husband held to constitute connivance, 110—112.

Of husband held not to constitute connivance, 112, 113.

Of wife held to constitute connivance, 113.

Of wife held not to constitute connivance, 113, 114.

Misconduct of petitioner a bar to relief in suits for dissolution of marriage, 146, 150.

*Conduct of husband*, Custody of wife—Discretion of Court, *Q—S*, 254, 255

*Conduct of petitioner*, Conducting to adultery—Just and reasonable cause for desertion  
Drunkenness of wife, *S*, 143.

*Confirmation*, Of decree for dissolution by District Judge, *S*, 17, 176, 177.

District Judge passing decree for dissolution of marriage, subject to, with costs against respondent—Power to execute decree as to costs before, *L*, 130.

Decree for nullity of marriage, by High Court—Practice—Procedure, *R*, 181

Of District Judge's decree of nullity, *S*, 20, 203.

*Confirmation of decree by High Court*, See CONFIRMATION

*Conflict of law*, Arising out of *S*, 21 of the Divorce Act, IV of 1869, *K*, 205, 206.

*Conflict of rulings*, Hindu convert to Christianity—Application of the Act between Madras and Calcutta High Courts, *S—W*, 26.

*Connivance*, Suit for divorce—Prostitute, *O—Q*, 104.

In suit for dissolution, Court to be satisfied of absence of collusion, etc., *S*, 12, 108.

How differs from being "accessory to," *J*, 105, 107

Meaning of, *L*, *M*, 107.

What constitutes, *N—P*, 107.

Implies corrupt conduct, *Q—S*, 107, 108.

Conniving at meaning of, 107—114.

Passive,—Effect, *T*, 108.

Extreme negligence may amount to, *U*, 108.

Party conniving need not be accessory before the fact, *W—Y*, 108.

And condonation distinguished, *Z—B*, 108.

Is criminal—Condonation is often noble *C*, *D*, 109.

And being "accessory to" distinguished, *E*, 109.

Not to be presumed easily, *F—H*, 109.

Of adultery with *A* bars relief in respect of adultery with *B—K*, 109.

\* Deed of separation—Presumption of, *L*, 109.

*Connivance*—(Concluded).

Proof of, *M—O*, 109, 110.

Consent given in consideration of an allowance constitutes, *P*, 110.

Conduct of husband held to constitute, 110—112.

Examples of, 110—114.

Conduct of husband held not to constitute, 112, 113.

Conduct of wife held to constitute, 113.

Conduct of wife held not to constitute, 113, 114.

Stamp on petition under Divorce Act—Petition to state absence of collusion or statements to be verified, *S*, 47, 360.

*Consanguinity*, See AFFINITY.

See PROHIBITED DEGREES.

Prohibited degrees of, or affinity contemplated by the law—English law and Indian, *E—J*, 63.

Void and voidable marriages—Differences—Relationship by, *E, F*, 198.

Bigamy or, effect on marriage, *G—L*, 199.

and affinity—English law—and affinity before 5 & 6, Will, 4, c., 54, *S*, 2, *G—J*, 574.

*Consent*, Want of, of the party deserted is necessary to constitute desertion, 89—93.

given in consideration of an allowance constitutes connivance, *P*, 110.

Insanity and want of, effect of, on marriage, *M, N*, 199.

Want of real, by one of the parties, effect of, on marriage, *U*, 203.

Order by, of alimony, *K*, 309.

to re-marriage of minor widow, *S*, 7, 476.

Infant marriage amongst Parsis, of father or guardian—may be implied, *E—G*, 500—502.

Want of,—Effect of force or fear on marriage, *E, F*, 574.

*Consent of parties*, cannot confer jurisdiction, *A*, 35.

*Construction*, of Acts, 3—16.

of words and phrases

See WORDS AND PHRASES.

*Consular marriages*, Saving of, Act XV of 1872, *S*, 87, 625.

*Consular Marriage Act*, 1868, *St.* 31, and 32, *Vic.* c. 61, 841.

*Consummation of marriage*, Not necessary to constitute adultery, *D*, 60.

Practically impossible Effect—on marriage, *O—Q*, 169.

*Contract*, Marriage, how differs from other, *J—N*, 38, 39.

Separated wife deemed spinster for purposes of and suing, *S*, 25, 220, 221.

No suit to enforce marriage or arising out of marriage when husband under 16, or wife under 14 years.—Parsi Marriage Act, *S*, 37, 527.

*Conversion*, See CASTE.

Effect of, on Mahomedan marriage, *A, B*, 27.

effect of, on Christian marriage, *C—E*, 27,

of Christian to Buddhism—Effect of, *J*, 27, 28.

to or from Christianity does not affect liabilities incurred by previous marriage, *K—N*, 28.

in 1839, effect of, on rights of inheritance, *M*, 429.

in 1845, effect of, on rights of inheritance, *N, O*, 429.

Degradation by apostasy does not dissolve marriage tie among Hindus, *R—V*, 430.

Provisions of the Hindu Law as to the effect of, on the status of marriage, *W, X*, 430, 431.

**Conversion—(Concluded).**

Effect of change of religion on claim for restitution of conjugal rights among Hindus—Act XXI of 1850, *G, H, 432, 433.*

Change of religion by either spouse justifies desertion by the other—Hindus, *I—K, 434.*

Effect of, on right of inheritance under Mahomedan Law—Act XXI of 1850, *N, 435, 436.*

Provisions of Mahomedan Law as to the effect of change of religion on the status of marriage, *O—G, 436—439.*

Effect of, on the status of marriage according to the Mahomedan Law—Extracts from the writings of Muslem jurists, *H, I, 439, 440.*

Divorce Act IV of 1869 not applicable to Mahomedan converts to Christianity, *J, 440.*

Suits for restitution of conjugal rights by a Mahomedan convert to Christianity, *K, 440.*

Effect of change of religion on the obligation to maintain relatives under the Mahomedan Law, *L, 440.*

Apostacy—Dissolution of marriage—Singha Jats of Tarn Taran—Custom in Punjab, *M, 440.*

Law or usage which inflicts forfeiture of, or affects rights on change of religion or loss of caste to cease to be enforced, *S, 1, 441.*

Effect of, on relationship of parties—Hindu Law, *U, 442.*

Rule to regulate succession of Hindu after, *X—Z, 444.*

Effect of, under Hindu Law prior to Act XXI of 1850, *W, 447.*

Decree in case of male respondent refusing to co-habit on grounds of petitioner's change of religion—Act XXI of 1866, *S, 17, 650*, Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage, *S, 18, 651.*

Proof of marriage and desertion or repudiation of petitioner in consequence of, *S, 21, 652, 653.*

No appeal under Act XXI of 1866 but Judge may state case raising question whether, has dissolved marriage, *S, 29, 655*, Case to state necessary facts and documents, and suit to be stayed, *S, 30, 655*; case to be decided by three Judges, *S, 31, 655.*

**Convert, Hindu, to Christianity—Application of the Act—Conflict of rulings between Madras and Calcutta High Courts, *S—IV, 26***

Privileges of, which would interfere with the autonomy of caste, *S, 442.*

Application of Act XXI of 1850 to heirs of, *A—C 444*

Loss of caste—Hindu, to Mahomedanism—Succession, *V, 447*

The Native Convert's Marriage Dissolution Act XXI of 1866, *645—659.*

When, deserted by his wife may sue for conjugal society—Act XXI of 1866, *S, 4, 647*; When, deserted by her husband may sue, *S, 5, 647*. Court in which suit shall be brought, *S, 6, 647, 648.*

**Conviction, Proof of rape—Proof of, for rape not sufficient, *Z, A, 66.***

of husband—Consequent break-down of wife's health—If cruelty, *Z, 76.*

Wife's for felony, no bar to granting alimony *pendente lite*, *A, 275.*

**Copy, See CERTIFIED COPY.**

Searches in register-book and, of entries, *S, 63, 610.*

Solemnizing marriage with minor within fourteen days with authority of Court or without sending, of notice—Penalty, *S, 71, 616.*

Searches and, of entries—Act XV of 1872, *S, 79, 621*

*Copy—(Concluded).*

- of entries to be admissible in evidence, S. 9, 705.
- Searches and, of entries in register books, S. 25, 712.
- of entry to be given to parties, S. 12, 775 ; Index to be kept under Bengal Act I of 1876, S. 13, 775, 776.
- Co-respondent*, Respondent and,—One may be found guilty of adultery and the other not, A—C, 60.
- Adulterer to be, in suits for dissolution of marriage, S. 11, 99.
- Reason for making alleged adulterer a, C, 100.
- Reason for making alleged adulteress a, D, 100.
- All alleged adulterers to be made, H, I, 301.
- Affidavit to dispense with, Practice as to, P—R, 101.
- Discretion of Court to dispense with, English and Indian Law—Difference, D, 103.
- Delay, no ground to dispense with, F, G, 103.
- Applications to dispense with, Practice as to, H, 103.
- Affidavit in support of motion to dispense with, I, J, 103.
- Right to be heard in appeal, M, 104.
- Petitioner knowing the name of adulterer even when wife is leading the life of a prostitute, T, U, 104.
- Death of, whilst suit is pending—Practice, F, F, 106.
- Condonation of wife's adultery—Effect on husband's claim for damages against, F, G, 116.
- Death of respondent and, Z, 156.
- Damages and costs against adulterer, 262—271.
- Damages against adulterer—Measure of damages, 263—271 ; Circumstances which tend to reduce, 267, Those which tend to enhance them, 268.
- Order as to the payment and disposition of damages against adulterer, 268—270.
- Practice in claiming damages against adulterer, 270.
- Amendment of petition as to claim for damages—Addition of, C, D, 270.
- Claim for damages against adulterer without claiming dissolution or judicial separation, F—I, 270.
- Correction*, of entry in register of births or deaths, S. 28, 713.
- Correction of errors*, S. 78, 620, 621.
- under Act VI of 1886, 713.
- Costs*, See APPENDIX IV, 913—935.
- Contents of decree nisi for dissolution of marriage—Custody of children, L—P, 175, 176.
- Intervenor, when condemned in, Q, R, 176.
- District Judge passing decree for dissolution of marriage, subject to confirmation, with against respondent—Power to execute decree as to, before confirmation, L, 180.
- Damages and, against adulterer, 262—271.
- Power to order adulterer to pay, S. 35, 271.
- Alimony, W, 296.
- of adjournment, W, 379.
- Suit for divorce husband liable for wife's Rule of English Law applicable to Parsis, C—H, 514.
- Counter affidavits*, time for filing, J, 373.
- Counter Charges*, Pleading, V, W, 121.
- Duty of Court before pronouncing decree nisi, X, 121.
- Against petitioner, if barred by condonation, F, 133.

*Counter*—(Concluded).

Counter-claim of adultery—Alleged adulterer may intervene, *D*, 152.

Suppression of facts not sufficient to establish, may be collusion, *K*, 175.

*Court*, *S*, 3, 43.

*S*, 2, 497.

Of Faujdari Adalat may pass sentence of death in certain cases under Sati Regulation, *S*, 5, 837.

*Court-fee*, Petition for divorce, *Q*, 59.*Court seal*, under Parsi Marriage Act, *S*, 20, 510.

*Covenant*, in marriage settlement—Effect of, *F*, 219.

Effect of, in separation deeds, 261, 262.

*Covenant not to sue*, Effect under the Indian Law, *W—Y*, 260

- Separation deed containing a, for restitution of conjugal rights—Effect, *Z—A*, 260, 261.

*Criminal conversation*, Bar of suit for, under Divorce Act, *S*, 61, 398.*Cross-prayer*, Cases where affirmative relief was allowed on, *U—Y*, 151, 152.

for judicial separation, *X*, *Y*, 152.

Cases where affirmative relief was not afforded on, *Z—A*, 152.

for affirmative relief—Petitioner not allowed to withdraw petition, *E*, 153.

Notice of withdrawal of petition no bar to affirmative relief being prayed for by respondent, *F*, 153

Amendment of answer by adding a, *G*, *H*, 153.

*Cross-suits*, Conduct of suit to whom given, *P*, 151.*Cruelty*, Decree of judicial separation granted on ground of, Divorce on ground of subsequent adultery, *U*, 59.

Decree for judicial separation granted on ground of husband's adultery—Divorce on ground of subsequent, *V*, 59.

Conduct short of rape may amount, to, *B*, 66

What is, *N*, 67.

What constitutes legal, *O*, 67

What constitutes legal,—Case-law reviewed, *P—R*, 67—69.

See 67—80.

Tests to determine what is legal, *U—W*, 69, 70

Ground of interference by Court in cases of, *D*, 70.

Text of, Acts must be such as to render further co-habitation unsafe, *X*, 70.

In determining whether an act constitutes, regard must be had to the status of the parties, *Z—C*, 70.

Committed by an insane person, *H—I*, 70, 71.

Is a question of fact, *K*, 71

On the part of the wife—Protection of husband, *L*, *M*, 71.

Evidence of, *W—Y*, 72, 73.

Acts amounting to legal, 73—76.

To children, if, to wife, *X*, 75, 76.

Acts not amounting to legal, 76—78.

To child, if cruelty to mother, *R*, 78.

Acts that amount to, under special circumstances, 78—80.

Revival of condoned by subsequent, *B*, 80.

Harsh treatment revives condoned, *E*, 80.

Revival of former acts of by subsequent threats, *F*, 80.

Habitual unkindness revives condoned, *G*, 80.

*Cruelty*—(Concluded).

Revival of condoned by adultery and condoned adultery by subsequent, *Z*, 80.

Condoned revival of, *W*, 118.

And adultery—Revival of one by the other, *X*, 118.

Of petitioner as a bar to relief in suits for dissolution of marriage, 141, 142.

Condoned—Effect, *D, E*, 141, 142.

What amounts to, *F, G*, 142.

Pleading, *H, I*, 142.

Wife's drunken habits being the cause of husband's, *J*, 142.

Adultery and, 152, 153.

Decree of judicial separation obtained for, Evidence of *I*, 209.

Judicial separation on ground of wife's,—Alimony, *C*, 308.

Competence of husband and wife to give evidence as to, or desertion, *S*. 52, 376.

What is legal, among Parsis—English Law how far helpful, *V—Y* 517, 518.

Petitioner's, or adultery to bar suit under Act XXI of 1866, *S*. 25, 553.

*Culpable homicide*, Persons abetting sacrifice guilty of, *S*. 4, 537.

*Custody*, Power to make orders as to, of children in suit for separation, *S*. 41, 337,

Power to make such orders after decree, *S* 42, 337, 338.

Power to make orders as to, of children in suits for dissolution of nullity, *S*. 43,

338—Power to make such orders after decree or confirmation, *S*. 44, 338.

Who may intervene in petition for, of children, *D—L*, 340, 341.

of register-book, *S*. 55, 606.

*Custody of children*, Prayer for, of void marriage, *M*, 191.

Interest of children primarily cared for in making orders as to, *M—O*, 341.

Innocent party *prima facie* entitled to, 341—344.

Principles on which Courts Act in making orders as to, 341—348.

337—359.

Guilty party generally not given—Generally guilty party not to be given—

Exceptions to the above rule, 345—347.

Case where both parents are unfit—Custody given to a third person, 347.

\*Impartial custodians preferred in making orders as to, 347.

Subsequent variation of order as to, *T*, 348.

Interim orders regarding, and access to children, 348—350.

Practice and procedure in making orders as to, and access to children, 352—359.

*pendente lite* under Parsi Marriage Act—Orders as to, after final decree, *S*. 44, 529.

*Custody of wife*, Conduct of husband—Discretion of Court, *Q—S*, 254, 255.

*Custom*, Re-marriage according to, and independently—Act XV of 1856—Applicability of Act, *E*, 453.

Validity of widow re-marriage—Question to be decided not by, but by the Act, *Q*, 457.

Against re-marriage of widow—Concurrent finding of lower Courts—Finding cannot be questioned in second appeal, *W*, 458.

Hindu widow re-marrying according to,—Right to succeed to her son's estate, *J, K*, 464.

Widow re-marrying according to her caste if forfeits her estate, 465—470.

Customs as to widow marriages in the several Provinces of India, 477—493;

General, 477—478; Berar 478—479; Northern India Bengal, 479—480;

Behar, 480; Bombay, 481—484; Burma 484; Central Provinces, 484, 485;

Madras 485—487; N.W.P. 467; Rajaputana, 487, 488; Punjab, 488—492.



- Damages*, Condonation of wife's adultery—Effect on husband's claim for, against co-respondent, *F, G*, 116.  
 Husband may claim, from adulterer, *S*, 34, 262.  
 and costs against adulterer, 262—271.  
 against adulterer—Measure of, 263—271; Circumstances which tend to reduce, 267; Those which tend to enhance them, 268.  
 Order as to the payment and disposition of, against adulterer, 268—270.  
 Practice in claiming, against adulterer, 270.  
 Amendment of petition as to claim for, addition of co-respondent, *C, D*, 270.  
 Claim for, against adulterer without claiming dissolution or judicial separation, *F—I*, 270.  
 Settlement of, *S*, 39, 312.
- Variation of order regarding apportionment of, *T*, 313.  
 General principles as to apportionment of, *U—B*, 313, 314.
- Deaf and dumb deponent*, affidavit of, *B, C*, 376.
- Death*, of co-respondent whilst suit is pending—Practice, *E, F*, 166.  
 Delay in expectation of respondent's is reasonable, *T*, 141.  
 respondent and co-respondent, *Z*, 156.  
 Of either party while protection order or judicial separation order is in force—  
 Effects on rights of succession of the other party, *M—Q*, 220.  
 Of innocent party pending suit—Effect, *E, F*, 318.  
 Of guilty party—Effect, *G*, 318.  
 General registry offices of births, and marriages, 703—705.  
 Persons whose births and, are registrable, *S*, 11, 705, 706.  
 Registration of births and, 705—713.  
 Duty of Registrar to register births and, of which notice is given, *S*, 19, 709.  
 Persons authorized to give notice of *S*, 21, 710.  
 Entry of birth or, to be signed by person giving notice, *S*, 22, 710, 711.  
 Grant of certificate of registration of birth or, *S*, 23, 711.  
 Exceptional provision for registration of certain births and, *S*, 26, 712.  
 Correction of entry in register of births or, *S*, 28, 713.  
 The Births, and Marriages Registration Act XVI of 1886, Amendment Act, 1890, 759, 760.  
 The Births, and Marriages Registration (Amendment) Act, 1911, 761, 762.  
 Court of Faujdari Adalat may pass sentence of, in certain cases under Sati Regulation, *S*, 5, 837.  
 Registration of Births, and Marriages Army Act, 1879, 843, 844.
- Debt*, Separation by husband because of wife running him to, Desertion—*T*, 133.  
 Wife's liability for post-nuptial, *S*, 671.  
 Husband's liability for wife's, 679, 680.
- Deceased wife's sister*, Marriage with—Roman Catholic Christian of Indian domicile—  
 Marriage valid, when, *C*, 200.  
 Marriage with, or half sister—English Law, *V—B*, 200.
- Declaration*, by parties and witnesses under Special Marriage Act, *S*, 10, 549.
- Decree*, Enforcement of and appeals from orders and, under the Divorce Act, *S*, 55, 381.  
 Meaning, *N—Q*, 381.
- Decree absolute*, See DECREE nisi.  
 Petitioner not applying to make, Effect, *A*, 156.  
 Effect of, on the status of wife *C, D*, 156.  
 effect of—It operates as decree *in rem*, 156—158.  
 Time from which, takes effect, *O, P*, 158.

*Decree absolute—(Concluded).*

Who can apply for, 159.

Time for making, 159—162.

Practice in applying for, 162—164.

Confirmation of decree for dissolution by District Judge, S. 17, 176, 177.

Application to make,—Arrears of alimony, B, 279.

*Decree for dissolution of marriage, See DISSOLUTION OF MARRIAGE.*

Court may attach conditions to making of a, X, Y, 128, 129

Form of, Z, 129.

Cases where, was granted, 131, 132.

Cases where they were not granted, 132

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband, petitioner's adultery is excused and decree passed for dissolution, R, S, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Decrees for dissolution were granted to the husband, cases where, 136.

Decrees for dissolution were refused to the husband, cases where, 136, 137.

Decrees for dissolution were granted to the wife, cases where, 138.

Decrees for dissolution were refused to wife, cases where, 138.

*Decree for judicial separation, See JUDICIAL SEPARATION.*

Final, contents of, Z, 212.

Resumption of co-habitation after effect, Y, 228.

Effect of, in previous suit, A, 212.

Reversal of, 228.

Petition for reversal of, contents of, A, 228

*Decree for restitution of conjugal rights, See RESTITUTION OF CONJUGAL RIGHTS.*

*Decree in rem, Decree absolute, effect of—It operates as, 156—158*

*Decree nisi, See DECREE ABSOLUTE*

Counter charges—Duty of Court pronouncing, X, 121.

Decrees for dissolution to be *nisi*—Collusion, S. 16, 153, 154.

Effect of on suit, L, 155.

Its effect on the marriage, M—O, 155

Continuance of marriage between, and decree absolute, P—R, 155

does not confer liberty to remarry, S, 155

not a decree as defined in Civ Pro Code, T, 155.

effect of, on husband and wife, U, 155.

Appeal from, provisions as to, U—I, 155.

Effect of, being rescinded, V, 156 & Q, 158.

Death of petitioner after, and before decree absolute, X, Y, 156.

Time for making decree absolute, 159—162.

Confirmation of decree for dissolution by District Judge, S. 17, 176, 177.

effect of, T, 177.

Re-marriage just after a fortnight after, for nullity, U, V, 177, 178.

Confirmation of decree by High Court—Effect, W, 178.

Necessity for a motion for High Court to make, absolute, M—P, 180, 181.

Original summons personally served on the respondent, passed, *ex parte*—

Application for making the decree absolute, Q, 181.

*Decree nisi*—(Concluded).

Contents of, for nullity of marriage, *L*, 188.

for dissolution and of nullity—Difference, *A*, 204.

Alimony *pendente lite* - Jurisdiction—Application after, *C—E*, 273.

for dissolution, no bar to ordering alimony *pendente lite*, *X*, 275.

*Decrees of Indian Courts*, if can be recognized by English Courts, *Z*, 41.

*Decree of nullity of marriage*, Petition for, *S*, 18, 181.

Grounds of, *S*, 19, 189.

The party who is disqualified may also apply under certain circumstances for—

Other cases where the party who is not fit can apply for, *B—E*, 190.

Cases where decrees for nullity of marriage have been granted to the husband, 191—193.

Cases where—have been refused to the husband, *Z—C*, 193.

Cases where decrees for nullity were granted to the wife, 193, 194.

Cases where—were refused to the wife, *J—L*, 194.

Confirmation of District Judge's, *S*, 20, 203.

Children of annulled marriage, status of, *S*, 21, 204.

Dower may be barred by a declaration in a —, *S*, 6, 422—Or by a declaration in the husband's will, *S*, 7, 422.

*Defence*, Suits for dissolution of marriage in, *D*, 57.

Wife's anti-nuptial incontinence cannot be pleaded in, of wife's adultery, *G*, 58.

*Degradation*, effect of, among Hindus prior to the passing of the *Lex loci* Act, *Y*, 431.

*Degradation of caste*, No ground of exclusion from inheritance, *K*, 445

*Delay*, in bringing suit to be explained by petitioner, *X*, 99.

No ground to dispense with co-respondent, *F*, *G*, 103.

As bar to relief—Reason of the rule, *W—B*, 138, 139.

Effect of, on suit for dissolution of marriage, 138—141.

Nature of the, contemplated as being bar to relief, *C—G*, 139.

Must be after knowledge of offence, *H*, *I*, 139

Bars relief only when it is unreasonable, *J—L*, 139, 140.

Void marriage, Effect of, in case of—Suits for nullity of marriage, *M*, *N*, 140.

Want of means will excuse, *O—Q*, 140.

Insanity will excuse, *R*, 140.

Cases where, was held to be reasonable in suits for dissolution of marriage, 140, 141.

to avoid public scandal is reasonable, *S*, 141.

in expectation of respondent's death is reasonable, *T*, 141.

Suit must be instituted with reasonable promptness—Effect of, *F*, *G—I*, 191.

Appeal filed after time—Cause of, *X—B*, 382.

*Delegates*, Appointment of, under Parsi Marriage Act, *S*, 21, 510.

Power to appoint new, under Parsi Marriage Act—Deemed public servants—

Selection of, under *Ss.* 16 and 17 from those appointed under *S*, 21, *Ss.* 22, 23, 24, 511.

*Delegation of authority*, Power to delegate functions under Act XV of 1872 of Governor General in Council, *S*, 86, 624.

*Demand*, Previous, in writing necessary before restitution can be claimed in Court—English Law—Form of, *R—T*, 235, 236.

*Deserted wife*, may apply to Court for protection, *S*, 27, 228.

*Desertion*, *S*, 8, 44.

Condoned adultery and—Revival of, *A*, 80.

What constitutes, *G—I—X*, 80—82.

implies abandonment and want of consent, *E*, *H*, 82,

*Desertion—(Concluded).*

- English decisions to be referred in deciding whether an act constitutes, *Y—C*, 82.
- commencement of, *G—K*, 83.
- implies a prior living together, *L*, 83.
- once began not stopped by subsequent imprisonment, *N*, 83.
- What is, in one may not be, in another, *O—R*, 83.
- Proof of, *T, U*, 83, 84.
- Acts amounting to, 84.
- Acts not amounting to, 86 - 89.
- Elements of, 89 - 96.
- Want of reasonable excuse is necessary to constitute, 93 - 96.
- Offer to return - Effect of on, 96 - 98.
- Abandonment must continue for two years or upwards to constitute, *M—Q*, 98.
- Pleading,—Practice as to, *Z*, 99.
- Condoned, revival of, *X*, 118.
- Separation being common to both parties, if, *M*, 142.
- Mixed question of law and fact, *N*, 142.
- Evidence of, *O*, 142.
- Reason of the rule as to, being a discretionary bar to relief, *P—R*, 142, 143.
- Petitioner's, a bar to relief in suits for dissolution of marriage, 142 - 145.
- Conduct of petitioner conducing to adultery—Just and reasonable cause for,—
- Drunkness of wife, *S*, 143.
- Separation by husband because of wife running to debt, *T*, 143.
- Blea of, in defence, *U*, 143.
- Cases where, was held to be reasonable, 143, 144.
- Cases where, was held to be not reasonable, 144, 145.
- Where, is not proved to have been for two years or upwards—Practice—Adjournment and withdrawal of suit, *J—J*, 209.
- Deserted wife may apply to Court for protection, *S*, 27, 228.
- Absence on business is no, *F*, 230.
- Legacy bequeathed to wife after, and previous to protection order, *M*, 234.
- Competence of husband and wife to give evidence as to cruelty or, *S* 52, 376.
- Position of the wife who lawfully deserts or is deserted by her husband, *L, M*, 434, 435.
- When convert deserted by his wife may sue for conjugal society—Act XXI of 1866, *S*, 4, 647; When convert deserted by her husband may sue, *S*, 5, 647; Court in which suit shall be brought, *S* 6, 647, 648.
- Proof of marriage and, or repudiation of petitioner in consequence of conversion, *S*, 21, 652, 653.
- Destroying or falsifying register-books*, Penalty, *S*, 75, 620.
- Devise*, of real estate to the widow shall bar her dower, *S* 9, 422.
- Discharge of protection order*, Effect, *C*, 233.
- English Law and Practice, *D—F*, 233.
- Discharge or variation of protection orders, *S* 29, 232.
- Discretion of Court*, to dispense with co-respondent—English and Indian Law—Difference, *D*, 103.
- in cases of dissolution, how to be exercised, *B—G*, 129, 130.
- Discretion in suits for dissolution of marriage not exercised so as to injure public morality, *H*, 130.

*Discretion of Court—(Concluded).*

Duty of Court exercising jurisdiction under Divorce Act, *L*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *A—F*, 132.

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband of, petitioner's adultery is excused and decree passed for dissolution, *H, S*, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Grant of alimony discretionary with Court, *B*, 273.

to make provision for a guilty wife, *Q—T*, 306.

Consideration for Court in matters of variation of settlements, *N—P*, 332.

to admit to bail or not persons charged under Sati Regulation, *S*, 4, 837.

*Dismissal of petition*, for dissolution on ground of collusion, etc., *S* 13, 121.

*Dismissal of suit*, if either party under age required by the Act, or if parties cohabiting, or respondent willing to co-habit, *S*, 23, 653, Revival of suit after such dismissal, *S*, 24, 653.

*Disposition of damages*, Order as to the payment and against adulterer, 268—270.

*Dissolution of Marriage*, See DIVORCE.

See DECREE FOR DISSOLUTION OF MARRIAGE

When husband may petition for, *S*, 10, 54.

Contents of petition for dissolution, *S*, 10, 55.

Reasons why divorce cannot be granted for simple adultery of husband, *T—W*, 56.

Suit by minors for, *Y*, 56.

Suits for, defences in, *D*, 57.

Compounding of suits for, *H, I*, 58.

Agreement to compromise suits for, *J*, 58.

Abatement of suit for, *K—M*, 58.

Judicial separation may be granted in a suit for, *R—T*, 59.

Adulterer to be co-respondent in suits for, *S*, 11, 99.

Burden of proof in suits for, *Y*, 99.

In suit for dissolution, Court to be satisfied of absence of collusion, connivance etc., *S*, 12, 106.

Dismissal of petition for dissolution on ground of collusion, etc., *S*, 13, 121.

Power to Court to pronounce decree for dissolving marriage, *S*, 14, 126.

Decree for dissolution not to be made on mere admissions, *P*, 127.

Amendment of petition for dissolution into one for judicial separation, *T, U*, 128.

Power to grant judicial separation where, is prayed for, *W*, 128.

Discretion of Court in cases of dissolution how to be exercised, *B—G*, 129, 130.

Discretion in suits for, not exercised so as to injure public morality, *H*, 130.

Duty of Court exercising jurisdiction under the Divorce Act, *L*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *A—E*, 132.

*Compensatio criminum*, doctrine of—Canon Law—Above doctrine not applicable under Indian Divorce Act, *H—J*, 133.

*Dissolution of Marriage—(Continued).*

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband, petitioner's adultery is excused and decree passed for dissolution, *R, S*, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Decrees for dissolution were granted to the husband, cases where, 136.

Decrees for dissolution were refused to the husband, cases where, 136, 137.

Decrees for dissolution were granted to the wife, cases where, 138.

Decrees for dissolution were refused to wife, cases where, 138.

Delay, effect of, on suit for, 138—141.

Cases where delay was held to be reasonable in suits for, 140, 141.

Cruelty of petitioner as a bar to relief in suits for, 141, 142.

Petitioner's desertion a bar to relief in suits for, 142—143.

Wilful neglect of petitioner a bar to relief in suits for, 143.

Misconduct of petitioner a bar to relief in suits for, 146—149.

Decrees for dissolution to be  *nisi*—Collusion, *S*, 16, 153, 154.

Confirmation of decree for dissolution by District Judge, *S*, 17, 176, 177.

Effect of Divorce on widow's right to administer estate, *Y*, 178.

District Judge passing decree for subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, *L*, 180.

Decree  *nisi* for dissolution and decree  *nisi* of nullity—Difference, *A*, 204.

Distinction between suits for judicial separation and suits for, *T—W*, 207.

Suit for, if decree for judicial separation can be passed in, *X*, 207.

Petitioner for, can ask for judicial separation only, *Y*, 207.

Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution or nullity or judicial separation, *W—Z*, 255.

Claim for damages against adulterer without claiming dissolution or judicial separation, *F—I*, 270.

Decree  *nisi* for dissolution, no bar to ordering alimony *pendente lite*, *X*, 275.

Does not *per se* create forfeiture, *C*, 320.

Court cannot vary settlements after, abroad, *W*, 328.

Power to make orders as to custody of children in suits for dissolution of nullity, *S*, 43, 338—Power to make such orders after decree or confirmation, *S*, 44, 338.

Suit for, <sup>2</sup> Affidavit—Practice, *M*, *N*, 371.

Liberty to parties to marry again after Divorce, *S*, 57, 394.

English clergyman not compelled to solemnize marriages of persons divorced for adultery, *S*, 58, 395.

English Minister refusing to perform ceremony of second marriage to permit use of his church, *S*, 59, 396.

Rules for confirmation of decrees for, *O*, 399.

Suit for a decree of dissolution in case of absence among Parsis—In case of absence for seven years, *S*, 29, 513.

Native Converts' Marriage Dissolution Act, 1866, 645—659.

Liberty to marry again after dissolution of marriage under Act XXI of 1886, *S*, 19, 652.

Not to affect status or right of children under Act XXI of 1866, *S*, 27, 654.

*Dissolution of Marriage—(Concluded).*

No appeal under Act XXI of 1866; but Judge may state case raising question whether conversion has dissolved marriage, S. 29, 655; Case to state necessary facts and documents, and suit to be stayed, S. 30, 655; Case to be decided by three Judges, S. 31, 655

Petition for,—Malabar Marriage Act, S. 19, 823, 824.

Petition for, under Malabar Marriage Act—Notice to be given to other party, if petition is not joint, S. 20, 825, Court to declare marriage dissolved on motion made within a specified period, S. 21, 825.

*Distress*, present of wife no ground for urgency in granting alimony, W, X, 279.

Levy of fines by, under Parsi Marriage Act, S. 48, 530, Procedure until return made to, warrant, S. 49, 530, Imprisonment if no sufficient, S. 50, 531.

*District*, S. 2, 772.

*District Court*, S. 3, 43.

Reason why, was given jurisdiction in matrimonial causes, V, 51.

*District Judge*, S. 3, 43.

Confirmation of District Judge's decree of nullity, S. 20, 203.

Confirmation of decree for dissolution by, S. 17, 176, 177.

Passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, L, 130.

Power to declare who shall be, for purposes of Act XV of 1872, S. 85, 624.

*District Matrimonial Court*, Parsee, S. 17, 509.

*District Registrar*, Muhammadan Registrars to be subject to control of, S. 17, 776, 777. Copies of entries under Bengal Act I of 1876 to be sent monthly to Registrar of district, S. 22, 777.

*Dworce*, See DISSOLUTION OF MARRIAGE

in Hindu Law, E-I—I, 27.

Admission of Petition for, Jurisdiction of High Court, K, 50.

English Law, on what grounds obtainable, R, 55.

Effect of, on domicile, G—K, 179.

Difference between alimony granted after judicial separation or after, K—N, 298, 299.

Suits for, or judicial separation among Parsees, S. 32, 519.

The Bengal Muhammadan Marriages and, Registration Act I of 1873, 769—792.

Register of marriages as prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and, 779, 780.

Register of, other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and, 780.

Register of, of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and, 781.

No, among Nambudris, I, 809.

under Malabar Marriage Act. 823—829.

Bills Evidence Act, 1820, 839, 840.

Statute law relating to India concerning the subject of marriage and, 839—853.

*Divorce Act*, Indian, to apply to persons marrying under Special Marriage Act, S. 17, 852.

*Divorce a mensa et toro*, Bar to decree for, S. 22, 206.

*Divorce Bills Evidence Act*, 1820, St. I, Geo. IV, ch. 101, 839, 840

*Divorce Court Rules*, under England, 855—878.

*Domicile*, Jurisdiction of Court to grant divorce— not test of jurisdiction, *Q—T*, 28, 29.

Jurisdiction of English Courts to pronounce decree of divorce if based on, English law, *U, V*, 34.

Rules for determining the, of a person, *W, X*, 34.

Wife's, dependent on that of her husband—Succession Act, *Y, Z*, 34.

Residence falling short of, will not confer jurisdiction under English Law, *B*, 35.

Where, is established other considerations are immaterial, *O—F*, 35.

Matrimonial, same as ordinary, *G*, 35.

of wife follows that of husband, *H*, 35.

of parties when wife is deserted by husband—Domicile at the moment of desertion is alone considered, *I*, 36.

Marriage celebrated in accordance with the law of the, of the parties, *A & B*, 41.

Effect of divorce on, *G—K*, 179.

Suit for nullity of marriage—First wife being the uterine half sister of second wife, *V*, 197.

Law governing validity of marriage, *W, X*, 197, 198.

Question of, being in dispute if a bar to grant of alimony, *I*, 278.

*Dower*, Act XXIX of 1839, 410—424.

English Law of, recognized in this country from very early times, *N, O*, 413, 414.

Law of, part of the law of inheritance, *P, Q*, 414.

Dower Act XXIX of 1839—what is, *T, U*, 414, 415.

Early history of the Law of, *V*, 415.

In England previously to the passing of the Dower Act, 3 and 4 Will, IV, c. 105, 415—417.

Under the Dower Act, 3 and 4 Will, IV, c., 105 Jointure, *X*, 417.

Assignment of, *G—I*, 418.

Right of, how defeated under the Dower Act, 3 and 4 Will, IV, c. 105, *M—Q*, 419.

Right of, how defeated—Jointure, *R—T*, 420.

Equitable bar to dower by contract, *U, V*, 420.

Effect of incontinence or second marriage on right to, *X, Y*, 420.

Widows to be entitled to, out of equitable estates, *S. 2*, 421.

Seisin shall not be necessary to give title to, *S. 3*, 421.

No, out of estates disposed of, *S. 4*, 421.

May be barred by a declaration in a deed, *S. 6*, 422—or by a declaration in the husband's will, *S. 7*, 422.

Shall be subject to restrictions, *S. 8*, 422.

Devise of real estate to the widow shall bar her, *S. 9*, 422.

Bequest of personal estate to the widow shall not bar her, *S. 10*, 423.

Agreement not to bar, may be enforced, *S. 11*, 423.

Legacies in bar of, still entitled to preference, *S. 12*, 423.

*Dower Act XXIX of 1839*, 410—424.

*Dower Act*, Applicability of the, to Armenians—English Law of dower if introduced in this country, *C—M*, 412, 413.

*Drunken habits*, Wife's, being the cause of husband's cruelty, *J*, 142.

*Drunkenness*, if cruelty, *B—E*, 76.

Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion, of wife, *S*, 143.

*Dum casta clause*, in variation of settlements, *F*, 326.

*Duress*, Threat or, effect of, on marriage, *M—P*, 202, *Q*, 203.

Or fraud, effect of, on marriage, *D*, 373.

*Duty of Judge*, to satisfy himself that petitioner is not accessory, *K*, 107



## E

*Earnings*, Married women's, to be their separate property, S. 4, 664.

Married Women's Wages and, 664—666.

*Ecclesiastical Courts*, Alimony *pendente lite*, when payable—practice of, J, 274.

Facts to be established before alimony *pendente lite* can be granted—Practice of, L—T, 274, 275.

*Ecclesiastical law*, Parsis not subject to, E, F, 494.

*Enforcement of decrees*, or orders made heretofore by Supreme or High Court, S. 5, 51.

*Enforcement of order*, for alimony *pendente lite*, 289, 290.

*Enforcement*, of and appeals from orders and decrees under the Divorce Act, S. 55, 381.

*English authorities*, value of, in interpreting Indian Acts, V—X, 8.

*English Courts*, Decrees of Indian Courts, if can be recognized by, Z, 41.

*English Divorce Court Rules*, Divorce Court Rules under England, 865—878.

*English Law*, Jurisdiction of English Courts to pronounce decree of divorce is based on domicile, U, V, 34.

Residence falling short of domicile will not confer jurisdiction under, B, 35.

Divorce on what grounds obtainable, R, 55.

English decision to be referred in deciding whether an act constitutes desertions. Y—C, 82.

Administration to wife dying after a judicial separation or protection order, Z—D, 178, 179.

Voidable marriage and void marriage—Difference, D—F, 182.

Essentials of a valid marriage, H, H-1, 183.

Suits for nullity, Test of jurisdiction, G—I, 186.

When marriage is voidable for impotency, N, 189.

Marriage with deceased wife's sister or half sister, V—B, 200.

Previous demand in writing necessary before restitution can be claimed in Court—Form of demand, R—T, 235, 236.

Refusal to comply with decree of restitution of conjugal rights—Effect, F—I, 239.

Construction of Parsi Marriage Act—how far helpful, G—L, 494, 495.

Parsi Marriage Act is based on, M, 493.

Rule as to introduction of, in a conquered country, N, 495.

Suit by wife for nullity—General and relative impotency—Impotency *quoad hanc*, W—Z, 512.

Suit for divorce—Husband's liability for wife's costs—Rule of, applicable to Parsis, C—H, 514.

What is legal cruelty among Parsis—how far helpful, V—Y, 517, 518.

Deeds of separation—Agreement to live separate, if good defence in suit for restitution among Parsis—Principles of, on the above subject applicable to Parsis, N—S, 523, 524.

Regarding solemnization of marriage, 570—579.

Marriage Acts in England, P—T, 573, 576.

Special license—Where granted, C, 577.

Ordinary's license, who may grant, D, 577.

Marriage without license or banns, E, 577.

Form and ceremony of marriage, F, 577.

Marriage in the vestry, I—L, 577.

Presence of priest, if necessary for marriage, M—W, 577, 578.

British subjects abroad marriage of, X—A, 578, 579.

Marriages *per verba de present*, C, 579.

*English marriage*, validity of marriages of Jews and Quakers, Y—D, 196.

*Equity*, See JUSTICE, EQUITY AND GOOD CONSCIENCE.

Where an enactment has no express provisions, Court to act according to justice and good conscience, *H*, 5.

*Erasures*, Interlineations alterations, or, in body of affidavit, *Z*, 375

*Erroneous belief*, as to nature of marriage ceremony—Effect of, on marriage, *S, T*, 203.

*Error of judgment*, Want of prudence—not connivance, *V*, 108.

*Errors*, Correction of, under Act VI of 1886, 713.

*Evidence*, See APP. V, 937—951, of ADULTERY, 60—62.

Petitioner being unable to obtain, against adulterer, *A—C*, 105.

*Evidence*, of condonation, *B—D*, 116.

Parties concurring to get up, of the case, if collusion, *L, M*, 123.

Of marriage, *N, O*, 127.

Uncorroborated testimony of wife, *Q*, 128.

Of adultery, *G*, 133

Of desertion, *O*, 142.

Decree of judicial separation obtained for cruelty—of cruelty, *I*, 209.

Of adultery, *R—T*, 277.

Mode of taking, in cases under the Divorce Act, *S*, 51, 371.

Competence of husband and wife to give, as to cruelty or desertion, *S*, 52, 376.

Adoption among Parsis—Will, *X—Z*, 496.

Certified copy of entry in marriage register, etc., to be, *S*, 80, 621.

Copies of entries to be admissible in, *S*, 9, 705.

Registration of Muhammadan Marriages—Copy of entry in Register, *F*, 773.

The Divorce Bills Act, 1820, 839, 840.

*Examination of witness*, Mode of taking evidence in cases under the Divorce Act, *S*, 51, 371.

Judge to order commission to issue for examination of exempted persons, *S*, 20, 652.

*Exclusion from inheritance*, Degradation of caste—No ground of, *X*, 445.

*Excommunication*. See CASTE, Act XXI of 1850 applicable to all, from caste, Cause of, immaterial, *I, J*, 445.

Widow re marriage—Exclusion from temple—Jurisdiction, *O*, 449.

*Execution of decree*, See ENFORCEMENT OF DECREES.

District Judge passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, *L*, 180.

Decree for restitution, enforcement of, *Y—A*, 236.

Provisions of the Code of Civil Procedure as to enforcement of decrees for restitution of conjugal rights, *B—D*, 238, 239.

Enforcing order for alimony *pendente lite*, 289, 290.

Enforcement of and appeals from orders and decrees under the Divorce Act, *S*, 55, 381.

Wife's property seized in execution against husband—Right of wife to sue, *T—V*, 670, 671.

*Executors*, Non-survival of right to sue for divorce to, or administrators, *E, F*, 179.

*Extraordinary jurisdiction of High Court*, *S*, 8, 54

## F

*False certificate*, Penalty for making, &c, under Parsi Marriage Act, *S*, 12, 507.

*False charge*, Wife charging husband with, of unnatural offence, if cruelty, *W*, 75.  
of adultery, if cruelty, *M*, 77.

*False declaration*, What is, *W—Y*, 611.

*False information*, Penalty for, under Act VI of 1886, 713.

Penalty for wilfully giving, under Act VI of 1886, S. 27, 713.

*False personation*, Forbidding by, issue of certificate by Marriage Registrars—Penalty, S. 67, 612.

*False report*, Where a husband spread a, about his wife, if cruelty, T, 75.

*False statement*, Penalty for signing declarations or certificates containing, under Special Marriage Act, S. 21, 533.

*Falsifying register-books*, Destroying or, Penalty, S. 75, 620.

*Family*, Marumakkathayam Law and Aliyasantana Law—Nature of, governed by—such Law, Classes governed by Marumakkathayam Law, D, E, 799, 800.

*Father*, Hindu Law—Loss of caste—Effect on right of guardianship of, B—I, 447, 448.  
Infant marriage amongst Parsis—Consent of or guardian—Consent may be implied, E—G, 500—502.

*Fauzdari Adalat*, Court of, may pass sentence of death in certain cases under Sati Regulation, S. 5, 837.

*Fear*, Want of consent—Effect of force or on marriage, E, F, 575.

*Fees*, Under Special Marriage Act, S. 14, 551

Local Government to prescribe, under Act XV of 1872, S. 82, 622.

Power to prescribe, and rules for Native States under Act XV of 1872, S. 84, 623.

Payable to Registrar under Malabar Marriage Act, S. 14, 820.

*Felony*, wife's conviction for, no bar to granting alimony *pendente lite*, A, 275

And imprisonment if bar to an application for alimony, B—D, 275

*Fever*, Violence committed under the influence of an acute disorder, such as brain, I, 71.

*Fines*, Levy of, by distress under Parsi Marriage Act, S. 48, 530, Procedure until return made to distress warrant, S. 49, 530; Imprisonment if no sufficient distress, S. 50, 531.

*First trial*, Applicant (wife) found guilty *fu* Alimony in second trial, U, V, 277.

*Forbidding*, by false personation issue of certificate by marriage Registrar—Penalty, S. 67, 612.

*Force*, Want of consent—Effect of, or fear on marriage, E, F, 574.

*Foreign decrees*, of divorce when recognized by English Courts, A—G, 38.

*Foreigners*, Where marriage was contracted in England by, with the object of evading the laws of their own country, B, C, 183.

Where, marry in England within prohibited degrees of relationship of their country, D—F, 186.

*Foreign Marriage Act*, XIV of 1903, 763—766.

St. 55 and 56, Vic. Ch. 23, 845—852.

*Forfeiture*, Law or usage which inflicts, of, or affects, rights on change of religion or loss of caste to cease to be enforced, S. 1, 441.

Act XXI of 1850 intended to prevent the, of rights of others than those who are put out of caste on account of their renouncing or being excluded from religion—Case-law on the point reviewed, I, W, 443, 445.

Hindu widow—Excommunication for unchastity causes no, of her rights, L, 446.

Of right which widow had not at time of re-marriage, if contemplated by section, O, P, 461.

Practice in Deccan—Sudra castes—Of husband's estate on re-marriage of widow, N, 464.

Widow re-marrying according to custom of her caste, if forfeits her estate, 465—470.

*Forms*, of petitions and statements, S. 46, 360.

In the Divorce Act not intended to be literally followed, P, Q, 360.

- Fraud*, Fraudulent misrepresentation—Effect of on marriage—English Law, *K*, 202.  
 Plot to procure a marriage with an unworthy person—Effect of, on marriage, *Y*, 203.  
 Duress or, effect of, on marriage, *D*, 573.  
*Free-hold estates*, Estates in this country held by British subject under the name of, of inheritance, nature and incidents of, *R*, *S*, 414.

G

- Galling words*, if cruelty, *A*, 76.  
*Gazette*, Rules under Bengal Act I of 1876 to be approved by Lieutenant-Governor and published in, *S*, 19, 777.  
*Gotra*, of the widow re-marrying, *J*, *K*, 475, 476.  
*Government*, to provide seal and books under Bengal Act I of 1876, *S*, 5, 773.  
*Governor-General in Council*, Power to delegate functions under Act XV of 1873 of, *S* 86, 624.  
 Power for, to appoint Registrars for Native States, *S*, 13, 707.  
*Gratuity*, Muhammadan Registrar may receive, *S*, 10, 774.  
*Guardian*, Suit by, of lunatic, *H*, 201.  
 Infant marriage amongst Parsis—Consent of father or, consent may be implied, *E—G*, 500—502.  
 Minority—Practice and procedure under Parsi Marriage Act, *I—L*, 529.  
*Guardian ad litem*, Petitioner or respondent being minor or lunatic—English law and practice, *D*, 208.  
 not liable for alimony, *A*, 279.  
*Guardianship*, Right of, if within purview of Act XXI of 1850, *A*, 447.  
 Hindu Law—Loss of caste—Effect on right of father, *B—I*, 447, 448.  
 Hindu Law—Loss of caste—Right of mother, *J—L*, 448, 449.  
 of children of deceased husband on the re-marriage of his widow, *S*, 3, 470.  
 of minor wife and children, *S*, 18, 823.  
 provision as to, under Malabar Marriage Act, 823.  
*Guilt*, Wife's, how affects her right to alimony *pendente lite*, 275—277.  
*Guilty husband*, Cases where husband was found guilty—Settlement how varied, *R—X*, 324, 325.  
*Guilty party*, Death of, Effect, *G*, 318.  
 how affected in cases of variation of settlement, *G—J*, 320.  
 generally not given custody of children—Generally, not to be given custody of children—Exception to the above rule, 345—347.  
*Guilty wife*, Permanent alimony for a, 306—308.  
 Amount of permanent alimony ordered to a, *Y—A*, 307, 308.  
 Compassionate allowance to, *B*, 308.  
 Permanent alimony to, Indian law, *E*, 308.  
 Cases where wife was found guilty—Settlement how varied, *F—Q*, 322—324.

H

- Half blood*, Relationship by, effect of on marriage, *O*, 199.  
*Half sister*, Marriage with deceased wife's sister or,—English Law, *V—B*, 200.  
*Headings*, if guide in construction, *G*, *H*, 7.  
*High Court*, *S*, 3, 42.  
 Extraordinary jurisdiction of, *S*, 8, 54.  
 Reference to, *S*, 9, 54.  
 Confirmation of decree by, effect, *W*, 178.  
 Appeal to, under Parsi Marriage Act, *S*, 42, 528.  
 Rules of procedure of Parsi Matrimonial Courts to be made by, *S*, 51, 531.

*High Court, confirmation of decree by*, See CONFIRMATION.

*High Court, jurisdiction of*, Jurisdiction of High Court to deal with matrimonial causes among Parsis, *U*, 508, 509.

High Court may refer case to Judge for additions or alterations—Act XXI of 1866, *Ss*. 32, 655, High Court may decide question raised, and Judge shall dispose of case accordingly, *S*. 33, 655.

*Hindu convert*, See CONVERT.

See CONVERSION.

To Christianity—Application of the Act—Conflict of rulings between Madras and Calcutta High Courts, *S—W*, 26.

*Hindu family*, Suit by person born a Mahomedan claiming right as reversioner in, *D, E*, 444, 445.

*Hindu Law*,—General, Divorce in, *E-1—I*, 27

“Provisions of the, as to the effect of conversion of the status of marriage, *W, X*, 430, 431.

Provisions of Hindus Smritis relating to the effect of degradation as causing forfeiture of right of inheritance, *Z—F*, 431, 432.

Act XXI of 1850 how far has affected rules of, *Q*, 441, 442.

Effect of conversion on relationship of parties, *U*, 442.

Applicability of *Lex Loci* Act—Disqualification to inheritance resulting from unchastity—Effect, *M, N*, 446.

Effect of conversion under, prior to Act XXI of 1850, *W*, 447.

Loss of caste—Effect on right of guardianship of father, *B—I*, 447, 448.

Loss of caste—Right of guardianship of mother, *J—I*, 448, 449.

*Hindu law—Adoption*, See ADOPTION.

Power of re-married widow to give in adoption—Son by former husband, *L*, 464.

Operation of section—Power of re-married widow to give in adoption, son by former husband, validity of, *C*, 474.

Re-married mother—Power to give in adoption son by former husband, *D, E*, 474.

*Hindu Law—Alienation*, No analogy between alienation by widow before adoption and alienation before re-marriage, *U—W*, 462.

Alienation by widow not binding on reversioners—Validity during widow-hood—Effect of re-marriage on alienor's rights, *A*, 463

*Hindu law—Custom*, Widow re-marrying according to custom, of her caste 'if forfeits her estate, 465-470.

as to Widow Marriages in the several, Provinces of India, 477-492; General, 477, 478; Bera, 478-479; Northern India—Bengal, 479, 480; Behar 480; Bombay, 481-484; Burma, 484; Central Provinces, 485-488; Madras, 485-487; N.W.P. 487; Rajaputana, 487, 488; Punjab, 488-492.

Effect of Hindu customs on Parsi Law of Marriage, *O*, 495.

*Hindu Law—Restitution of conjugal rights*, Provisions relating to suits for restitution of conjugal rights among Hindus, 241-249.

*Hindu Law—Reversioners*, Arrangement between re-married widow and next reversioner—Whether heirs of such reversioner bound by such arrangement, *M*, 464.

*Hindu Law—Widow*, Rights of widow and mother compared, *B*, 463.

Excommunication for unchastity causes no forfeiture of her rights, *L*, 446.

*Hindu marriage*, nature of, *K—N*, 25.

*Hindu temple*, Act XXI of 1850 not to affect usage of, or other religious institutions, *M, N*, 449.

*Hindu Widows' Re-marriage Act XV of 1856*, 451, 492.

*His or her absence*, meaning of, *Z*, 223.

*Husband*, When, may petition for dissolution of marriage, *S*, 10, 54.

What is cruelty in, is cruelty in wife, *T*, 69.

Conduct of, held to constitute connivance, 110—112.

Conduct of, held not to constitute connivance, 112, 113.

Condonation by wife, and condonation by, difference, *V—Z*, 115, 116.

Where the adultery is committed in consequence of the violence and threats of the, petitioner's adultery is excused and decree passed for dissolution, *R*, *S*, 135.

Decrees for dissolution were granted to the, cases where, 136.

Decrees for dissolution were refused to the, cases where, 136, 137.

What is misconduct in the, 148, 149.

What is not misconduct in the, 149, 150.

Cases where decrees for nullity of marriage have been granted to the, 191—193.

Cases where decrees of nullity of marriage have been refused to the, *Z—C*, 193.

Affinity between kindred of, and kindred of wife, *T*, 200.

when liable for necessaries of wife, 222—224.

What is compliance by, with decree for restitution of conjugal rights, *J—L*, 239.

Refusal to comply with decree for restitution of conjugal rights by,—Effect, *O*, 240.

may claim damages from adulterer, *S* 34, 262.

Power to order settlement of wife's property for benefit of, and children, *S*, 39, 311, 312.

When convert deserted by his wife may sue for conjugal society—Act XXI of 1866, *S* 4, 647; When convert deserted by her, may sue, *S*, 5, 647; Court in which suit shall be brought, *S*, 6, 637, 648.

Insurances by wives and, 667—670.

Insurance by, for benefit of wife, *S* 6, 668, 669.

Suit against a married woman—Not necessary party, *G*, *H*, 673.

Not liable for wife's ante-nuptial debts, *S* 9, 679.

Husband's liability for wife's debts, 679, 680.

*Husband and wife*, Wife's domicile dependent on that of her husband—Succession Act, *Y*, *Z*, 34.

Competence of, to give evidence as to cruelty or desertion, *S*, 52, 376.

*S*, 2, 496.

*Husband's means*, Mode of determining, for the purpose of awarding alimony *pendente lite*, 286—289.

## I

*Advoc*, Grounds of decree of nullity of marriage, *S*, 19, 189.

*Idiot*, Marriage with an, validity of, *B—D*, 204.

*Ignorance of fact*, Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in, or in ignorance of law, 134—136.

*Ignorance of law*, Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in, ignorance of fact—Where the adultery is committed in, 134—136.

*Illegitimate relationship*, effect of, on marriage, *P*, 199.

*Illiterate person*, Affidavit by blind or illiterate deponents, *A*, 375, 376.

*Illustrations*, how far guide in construction of statutes, *I—U*, 7, 8.

*Impartial custodians*, preferred in making orders as to custody of children, 347.

*Impotency*, See *L, M*, 574.

When marriage is voidable for,—English law, *N*, 189.

Practice in case of alleged, medical examination as to alleged impotency, 194, 195.

Grounds of decree of nullity of marriage, *S*, 19, 189.

Proof of, *H, I*, 191.

Suit for a decree of nullity of marriage among Parsis, 511, 512; In case of lunacy or mental unsoundness, *S* 27, 511, In case of, *S* 28, 512.

Suit by wife for nullity—General and relative,—*quoad hanc*—English Law, *W*—*Z*, 512.

*Imprisonment*. Felony and, if bar to an application for alimony, *B—D*, 275.

*Incapacity of mind*, Effect, *Z*, 572, 573.

*Incest*, Charge of having committed, if cruelty, *P, Q*, 77.

*Incestuous adultery*, *S*, 3, 44.

How defined in the English statute, *D*, 63.

Condoned, revival of, *V*, 118.

*Incurable malformation*, effect of, on marriage, *U*, 189.

*Indecent assault*, Conviction for, no bar to suit for dissolution on ground of rape, *D*, 66.

*Indemnity*, Decree for separation or protection-order valid as to persons dealing with wife before reversal—of persons making payment to wife without notice of reversal of decree or protection order, *S* 60, 397.

*Identity*, Where adulterer's, is lost through neglect, *D*, 106.

See APP. V, PROOF OF 927—951

*Indexes*, To be kept at general registry office, *S*, 7, 705.

To be open to inspection, *S*, 8, 705.

Copies of entry to be given to parties *S*, 12, 775,—to be kept under Bengal Act I of 1876, *S*, 13, 775, 776.

Particulars to be shown in, under Bengal Act I of 1865, *S*, 14, 776.

under Bengal Act I of 1876 may be inspected and copies of entries in registers taken, *S*, 15, 776.

*Indian Marriage Act*, 1865, Act V of 1865, 893—908

*Infant*, Necessaries, *R—U*, 227.

Interest of, children protected in matters of variation of settlements—Interests of children, sometimes adversely affected unborn children's interests, *Q—V*, 333.

*Infant marriage*, Among Parsis, *D*, 499, 500.

Amongst Parsis—Consent of father or guardian—Consent may be implied, *E—G*, 500—502.

*Inheritance*, Law of dower, part of the law of, *P, Q*, 414.

Effect of conversion on right of, under Mahomaden Law—Act XXI of 1850, *N*, 435, 436.

Degradation of caste—No ground of exclusion from, *K*, 445.

Hindu widow remarrying after she ceases to be a Hindu—Effect on her rights of, *T*, 447.

*Injunction*, To restrain husband from making away with property—Alimony, *I, J*, 305.

To restrain husband from receiving legacy—Alimony, *K, L*, 305.

*Innocent party*, Death of, pending suit—Effect, *E, F*, 318.

How affected in cases of variation of settlement, *D—F*, 320.

*Prima facie*, entitled to custody of children, 341—344.

*Insane person*, Cruelty committed by an, *E—H*, 70, 71.

*Insanity*, of respondent if ground for staying proceedings, *N—P*, 58, 59.

Will excuse delay, *R*, 140.

*Insanity*—(Concluded).

and want of consent, effect of, on marriage, *M, N, 199.*

Reason of the rules as to, being a ground for a suit for nullity, *F, 201.*

Doubt as to alleged, Effect, *I, 201.*

if bar to marriage, *X, Y, 572.*

*Inspection*, Refusal to submit to,—Effect, *K, 191.*

Marriage-register to be open for public, under Parsi Marriage Act, S. 8, **505.**

Indexes to be open to, S. 8, **705.**

Index under Bengal Act I of 1876 may be inspected and copies of entries in registers taken, S. 15, **776.**

*Inspector-General of Registration*, S. 2, **772.**

to exercise general superintendence, S. 18, **777.**

*Insult*, Neglect, coldness and, producing an attack of melancholia, if cruelty, *M, N, 74.**Insurgence*, Married woman may effect policy of, S. 5, **667.**

by wives and husbands, **667—670.**

by husband for benefit of wife, S. 6, **668, 669**

Policy for "wife and children"—Joint tenancy, *M—Q, 669.*

*Intention of Legislature*, Courts are bound to give effect to expressed intention, *O—T, 13.*

Statement of Objects and Reasons, how far guide to the, *U—V, 13.*

*Interalienations*, alterations, or erasures in body of affidavit, *Z, 375.**Interim orders*, regarding custody of children and access to children, **348—350.***Interrogation*, First, of respondent under Act XXI of 1866, S. 13, **649**, by Judge may be public or private, S. 14, **649.**

Procedure when female respondent refuses to co-habit with petitioner under Act XXI of 1866—Adjournment for a year—Interview, S. 15, **650**, Procedure on expiration of adjournment—of respondent—Decree, S. 16, **650.**

*Intervenor*, when condemned in costs, *Q, R, 176.**Intervention*, See **165—175.**

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene, *A, B, 102.*

Persons implicated by petitioner may intervene, *S—Z, 102.*

General principles as to, **165, 166.**

Who can intervene, **165—174.**

by Queen's Proctor, **166—170.**

by private persons, **170—174.**

Grounds for, **174, 175.**

who may intervene in petition for custody of children, *D, J, 340, 341*

of third parties allowed in matters of application for custody and access to children *Q, 353, 354.*

*Interview*, Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—Adjournment for a year—S. 15, **650**;—Procedure on expiration of adjournment—Interrogation of respondent—Decree, S. 16, **650.***Intoxication*, effect of, on marriage contracted during, *R, 203.**Irregularities*, in solemnization, effect of, on marriage, *J, 183.*

Irregularities which have been held not to invalidate the marriage, **184, 185.**

Marriage not invalid by reason of, in procedure, S. 16, **821.**

*Irregular marriages*, Validation of records of, S. 4, **643.**

Penalty for solemnizing Act II of 1892, S. 6 **644.**



## J

*Jactitation of marriage*, Meaning of, *Q*, 23.

Suit for, *R—U*, 23.

Suit for, defences in, *X*, 23.

*Jews*, English marriages, validity of Marriages of and Quakers, *Y—D*, 193.

*Joint tenancy* Policy for "Wife and children," *M—Q*, 669.

*Jointure*, Dower under the Dower Act, 3 and 4 Will, IV, C, 105, *X*, 417.

Right of dower, how defeated, *R—T*, 420.

*Judge*, Functions of, and legislator, *E—G*, 4.

*Judicial separation*, See DECREE FOR JUDICIAL SEPARATION.

See also 206—228.

Suit for,—Pleader's fee, *P*, 53.

\* May be granted in a suit for divorce, *R—T*, 59.

Decree of, granted on ground of cruelty—Divorce on ground of subsequent adultery, *U*, 59

Decree for, granted on ground of husband's adultery—Divorce on ground of subsequent cruelty, *V*, 59.

Amendment of petition for dissolution into one for, *T*, *U*, 128.

Power to grant, where dissolution of marriage is prayed for, *W*, 128.

Cross-prayer, *X*, *Y*, 152.

Administration to wife dying after a, or protection order—English law, *Z—D*, 178, 179.

Decree of separation, how far bars relief on ground of nullity of marriage, *C*, 321.

Bar to decree for divorce a *mesna et toro*, S. 22, 206.

Distinction between suits for, and suits for dissolution of marriage, *T—W*, 207.

Suit for dissolution of marriage, if decree for, can be passed in, *X*, 207.

Petitioner for dissolution of marriage can ask for, only, *Y*, 207.

Molestation of petitioner by respondent after decree for, *C*, 208.

Decree for, Effect, *F*, 208.

Respondent in suit for restitution of conjugal rights may ask for, *Z*, 208.

Decree of, obtained for cruelty—Evidence of cruelty, *I*, 209.

Where desertion is not proved to have been for two years or upwards—Practice—Adjournment and withdrawal of suit, *J—L*, 209.

Application for separation made by petition, S. 23, 210.

Effect of decree of, in previous suit, *A*, 212.

Final decree for, contents of, *Z*, 212.

Legal ground why the application for, should not be granted—What are such legal grounds, 212—215, What are not such legal grounds, 216, 217.

Separated wife deemed spinster with respect to after-acquired property, S. 24, 217, 218.

Decree of separation removes restraint on anticipation, *G*, 219.

Decree for, and protection order—Difference, *J*, 219.

Death of either party while protection order or, order is in force—Effects on rights of succession of the other party, *M—Q*, 220.

Separated wife deemed spinster for purposes of contract and suing, S. 25, 220, 221.

Reversal of decree of, 228.

Decree of separation obtained during absence of husband or wife may be reversed, S. 26, 228

Petition for reversal of decree of judicial separation, contents of, *A*, 228.

*Judicial separation—(Concluded).*

- Resumption of co-habitation after decree for,—Effect, *Y*, 228.
- Decree of, and protection order—Difference—English Law, *N—P*, 234.
- Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution of nullity or, *W—Z*, 255.
- Claim for damages against adulterer without claiming dissolution or, *F—I*, 270.
- Difference between alimony granted after, or after divorce, *K—N*, 298, 299.
- Court cannot vary settlements after, *U*, 327.
- Power to make orders as to custody of children in suit for separation, *S*, 41, 337—
- Power to make such orders after decree, *S*, 42, 337, 338.
- Decree for separation or protection-order valid as to persons dealing with wife before reversal—Indemnity of persons making payment to wife without notice of reversal of decree or protection order, *S*, 60, 397.
- Suit for divorce or, among Parsis—On ground of wife's adultery—On ground of husband's adultery, &c., *S*, 30, 513—522.
- Grounds of, among Parsis, *S*, 31, 518.
- Suits for divorce or, among Parsis, *S*, 32, 519

*Jurisdiction*, See Matrimonial jurisdiction.

- Object of the legislature in fixing residence as the test of, under the Act, *U*, *V*, 29.
- History of the bill as to, based on residence, *C*, 32.
- Consent of parties cannot confer, *A*, 35.
- Residence falling short of domicile will not confer, under English Law, *B*, 35.
- Under Divorce Act, 49—54.
- Reason why District Courts were given, in matrimonial causes, *V*, 51.
- Suits for nullity, Test of,—English Law, *G—I*, 186.
- Plea as to, no bar to grant of alimony *pendente lite*, *W*, 275.
- Questioned, no bar to grant of alimony, *G*, *H*, 278.
- Court in which suits to be brought under Parsi Marriage Act—When defendant has left British India, *S*, 26, 511.

To grant divorce—Domicile not test of jurisdiction, *Q—T*, 28, 29.

*Jurisdiction of District Courts*, Power to alter territorial — *S*, 18, 510.

*Jurisdiction of English Courts*, To pronounce decree of divorce is based on domicile—English Law, *U*, *V*, 34.

To decree divorce to wife domiciled in England at time of marriage, *J*, 36.

To adjudicate on the validity of marriages celebrated in England, *H*, *I*, 36.

*Jurisdiction of High Court*, Admission of petition for divorce, *K*, 50.

*Just*, Lawful—Meaning of the expressions, *K—M—I*, 523.

*Justice, equity and good conscience*, See EQUITY.

Rule of, when to be applied to Parsis, *P*, 495.

Where an enactment has no express provisions, Court to act according to equity, and good conscience, *H*, 5.

**K**

*Kali*, Naib, *S* 3, 689.

Nothing in the, Act to confer judicial or administrative power, or to render the presence of, necessary, or to prevent any one acting as,—*S*, 4, 689, 690.

Right of stranger to officiate as,—Suit by, for remuneration received by such stranger, *K*, *L*, 690.

Rules made under the, Act, *Pengul*, 690—693, *Bombay*, 693—694.

*Kazis'* Act XII of 1880, 681—696.

*Karewa*, Marriage in, form, *T*, 457.

**Kazi**, Reasons for the passing of the Kazis Act—History of Indian Legislation relating to, *D*, 681—683.

Who can appoint, under Muhammadan Law, *F—N*, 683, 684.

Nature of office of, *O—Z*, 684, 685

Office of, ancient nature of, *A*, 685.

Muhammadan Law—Appointment of—Qualifications—Reg. XXVI of 1827—Act XI of 1864—Office of, not hereditary, *B—E*, 685.

Powers of,—Muhammadan Law, *F—M*, 685, 686.

Functions of,—Bom. Reg. XXVI of 1827, *N—S*, 686, 687.

Remuneration of—Law before the passing of the Kazi Act, *T—J*, 687, 688.

Power to appoint, for any local area, *S*, 2, 689.

**Khatrans**, Marriage by *chadar andazi* between a Khatri and a widow—Legitimacy of children of such marriage, *S*, 487.

**Khatris**, Marriage by *chadar andazi* between a, and a Khatrani widow—Legitimacy of children of such marriage, *S*, 487.

**Khula**, Register of divorces other than those of the kind known as, prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 780.

Register of Divorces of the kind known as, prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 781.

**Kindred**, Affinity between, of husband and of wife, *T*, 200.

## L

**Land**, *S*, 1, 411.

**Lapse of time**, Void marriages, effect of, on, *Y, Z*, 182.

Effect of, on suit for nullity of marriage, *F—K*, 188.

**Law**, to apply to issue of marriages under Special Marriage Act, *S*, 18, 552.

**Lawful**, "Just"—meaning of the expressions, *K—M* 1, 523.

**Legacy**, bequeathed to wife after desertion and previous to protection order, *M*, 234.

In bar of dower still entitled to preference, *S*, 12, 423.

**Legal Practitioner**, Practitioners in Matrimonial Courts under Parsi Marriage Act, *S*, 25, 511.

**Legal proceedings**, Married women may take, *S*, 7, 670.

by and against married women, 670—678.

**Legal questions**, Determination of questions of law and fact—Procedure under Parsi Marriage Act, *S*, 41, 528.

**Legislation**, principles of, in Native States, 17—22.

**Legislator**, Functions of Judge and, *E—G*, 4.

**Letters of Administration**, Protection order, *W*, 232.

**Libel**, Action for, by wife obtaining protection order, *J*, 234.

**License**, Special,—Where granted—English Law, *C*, 577.

Marriage without, or banns—English Law, *E*, 577.

Grant and revocation of, to solemnize marriages under Christian Marriage Act, *S*, 6, 579.

of persons to grant certificates of marriage between Native Christians under Christians Marriage Act, *S*, 9, 581.

Unlicensed person granting certificate pretending to be, licensed,—Penalty, *S*, 74, 619, 620.

Lieutenant-Governor may grant, to register marriages under Act I of 1876, *S*, 8, 772.

**Lieutenant-Governor**, may grant licenses to register marriages under Act I of 1876, *S*, 3, 772.

*Limitation*, in case of withdrawal of suits, *O*, 210.

*Lis pendens*, *I*, 329.

*Local Government*, Power to invest chief executive officer with powers of, under Parsi Marriage Act S 52, 531.

to prescribe fees under Act XV of 1972, S. 82, 622.

Power for, to appoint Registrars for its territories, S. 12, 706.

*Lucid interval*, Marriage of a lunatic during a -, *A*, 573.

Burden of proof as to,—Opinion of Lord Thurlow, *B*, 573.

*Lunacy*, Grounds of decree of nullity of marriage, S. 19, 189.

Suit for a decree of nullity of marriage among Parsis, 511, 512; in case of, or mental unsoundness, S. 27, 511; in case of impotency, S. 28, 512.

*Lunatic*, Suits on behalf of—, *N*, 57.

cruelty committed by an insane person, *E—H*, 70, 71.

Suit by guardian of—, *H*, 201.

• Petitioner or respondent being minor or,—Guardian *ad litem*—English law and practice, *D*, 208.

Suits on behalf of, under Divorce Act, S. 48, 361.

Provision of the Civil Procedure Code with regard to suits by or against minors and persons of unsound mind, 363 366.

Marriage of a, during a lucid interval, *A*, 573.

*Luxuries*, What, are necessities, *K*, 226.

## M

*Magistrate*, When to be Marriage-Registrar under Christian Marriage Act, S. 7, 580.

how to proceed against parties concerned in Sati, S. 4, 837.

*Maintenance*, See ALIMONY.

See ALIMONY, *pendente lite*.

See ALIMONY, PERMANENT.

Use of the above word, *R*, 272.

Permanent, not alienable, *G*, 311.

Right of, of a woman whose marriage has been dissolved under S. 18, of Act XXI of 1866, *I—K*, 651, 652.

Pin-money Separate, settled on wife, *G*, 667.

under Malabar Marriage Act, 821, 822.

of wife and children—Malabar Marriage Act, S. 17, 821, 822.

when claimable by divorced wife under Malabar Marriage Act, S. 22, 825, 826.

*Maintenance of child*, Necessaries procured for —, *M—Q*, 226, 227.

*Majority*, Marriage among Parsees—Suit for declaration of invalidity of marriage during infancy—Effect of custom validating such marriage—Age of, among Parsis for purposes of marriage, *M—O*, 502, 503.

*Major widow*, Consent to re-marriage of a, S. 7, 477.

*Makkathayam Law*. Classes governed by, *G*, 800.

*Malabar family*, Marumakkathayam Law and Aliyasanthana Law—Nature of family governed by such Law,—Classes governed by Marumakkathayam Law, *D*, *E*, 799, 800.

*Malabar Law*, See ALIYASANTHANA LAW

See MARUMAKKATAYAM LAW

Adoption different forms of, in Malabar, *K—P*, 810.

*Malabar Marriage*, See ALIYASANTHANA MARRIAGE.

History of the Malabar Marriage Act—Marriage Law in Malabar prior to the passing of the Act—Nature and scope of the Act, 793 - 798.

Act IV of 1896 (Madras), 793 - 830.

Nature and effects of marital relationship among Nayers, *J—M*, 800, 801.

*Malabar Marriage*—(Concluded).

*Marriage* is optional with women in Malabar—Its nature and incidents, *N—Q*, 801—803.

Tali Kattu-Kalyanam—Its nature and incidents, *R—Y*, 803—806.

Ceremonies among Nambudri Brahmins, *F*, 809.

Widow marriage in Malabar, *G*, 809.

Widow marriage among Nambudris, *H*, 809.

Registration of marriages under, Act, 815—821.

Registrar to file such notices and to maintain the "Marriage Notice Book" under Malabar Marriage Act, S. 6, 816; copies of notice to be served on interested parties—Withdrawal of notice, S. 7, 816.

*Malformation*, Incurable, effect of on marriage, *U*, 189.

*Mania*, Fits of, if cruelty, *S*, 75.

*Marginal notes*, How far guide in construction, *Z—D*, 6, 7.

*Marital reliefs*, Relief which may be granted by English Courts in their matrimonial jurisdiction, *N, O*, 122.

Reliefs provided for by the Divorce Act, *P*, 23.

*Marriage*, See MAHOMEDAN MARRIAGE.

See MARUMAKKATAYAM MARRIAGE.

See PARSI MARRIAGE.

See RE-MARRIAGE.

See WIDOW RE-MARRIAGE.

How differs from other contracts, *J—N*, 38, 39.

Refers to Christian marriages, *O, P*, 39.

What, is recognized as valid in English Courts—It must be monogamous, *J—M*, 42.

There must be some proof of, in Matrimonial suits, *V*, 99.

Statutes relating to, construction of, *W, X*, 181, 182.

Law governing validity of,—Domicile, *W, X*, 197, 198.

English, validity of, of Jews and Quakers, *Y—D*, 198.

With deceased wife's sister or half sister—English Law, *V—B*, 200.

Proof of, necessary before restitution can be decreed, *I*, 237.

Proof of, *R, S*, 296.

Communications during, Privileged, *F*, 377.

Degradation by apostacy does not dissolve, tie among Hindus, *R—V*, 490.

Provisions of the Hindu Law as to the effect of conversion on the status of, *W, X*, 430, 431.

Provisions of Mahomedan Law as to the effect of change of religion on the status of, *O—G*, 436—439.

Effect of conversion on the status of, according to the Mahomedan Law—Extract from the writings of Muslem jurists, *H, I*, 439, 440.

of Hindu widows legalized, *S*, 1, 457.

Customs as to widow, in the several Provinces of India, 477—492; General, 477, 478; Berar, 478, 479; Northern India-Bengal, 479, 480; Behar, 480; Bombay, 481—484; Burma, 484; Central Provinces, 484—485; Madras, 485—487; N.W.P. 487; Rajaputana, 487—488; Punjab, 488—492.

*S. 2*, 496.

Indian Christian, Act 1872, 561—640.

Statutes relating to—How interpreted, *L, M*, 568.

Presumption in favour of, *R, S*, 572.

what is, *T*, 572.

Parties, *U, V*, 572.

*Marriage—(Concluded).*

of a lunatic during a lucid interval, *A*, 573.

When, not had within two months after notice, new notice required, *S*. 59, 605.

The native Converts' Marriage Dissolution Act, 1866, 645—689.

The births, deaths and, Registration Act, 1886, 695—756.

General registry offices of births, deaths and, 703—705.

The Births, Deaths and, Registration Act XVI of 1886, Amendment Act, 1890, 759, 760

The Births, Deaths and, Registration (Amendment) Act, 1911, 761, 762.

Foreign, Act XIV of 1903, 763—766.

Foreign, Act, 1892, 845—852.

Notice of, intended to be solemnized under 55 and 56 Vict., c. 23, *S*. 2, 765, 766.

Exemption of certain, from Act VII of 1909, *S*. 3, 767.

Anand, Act, 1909, 767, 768.

The Bengal Muhammadan, and Divorces Registration Act, I of 1876, 769—792.

Register of marriages as prescribed by *S*. 6 of Bengal Act I of 1876 for voluntary registration of Muhammadan, and divorces, 779, 780.

Register of divorces other than those of the kind known as *Khula* prescribed by *S*. 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 780.

*S*. 2, 810.

Conditions subject to which a sambandam may be registered as a, *S*. 3, 811, 812.

English Statute law relating to India concerning the subject of, and divorces, 839—853.

The Consular, Act, (1868), *St*. 31 and 32, *Vic*. Ch. 61, 841.

Registration of Births, Deaths and, Army Act, 1879, 843, 844.

By Registrars Act, *V*, of 1852, 879—886.

Of Christians Act, XXV of 1864, 887—892

The Indian, Act V of 1865, 893—908.

*Marriage Act*, in England, *P—T*, 575, 576.

Amendment of, 713, 714.

*Marriage certificate book*, Transmission of certified copies of entries in, to the Registrar General of Births, Deaths and Marriages under Special Marriage Act, *S*. 13-A, 551.

Transmission of certified copies of entries in, to the Registrar General of Births, Deaths and Marriages, *S*. 29, 713.

Registrar to enter certificate of marriage in, under Malabar Marriage Act, *S*. 12, 820.

*Marriage Notice Book*, Registrar to file notices and to maintain the, under Malabar Marriage Act, *S*. 6, 816; Copies of notice to be served on interested parties—Withdrawal of notice, *S*. 7, 816.

*Marriage per verba de praesenti*, English Law, *C*, 579.

*Marriage Register*, See REGISTER.

to be open for public inspection, under Parsee Marriage Act, *S*. 8, 505.

Transmission of certified copies of certificates in, to Registrar General of Births, Deaths and Marriages, *S*. 8-A, 505; *S*. 31, 714.

Certified copy of entry in, etc., to be evidence, *S*. 80, 621.

*Marriage Registrar*, See REGISTRAR.

Appointment of, under Special Marriage Act, *S*. 3, 547.

Magistrate when to be, under Christian Marriage Act, *S*. 7, 580.

under Christian Marriage Act, *S*. 7, 580.

*Marriage Registrar*—(Concluded).

May ask for particulars to be registered, S. 53, 605.

Appointment of, under Malabar Marriage Act, S. 4, 815

*Marriage Registrars in Native States*, under Christian Marriage Act, S. 8, 580.

*Marriage Validation*, Act, II of 1892, 641—644.

*Marriage with another woman*, S. 3, 44.

*Married man*, Succession to separate property of a, dying intestate—Malabar Marriage Act, S. 23, 826.

*Married woman*, Will of—U, 232.

Action of tort by—, V, 232.

Wife's legal position during continuance of protection order, S. 31, 234.

Women's earnings to be her separate property, S. 4, 664.

Women's wages and earning, 664—666

• Savings from separate estate of—, C, D, 666

may effect policy of insurance, S. 5, 667.

Insurances by wives and husbands, 667—670

may take legal proceedings, S. 7, 670

Legal proceedings by and against, 670—678

Suit against a,—Husband not necessary party, G, H, 673.

Application of S. 8 of Act III of 1871 to separate property of, subject to restraint upon anticipation, 673—678.

Husband's liability for wife's debts, 679, 680.

Succession to separate property of a, dying intestate—Malabar Marriage Act, S. 24, 828.

*Married woman's property*, Separated wife deemed spinster with respect to after-acquired property, S. 24, 217, 218.

Proprietary rights of woman, how<sup>d</sup> affected by her marriage—English Law—History of the Law, U—E, 221, 222.

Liability of husband seizing wife's property after notice of protection order, S. 30, 233.

Married Women's Property, Act III of 1874, 661 680.

*Marumakkatayam Law* See MALABAR LAW

See ALIYASANTHANA LAW.

And Aliyasantana Law—Nature of family governed by such Law Classes governed by, D, E, 799, 800

*Marumakkatayam Marriage*, See MARRIAGE

Aliyasantana marriage, how differs from, H, I, 800.

*Matrimonial causes*, Reason why District Courts were given jurisdiction in, V, 51.

Jurisdiction of High Court to deal with, among Parsis, 508, 509.

*Matrimonial Courts*, Of Parsee—, 508—511.

Practitioners in, under Parsi Marriage Act, S. 25, 511.

*Matrimonial domicile*, same as ordinary domicile, U, 35

*Matrimonial jurisdiction*, of High Courts to be exercised subject to Divorce Act, S. 4, 49.

*Matrimonial relief*, See RELIEF.

*Matrimonial Suits*, under Parsi Marriage Act, 511—528.

*May*, Meaning, Y—F, 11, 12.

*Meaning of words*, See WORDS AND PHRASES Construction of words defined by the Legislature, E—O, 9, 10.

Undefined words, construction of, P—T, 10

Judicially interpreted words occurring in enactments, construction of, U, 10.

“Or”—“And”—Meaning, V—X, 10, 11.

“May”—“Shall”—Meaning, Y—F, 11, 12.

*Means of husband*, Mode of determining husband's means for the purpose of awarding alimony *pendente lite*, 286—289.

*Medical examination*, Practice in case of alleged impotence—As to alleged impotency, 194, 195.

*Merchant Shipping Act*, 1594, St. 57 & 58 Vic., Ch. 60, 853.

*Minister of religion*, English refusing to perform ceremony of second marriage to permit use of his church, S. 59, 396.

*Minor*, Suit by, for dissolution of marriage, Y, 86.

• Marriage of, not null and void, I, 183.

Petitioner or respondent being, or lunatic—Guardian *ad litem*—English law and practice, D, 208.

Suits by, under Divorce Act, S. 49, 362.

Provisions of Civil Procedure Code with regard to suits by or against, and persons of unsound mind, 363—366.

'S. 3, 370.

Marriage of, English Law, K, 574.

Solemnizing without notice or within fourteen days after notice marriage with—Penalty, S. 70, 617.

Solemnizing marriage with, within fourteen days without authority of Court, or without sending copy of notice—Penalty, S. 71, 618.

Issuing certificate after expiry of notice, or in case of, within fourteen days, after notice, or against authorized prohibition—Penalty, S. 72, 618.

*Minor children*, S. 3, 43.

*Minority*, Guardians—Practice and procedure under Parsi Marriage Act, I—L, 529.

*Minor widow*, Consent to re-marriage of, S. 7, 476.

*Minor wife*, Guardianship of, and children, S. 18, 823

*Misconduct*, Mere carelessness is not neglect or, R, 145

of petitioner a bar to relief in suits for dissolution of marriage, 146—150.

What is, in the husband, 148, 149.

What is, in the wife, 149.

What is not, in the husband, 149, 150

What is not, in the wife, 150.

*Misrepresentation*, Fraudulent,—Effect of on marriage—English Law, K, 202.

*Missing person*, Presumption as to death of a, A, B, 513.

*Month*, S. 3, 647.

*Mother*, Hindu Law—Loss of caste—Right of guardianship of, J—L, 448, 449.

Rights of widow and, compared, B, 463

Right of re-married, to succeed to son by former husband, C—I, 463, 464.

Re-married—Power to give in adoption son by former husband, D, E, 474.

*Motive*, For condonation, U, 115.

Of petitioner in asking for restitution, not material, G, H, 237.

*Motives of parties*, Reasons for enacting law, C, 14.

*Muhamedan*, Suit by person born a, claiming right as reversioner in Hindu family, D, E, 444, 445.

The Bengal, Marriages and Divorces Registration Act, I of 1876, 769—792.

*Muhammadan*, Registrar to keep registers, S. 6, 773

*Muhamedanism*, Loss of caste—Hindu convert to, Succession, V, 447.

*Muhamedan Law*, Effect of conversion on right of inheritance under, Act XXI of 1850, N, 435, 436.

Provisions of, as to the effect of change of religion on the status of marriage, O—G, 436—439.

Effect of conversion on the status of marriage according to the—Extracts from the writings of Muslem jurists, H, I, 439, 440.



*Muhamedan Law—(Concluded).*

- Divorce Act, IV of 1869 not applicable to Mahomedan converts to Christianity, *J*, 440.
- Suits for restitution of conjugal rights by a Mahomedan convert to Christianity, *K*, 440.
- Effect of change of religion on the obligation to maintain relatives under the, *L*, 440.
- Who can appoint Kazi under, *F—N*, 683, 684.
- Appointment of Kazi—Qualifications—Reg. XXVI of 1827—Act XI of 1864—Office of Kazi not hereditary, *B—E*, 685.
- Powers of Kazi, *F—M*, 685, 686.
- Provisions of Muhammadan Law relating to suits for restitution of conjugal rights, 249—253.
- Muhamedan marriage*, Divorce Act, does not apply to polygamous marriages, *H—J*, 2, 25.
- Conversion, effect of, on—, *A, B*, 27.
- Jurisdiction to dissolve, *Q*, 39.
- Registration of,—Copy of entry in Register—Evidence, *F*, 773.
- Register of marriages as prescribed by S. 6 of Bengal Act I of 1876 for the voluntary registration of, and divorces, 779, 780.
- Register of divorces other than those of the kind known as Khula prescribed by S. 6 of Bengal Act I of 1876 for the voluntary registration of, and divorces, 780, 781.
- Muhamedan Registrar*, S. 2, 772.
- Duties of, on application, S. 9, 774.
- may receive gratuity, S. 10, 774.
- to be subject to control of District Registrar, S. 17, 776, 777.
- a public officer, S. 25, 778.

**N**

- Nab Kars*, S. 3, 689
- Nambudri Brahmins*, Marriage, Ceremonies among, *F*, 809.
- Widow marriage among, *H*, 809
- Name*, Divorced wife may retain the, of her first husband, *P—V*, 158, 159.
- Native Christians*, See CHRISTIANS.
- S. 3, 571.
- Licensing of persons to grant certificates of marriage between, under Christian Marriage Act, S. 9, 581.
- Registrars to ascertain that notice and certificate are understood by, S. 57, 606.
- to be made to understand declarations, S. 58, 607.
- Registration of marriages between, S. 59, 607.
- On what conditions marriages of, may be certified, S. 60, 607.
- Marriage of, 607—611.
- Books in which marriages of, under Part I or Part III of Act XV of 1872 are registered, S. 64, 610.
- S. 2, 642.
- Native Converts' Marriage Dissolution*, Act XXI of 1866, 645—659.
- Native husband*, S. 3, 647.
- Native law*, S. 3, 647.
- Native State*, S. 3, 670.
- Marriage Registrars in Native States under Christian Marriage Act, S. 8, 580.
- Officers to whom Registrars in, shall send certificates, S. 56, 606.
- Power to prescribe fees and rules for, under Act XV of 1872, S. 84, 623.

*Native State*—(Concluded).

Power for Governor General in Council to appoint Registrars for, S. 13, 707.

*Native wife*, S. 3, 547

*Naturalisation Act*, 1870, St. 33 & 34 Vic., Ch. 14, 842.

*Natural or legal*, Meaning of the terms, D, E, 201

*Nayars*, Nature and effects of marital relationship among, J—M, 800, 801.

*Necessaries*, Husband when liable for, of wife, 222—224.

What are, 224—227.

What luxuries are—, K, 226.

Procured for maintenance of child, M—Q, 226, 227.

*Neglect*, Coldness and insult producing an attack of melancholia, if cruelty, M, N, 74.

Wilful, of petitioner a bar to relief in suit for dissolution of marriage, 145.

Mere carelessness is not, or misconduct, R, 145.

Neglecting to apply promptly for alimony *pendente lite*—Effect, E, 275.

Extreme, may amount to connivance, U, 108.

Negligence, See NEGLECT.

*New trial*, Order for,—Effect, B, 156

*Not being brought before the Court*, meaning of the expression, K-1, 175.

*Notice*, One of the parties to intended marriage to give, to Registrar under Special Marriage Act, S. 4, 547, to be filed and copy entered in the Marriage Book,

S. 5, 547, Objection to marriage, S. 6, 548, Procedure on receipt of objection;

Objector may file suit, S. 7, 548, Certificate of filing of suit to be lodged with Registrar, S. 8, 548 Court may fine when objection not reasonable, S. 9, 549.

When marriage not had within two months after, new, required, S. 52, 605.

Registrars to ascertain that, and certificate are understood by Native Christians, S. 57, 606.

Solemnizing, without, or within fourteen days after, marriage with minor—Penalty, S. 70, 617.

Issuing certificate, or marrying without publication of,—Penalty, S. 71, 617.

Marrying after expiry of,—Penalty, S. 71, 617

Solemnizing marriage with minor within fourteen days without authority of

Court, or without sending copy of,—Penalty, S. 71, 618.

Issuing certificate after expiry of, or, in case of minor, within fourteen days, after, or against authorized prohibition—Penalty, S. 72, 612.

Duty of Registrar to register births and deaths of which, is given, S. 19, 709.

Persons authorized to give, of birth, S. 20, 709, 710.

Persons authorized to give, of death, S. 21, 710.

Entry of birth or death to be signed by person giving, S. 22, 710, 711.

Of marriage intended to be solemnized under 55 and 56 Viet., C. 23, S. 2, 765, 766.

Of intention to register a Samban lam to be given to the Registrar, S. 5, 815.

Petition for dissolution of marriage under Malabar Marriage Act—to be given to other party, if petition is not joint, S. 20, 825, Court to declare marriage dissolved within a specified period, S. 21, 825.

Service of, under Malabar Marriage Act, S. 25, 829.

*Nullity of marriage*, See DECREE FOR NULLITY OF MARRIAGE.

See VOIDABLE MARRIAGE.

See VOID MARRIAGE.

See pp. 181—206.

Void marriage—Effect of delay in case of—Suits for, M, N, 140.

Petition for decree of nullity, S. 18, 181.

Decree for,—Confirmation by High Court—Practice—Procedure, R, 181.

*Nullity*, Suits for,—Prayer for restitution—English practice S, 181.

Age of parties—How affects right to relief, A, B, 182.

**Nullity—(Concluded).**

- Decree of separation, how far bars relief on ground of, *C*, 182.
- Burden of proof in suits for, *G*, 182.
- Suits for nullity, test of jurisdiction—English Law, *G—I*, 186.
- Grounds for a petition to declare marriage *null* and *void*, *J, K*, 186.
- Who can commence proceedings for,—English Law, 186—188.
- Lapse of time, effect of, on suit for, *F—K*, 188.
- Contents of decree  *nisi* for, *L*, 188.
- Grounds of decrees of, *S*, 19, 189.
- The party who is disqualified may also apply under certain circumstances for decree of nullity—Other cases where the party who is not fit can apply for decree of nullity, *B—E*, 190.
- Suit must be instituted with reasonable promptness—Effect of delay, *F*, *G—I*, 191.
- Suit for restitution of conjugal rights—Right to declaration of, *L*, 191.
- Cases where decrees for, have been granted to the husband, 191—193.
- Cases where decrees of, have been refused to the husband, *Z—C*, 193.
- Cases where decrees for nullity were granted to the wife, 193, 194.
- Cases where decrees of nullity were refused to the wife, *J—L*, 194.
- Suit for,—First wife being the uterine half sister of second wife—Domicile, *V*, 197.
- Reason of the rule as to insanity being a ground for a suit for nullity, *F*, 201.
- Confirmation of District Judge's decree of nullity, *S*, 20, 203.
- Children of annulled marriage, status of, *S*, 21, 204.
- Decree  *nisi* for dissolution and decree  *nisi* of nullity—Difference, *A*, 204.
- Nullity suit—Provision for child—English law and practice, *L—O*, 206.
- Respondent in suit for restitution cannot ask for, *A*, 208.
- Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution or nullity or judicial separation, *W—Z*, 255.
- Variation of settlements in cases of, *X, Y*, 328.
- Power to make orders as to custody of children in suits for dissolution or nullity, *S*, 43, 338; Power to make such orders after decree or confirmation, *S*, 44, 338.
- Suit for a decree of, among Parsis, 511, 512, in case of lunacy or mental unsoundness, *S*, 27, 511, in case of impotency, *S*, 28, 512.
- Suit by wife for nullity—(General and relative impotency—Impotency, *quoad hanc*—English Law, *W—Z*, 512.

**O**

- Object of legislature*, In fixing residence as the test of jurisdiction under the Divorce Act, *U, V*, 29.
- Offence*, Cognizance of, under Parsi Marriage Act, *S*, 46, 530.
- Offer to return*, Effect of on desertion, 96—98.
- On*, Meaning of the word, *Y*, 297.
- Or*, Meaning of, *V—X*, 10, 11.
- Case where "And" is to be read as, *B*, 152.
- Orders*, Enforcement of and appeals from, and decrees under the Divorce Act, *S*, 55, • 381.
- Rules and, under Act XV of 1865 (Parsi Marriage and Divorce) in force in Bombay, 533—536.
- Rules and, made under Act III of 1872 (Special Marriage)—General, 556; Bengal, 557; Bombay, 557—559, U.P., 559, 560, Punjab, 560.
- Rules and, made under Act XV of 1872, Christian Marriage, Bengal, 630—633; Bombay, 634, 635; U.P., 635—638; Punjab, 639, 640.

*Orders—(Concluded).*

Rules and, made under Act VI of 1886—General, 719—730; Bengal, 730—745; Bombay, 745—751; Punjab, 752, 753; Madras, 754, 755; U.P., 756, 757.

*Order for alimony*, Enforcing, *pendente lite*, 289, 290.

*Oudh Estates Act*, Loss of caste—Succession under, I of 1869, N, 441.

**P**

*Parda-nashin*, S 2, 772.

*Parents*, Case where both, are unfit—Custody given to a third person, 347.

*Parsis*, Not subject to Ecclesiastical law, E, F, 494.

Construction of Parsi Marriage Act—English Law how far helpful, G—L, 494, 495.

Parsi Marriage Act is based on English Law, M, 495.

Effect of Hindu customs on, Law of marriage, O, 495.

• Rule of justice, equity and good conscience when to be applied to, P, 495.

Who are—Zoroastrians—Conversion, S—W, 495, 496.

Adoption among, —Will—Evidence, X—Z, 496.

Of marriages between, 497—503.

Infant marriages among, D, 499, 500.

Infant marriage among, —Consent of father or guardian—Consent may be implied, E—G, 500—502.

Punishment of bigamy among, S 5, 503.

Re-marriage by a Parsee save after divorce unlawful during lifetime of first wife or husband, S 4, 503.

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsee Marriage Act, not punishable, R, 504.

Jurisdiction of High Court to deal with matrimonial causes among, U, 508, 509.

Suit for a decree of nullity of marriage among, 511, 512, In case of lunacy or mental unsoundness, S. 27, 511, In case of impotency, S. 28, 512.

Suit for a decree of dissolution in case of absence, among,—In case of absence for seven years, S. 29, 513.

• Suit for divorce—Husband's liability for wife's costs—Rule of English Law applicable to, C—H, 514.

Second marriage contracted by a Parsi husband while first wife was living, prior to the passing of this Act, N—U, 516, 517.

What is legal cruelty among,—English Law how far helpful, V—Y, 517, 518.

Adultery of Parsi petitioner—Effect, Z—B, 519, 520.

Payment of alimony to wife or her trustee among, S 35, 522.

Decree for restitution among, how far enforceable, T—Z, 524—526.

No suit to enforce marriage or contract arising out of marriage when husband under 16, or wife under 14 years, Parsi Marriage Act, S. 37, 527.

Minority—Guardians—Practice and procedure under Parsi Marriage Act, I—L, 529.

Cognizance of offences under Parsi Marriage Act, S. 46, 530.

*Parsee Chief Matrimonial Courts*, S. 16, 509.

• *Parsee District Matrimonial Court*, S. 17, 509.

*Parsi Marriage*, See MARRIAGE.

Act is based on English Law, M, 495.

Requisites to validity of, S. 3, 497.

Table of prohibited degrees of consanguinity or affinity framed by the Governor General in Council, A, B, 498, 499.

Marriage among Parsees—Suit for declaration of invalidity of marriage during infancy—Effect of custom validating such marriage—Age of majority among

*Parsi Marriage*—(Concluded).

- Parsis for purposes of marriage, *M—O*, 502, 503.
- Penalty for solemnizing marriage contrary to section 4 of, Act, S. 9, 506.
- and Divorce Act XV of 1865—Alimony—Charge on husband's immoveable property—Widow—Distributive share, *I, J*, 522.
- Rules and orders under Act XV of 1865 (*Parsi Marriage and Divorce*) in force in Bombay, 533—536.
- Parsee Marriage and Divorce Act XV of 1865*, 493—536.
- Parsee Matrimonial Courts*, *Of*, 508—511.
- Rules of procedure of, to be made by High Court, S. 51, 531.
- Parsees*, Provisions relating to suits for restitution of conjugal rights among Parsees, 253, 254.
- Parsi widow*, *Parsi Marriage and Divorce Act XV of 1865*—Alimony—Charge on husband's immoveable property—Widow—Distributive share, *I, J*, 522.
- Parties to marriage*, *U, V*, 572.
- Parties to suit*, Suit against a married woman—Husband not necessary party, *G, H*, 673.
- Payment*, Order as to the, and disposition of damages against adulterer, 268—270.
- Penal servitude*, Alimony where wife undergoes sentence of, *Q*, 296.
- Penalty*, Punishment for abetting marriage made contrary to S. 7 of the Hindu Widows' Re-marriage Act—Effect of such marriage—Proviso, S. 7, 476, 477.
- Punishment of bigamy among Parsis, S. 5, 503.
- for solemnizing marriage contrary to S. 4 of *Parsi Marriage Act*, S. 9, 506.
- for priest's neglect of requirements of S. 6 of *Parsi Marriage Act*, S. 10, 506.
- for omitting to subscribe and attest certificate under *Parsi Marriage Act*, S. 11, 507.
- for making, &c., false certificate under *Parsi Marriage Act*, S. 12, 507.
- for not registering certificate under *Parsi Marriage Act*, S. 13, 507.
- Punishment of offences under *Parsi Marriage Act* committed within local limits of High Court, S. 47, 530.
- on married person marrying again under *Special Marriage Act*, S. 15, 552.
- Punishment of bigamy under *Special Marriage Act*, S. 16, 552.
- for signing declarations or certificates containing false statements under *Special Marriage Act*, S. 21, 553.
- under Act XV of 1872, 611—620.
- for solemnizing irregular marriages—Act II of 1892, S. 6, 644.
- on respondent not obeying citation under Act XXI of 1866, S. 11, 649.
- for false information under Act VI of 1886, 713.
- for wilfully giving false information under Act VI of 1886, S. 27, 743.
- Zamindars, etc., responsible for immediate communication to police of intended sacrifice—in case of neglect, S. 3, 832.
- In case of neglect to communicate about Sati, S. 3, 836.
- Pending suits*, when *Divorce Act* came into force, S. 6, 52.
- Permanent Alimony*, See ALIMONY, PERMANENT.
- Petition*, Forms of, and statements, S. 46, 360.
- Stamp on, under *Divorce Act*—to state absence of collusion or connivance—Statements to be verified, S. 47, 360.
- Pin-money*, Separate maintenance settled on wife, *G*, 667.
- Pleader's fee*, Suit for judicial separation, *P*, 53.
- Pleading*, counter charges, *V, W*, 121.
- Cruelty, *H, I*, 142.
- Police*, Zamindars, etc., responsible for immediate communication to, of intended sacrifice—Penalty in case of neglect, S. 3, 832.

*Police*—(Concluded).

how to act on receiving intelligence of intended sacrifice, S. 3, **832, 833.**

how to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **833.**

Zemindars, &c., responsible for immediate communication to, of intended sacrifice, S. 3, **835, 836.**

how to act on receiving intelligence of intended sacrifice—How to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **836.**

*Polygamous marriages*, Registration of Mahomedan Marriages Act, does not apply to, *H—J*, **2, 25.**

Courts, whether can grant relief in case of, *L—O*, **53.**

*Post-nuptial debts*, Wife's liability for, S. 8, **671.**

*Post-nuptial settlement*, Inquiry into existence of ante-nuptial or, S. 40, **314.**

What is, *B—I—D*, **328.**

Variation of, *E*, **329.**

*Powers of appointment*, Variation of, *X, Y*, **330.**

Varying joint, *B*, **331.**

Guilty party's, variation of, *C, D*, **331.**

*Power to transfer suits*, S. 8, **54.**

*Practice and Procedure*, See pp. **152, 153.**

See App. VI, pp **953—982.**

As to filing written statements, *J*, **53.**

Alimony *pendente lite*—Absence of means—Reference to Registrar, *H*, **305.**

As to settlement of damages, *R*, **313.**

Of English Courts as to affidavit, **373—376.**

Divergence between several High Courts—Course to be adopted by subordinate Courts, *C, D*, **9.**

Stay of proceedings, practice as to, *G*, **32.**

Adjournment, practice as to, *H*, **33.**

Court in India to act on principles of English Divorce Court, S. 7, **52.**

Courts, whether can grant relief in case of polygamous marriage, *L—O*, **53.**

Judicial separation may be granted in a suit for divorce, *R—T*, **59.**

Decree based merely on admissions and without recording evidence, *R—T*, **98.**

Adulterer to be co-respondent in suits for dissolution of marriage, S. 11, **99.**

Charge of adultery with persons, of whom some are known and some unknown—Practice, *L*, **101.**

Affidavit to dispense with co-respondent—Practice as to, *P—R*, **101.**

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene, *A, B*, **102.**

Person implicated by petitioner may intervene, *S—Z*, **102.**

Applications to dispense with co-respondent—Practice as to, *H*, **103.**

Affidavit in support of motion to dispense with co-respondent, *I, J*, **103.**

Where adulterer is absent abroad—Practice, *L*, **103.**

Co-respondents' right to be heard in appeal, *M*, **104.**

Respondent leading the life of a prostitute—Effect—Practice, *N*, **104.**

Where there are charges against unknown persons—Practice, *X, Y*, **105.**

Adulterer's name being known after filing petition—Practice, *Z*, **105.**

Where adulterer's identity is lost through neglect, *D*, **106.**

Death of co-respondent whilst suit is pending—Practice, *E, F*, **106.**

In suit for dissolution, Court to be satisfied of absence of collusion, connivance, etc., S. 12, **106.**

*Practice and Procedure—(Continued).*

Condonation need not be specially pleaded, *E*, 116.

Pleading counter charges, *V*, *W*, 121.

Counter charges—Duty of Court before pronouncing decree *nisi*, *X*, 121.

Dismissal of petition for dissolution on ground of collusion, etc., *S*, 13, 121.

Power of Court to pronounce decree for dissolving marriage, *S*, 14, 126.

Decree for dissolution not to be made on mere admissions, *P*, 127.

Amendment of petition for dissolution into one for judicial separation, *T*, *U*, 128.

Opportunity to be given to petitioner to amend petition in certain cases, *V*, 128.

Power to grant judicial separation where dissolution of marriage is prayed for, *W*, 128.

Court may attach conditions to making of a decree for dissolution of marriage, *X*, *Y*, 128, 129.

Discretion of Court in cases of dissolution how to be exercised, *B—G*, 129, 130.

Duty of Court exercising jurisdiction under the Divorce Act, *L*, 130.

Court refusing relief on ground of petitioner's adultery—Such refusal no bar to Court's granting relief on subsequent proceeding, *M*, *N*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *A—E*, 132.

*Compensatio criminum*, doctrine of—Canon Law—Above doctrine not applicable under Indian Divorce Act, *H—J*, 133.

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—or in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband, petition adultery is excused and decree passed for dissolution, *R*, *S*, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Decrees for dissolution were granted to the husband, cases where, 136.

Decrees for dissolution were refused to the husband, cases where, 136, 137.

Decrees for dissolution were granted to the wife, cases where, 138.

Decrees for dissolution were refused to wife, cases where, 138.

Cruelty of petitioner as a bar to relief in suits for dissolution of marriage, 141, 142.

Plea of desertion in defence, *U*, 143.

Wilful neglect of petitioner a bar to relief in suits for dissolution of marriage, 145.

Misconduct of petitioner a bar to relief in suits for dissolution of marriage, 146.

Relief to respondent in case of opposition on certain grounds, *S*, 15, 150.

Cross-suits—Conduct of suit to whom given, *P*, 151.

Suits for nullity—Prayer for restitution—English practice, *S*, 151.

Cases where affirmative relief was allowed on cross-prayer, *U—Y*, 151, 152.

Cases where affirmative relief was not afforded on cross-prayer, *Z*, *A*, 152.

Decrees for dissolution to be *nisi*—Collusion, *S*, 16, 153, 154.

Practice in applying for decree absolute, 162—164.

General principles as to intervention, 165, 166.

Intervention by Queen's Proctor, 166—170.

Who can intervene, 166—174.

Intervention by private persons, 170—174.

*Practice and Procedure—(Continued).*

Grounds for intervention, 174, 175.

Confirmation of decree for dissolution by District Judge, S. 17, 176, 177.

District Judge passing decree for dissolution of marriage, subject to confirmation, with costs against respondents—Power to execute decree as to costs before confirmation, L, 180.

Necessity for a motion for High Court to make decree *nisi* absolute, M—P, 180, 181.

Under the Divorce Act IV of 1869, 359—394.

Original summons personally served on the respondent—Decree *nisi* passed *ex parte*—Application for making the decree absolute, 181.

Decree for nullity of marriage—Confirmation by High Court—Practice—Procedure, R, 181.

The party who is disqualified may also apply under certain circumstances for a decree of nullity—Other cases where the party who is not fit can apply for decree of nullity, B—E, 190.

Suit for restitution of conjugal rights—Right for declaration of nullity of marriage, L, 191.

Cases where decrees for nullity of marriage have been granted to the husband, 191—193.

Cases where decrees of nullity of marriage have been refused to the husband, Z—C, 193.

Cases where decrees for nullity were granted to the wife, 193, 194.

Cases where decrees of nullity were refused to the wife, J—L, 194.

Practice in case of alleged impotence—Medical examination, as to alleged impotency, 194, 195.

Confirmation of District Judge's decree of nullity, S. 20, 203.

Decree *nisi* for dissolution and decree *nisi* of nullity—Difference, A, 204.

Nullity suit—provision for child—English Law and Practice, J—O, 206.

Petitioner or respondent being minor or lunatic—Guardian *ad litem*—English law and practice, D, 208.

Compromise of suit, practice as to, G, 208.

Respondent in suit for restitution of conjugal rights may ask for judicial separation, Z, 208.

Legal grounds why the application for judicial separation should not be granted—What are such legal grounds, 212—215; What are not such legal grounds, 216, 217.

Damages and costs against adulterer, 262—271.

Damages against adulterer—Measure of damages, 263—271; circumstances which tend to reduce, 267, those which tend to enhance them, 268.

Order as to the payment and disposition of damages against adulterer, 268—270.

Practice in claiming damages against adulterer, 270.

Claim for damages against adulterer without claiming dissolution or judicial separation, F—I, 270.

Power to order adulterer to pay costs, S. 35, 271.

Alimony *pendente lite*—Jurisdiction—Application after decree *nisi*, C—E, 273.

Alimony *pendente lite*, when payable—Ecclesiastical Courts, practice of, J, 274.

Facts to be established before alimony *pendente lite* can be granted—Practice of Ecclesiastical Courts, L—T, 274, 275.

Application to make decree absolute—Arrears of alimony, B, 279.

No application would lie for a small sum pending petition for alimony, S, 279.

Mode of determining husband's means for the purpose of awarding alimony *pendente lite*, 286—289.



*Practice and Procedure—(Concluded).*

- Enforcing order for alimony *pendente lite*, 289, 290.
- Regarding the grant of alimony *pendente lite*, 290.
- In matters of variation of settlements, 333—337.
- In making orders as to custody of children and access to children, 352—359.
- Power to close doors in proceedings under the Divorce Act, S. 58, 378.
- Suits with closed doors under Parsi Marriage Act, S. 88, 327.
- Power to adjourn cases under the Divorce Act, S. 54, 379.
- Determination of questions of law, procedure and fact under Parsi Marriage Act, S. 41, 328.
- Minority—Guardians—under Parsi Marriage Act, I—L, 529.
- Levy of fines by distress under Parsi Marriage Act, S. 48, 530, procedure until return made to distress warrant; S. 49, 530, imprisonment if no sufficient distress, S. 50, 531.
- Rules of procedure of Parsi Matrimonial Courts to be made by High Court, S. 51, 531.
- Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—Adjournment for a year—Interview, S. 15, 650; Procedure on expiration of adjournment—Interrogation of respondent—Decree, S. 16, 650.
- Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion—Act XXI of 1866, S. 17, 650, Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage, S. 18, 651.
- Person objecting to Registration of Sambandam may file a suit in a Civil Court, S. 9, 818, Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, 819.
- Preamble*, how far guide in construction of statutes, M—X, 5, 6.
- Recitals in Act or, how far guide in construction, Y, 6.
- Pregnancy*, concealment of—Effect of marriage contracted during such, V—X, 203.
- Prescribed*, S. 3, 703.
- Presumption*, is in favour of validity of marriage, U, V, 181.
- Marriage properly and duly performed—of validity, M, N, 196.
- as to death of a missing person, A, B, 513.
- in favour of marriage, R, S, 572.
- Priest*, See CLERGYMAN.
- S. 2, 496.
- Presence of, if necessary for marriage—English Law, M—W, 577, 578.
- Private persons*, Intervention by, 170—174.
- Private residence*, Registration at a, under Malabar Marriage Act, S. 13, 820.
- Privy Council*, Appeal to Queen in Council under Divorce Act, S. 56, 383.
- Provisions of the Code of Civil Procedure relating to appeals to the King in Council and principles and practice governing the same, 383—394.
- Privy Council—Practice of*, not disturbing concurrent findings when departed from, X, 178.
- Proceedings in Council*, If can be referred to in construing an Act, Z, 14.
- Procedure*, See PRACTICE AND PROCEDURE. Marriage not invalid by reason of irregularity in, S. 16, 821.
- Prohibited Degrees*, See AFFINITY. See CONSANGUINITY.
- Of consanguinity or affinity contemplated by the law—English law and Indian, E—J, 63.
- Where foreigners marry in England within the, of relationship of their own country, D—F, 186.

*Prohibited degrees*—(Concluded).

Grounds of decree of nullity of marriage, S. 19, 189.  
in this country not same as in England, D—L, 196.

*Proof*, See EVIDENCE.

of desertion, T, U, 83, 84.

What matters need not be proved in respect of marriage in accordance with Act XV of 1872, S. 77, 620.

Points to be proved on appearances of petitioner under Act XXI of 1866, S. 12, 649.

of marriage and desertion or repudiation of petitioner in consequence of conversion, S. 21, 652, 653.

*Proof of adultery*, Reference to previous records in proof of petitioner's adultery, O, 131.

*Proof of connivance*, M—O, 409, 410

*Proof of marriage*, There must be some, in Matrimonial suits, V, 99.  
necessary before restitution can be decreed, I, 237.

*Property*, S. 3, 44

meaning of, R, 220.

what is, L, 329.

*Property settled*, what is, M—O, 329, 330.

*Proprietary rights*, Effect of marriage on.—Succession Act, S. 4, K, L, 219, 220.

of woman, how affected by her marriage—English Law—History of the Law, U—E, 221, 222.

*Prostitute*, Respondent leading the life of a,—Effect—Practice, N, 104.

Suit for divorce—Connivance, O—Q, 404

Petitioner knowing the name of the adulterer even when wife is leading the life of a,—Co-respondent, T, U, 104

*Protection order*, See 223—234.

Administration to wife dying after a judicial separation or—English law, Z—D, 178, 179.

Decree for judicial separation and,—Difference, J, 219

Death of either party while, or judicial separation order is in force—Effects on rights of succession of the other party, M—Q, 220

Deserted wife may apply to Court for protection, S. 27, 226.

contents of, H, 230.

Effect, I, 230. T, 232

Liability of husband or creditor taking wife's property after J, 230

Court may grant, S. 28, 230

Form of, L, M, 231.

Order should be in general terms—Effect of such order, N—R, 231, 232

Alimony *pendente lite* effect of, upon, S, 232

Letters of administration, W, 232

Discharge or variation of, S. 29, 232.

Liability of husband seizing wife's property after notice of, S. 30, 233.

is retrospective in its effect, H, I, 234.

Action for libel by wife obtaining, J, 234.

No right of action for injury to property committed before date of, I, 234

Legacy bequeathed to wife after desertion and previous to, M, 234.

Decree of judicial separation and, —Difference—English Law, N—P, 234.

Wife's legal position during continuance of, S. 31, 234.

no bar to application for alimony *pendente lite*, F, 277.

*Protection order*—(Concluded).

Decree for separation or, valid as to persons dealing with wife before reversal—  
 Indemnity of persons making payment to wife without notice of reversal of  
 decree or, S. 60, 397.

*Proviso*, Their effect on the section, *H—K*, 14, 15.

*Prudence*, Want of,—Error of judgment not connivance, *V*, 108.

*Public Officer*, See PUBLIC SERVANT.

Muhammadan Registrar a, S. 25, 778.

*Public servant*, See PUBLIC OFFICER.

Power to appoint new delegates under Parsi Marriage Act—Delegates deemed,—  
 Selection of delegates under sections 16 and 17 from those appointed under  
 section 21, Ss. 22, 23, 24, 511.

Registrar to be deemed a—, S. 14, 707.

*Pudumers form*, Sambandam how contracted, *D, E*, 807, 808.

*Punctuation*, if guide in construction, *E, F*, 7.

## Q

*Quakers*, English marriages, validity of Marriages of Jews and, *Y—D*, 198

*Queen's Proctor*, Intervention by, 166—170.

*Question of fact*, Condonation is a, *A*, 116.

## R

*Rape*, Definition of, *X*, 65.

Proof of, —Proof of conviction for, not sufficient, *Z, A*, 66.

Conduct short of, may amount to cruelty, *B*, 66.

Wife's adultery no excuse for, by husband, *C*, 66.

Conviction for indecent assault no bar to suit for dissolution on ground of, *D*, 66.

*Reasons for enacting law*, Motives of parties, *C*, 14.

*Recital*, in Act or preamble, how far guide in construction, *Y*, 6

*Records*, Register books to be supplied and preservation of, to be provided for, S. 18,  
 709

*Reference*, to High Courts, S. 9, 54.

High Court may refer case to Judge for additions or alterations—Act XXI of  
 1866, S. 32, 655; High Court may decide question raised, and Judge shall  
 dispose of case accordingly, S. 33, 655.

when Marriage Registrar in Native State doubts authority of person forbidding,  
 S. 48, 603.

Procedure on, Act XV of 1872, S. 48, 604.

*Register*, See MARRIAGE REGISTER.

Marriage, to be open for public inspection under Parsi Marriage Act, S. 8, 505.

Appointment of Commissioners to examine, —Act VI of 1886, S. 34, 715; Duties  
 of Commissioners, S. 34, 715, 716.

Muhammadan Registrar to keep, S. 6, 773.

Registration of Muhammadan marriages—Copy of entry in, —Evidence, *F*, 773.

Lady's name clandestinely published wrongly—Correct name entered in the,—  
 Effect, S. 587.

*Register-book*, Custody of, S. 55, 606.

Keeping of, and deposit of extracts therefrom with Registrar-General, S. 62,  
 609.

Searches in, and copies of entries, S. 63, 610.

Destroying or falsifying—Penalty, S. 75, 620.

**Register-book—(Concluded).**

To be supplied and preservation of records to be provided for, S. 18, 709.

Duty of Registrars as to sending certified copies of entries in, to Registrar General, S. 24, 711.

Searches and copies of entries in, S. 25, 712.

Custody and disposal of, S. 37, 596.

**Register of divorces**, other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 780.

Of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 781.

**Register of marriages**, as prescribed by section 6 of the Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 779, 780.

**Registrar**, See MAHOMEDAN REGISTRAR.

See MARRIAGE REGISTRAR.

See REGISTRAR OF BIRTHS, DEATHS AND MARRIAGES.

See S. 2, 772.

Appointment of, under Parsi Marriage Act, S. 7, 504.

One of the parties to intended marriage to give notice to, under Special Marriage Act, S. 4, 547; Notice to be filed and copy entered in the Marriage Notice Book, S. 5, 547; Objection to marriage, S. 6, 548; Procedure on receipt of objection; Objector may file suit, S. 8, 548; Certificate of filing of suit to be lodged with, S. 8, 548; Court may fine when objection not reasonable, S. 9, 549. Officers to whom, in Native States shall send certificates, S. 56, 606.

to ascertain that notice and certificate are understood by Native Christians, S. 57, 606.

Forbidding by false personation, issue of certificate by marriage,—Penalty, S. 67, 612.

Superintendence of, by Registrars General, S. 10, 705.

Power for Local Government to appoint, for its territories, S. 12, 706.

Power for Governor General in Council to appoint, for Native States, S. 13, 707.

To be deemed a public servant, S. 14, 707.

Power to remove, S. 15, 707, 708.

Office and attendance of, S. 16, 708.

Absence of, or vacancy in his office, S. 17, 708.

Duty of, to register births and deaths of which notice is given, S. 19, 709.

Duty of, as to sending certified copies of entries in register books to Registrar General, S. 24, 711.

Muharramad, to keep registers, S. 6, 773.

Notice of intention to register a Sambandam to be given to the, S. 5, 815.

to file such notices and to maintain the "Marriage Notice Book" under Malabar Marriage Act, S. 6, 815; Copies of notice to be served on interested parties—Withdrawal of notice, S. 7, 816.

Person objecting to Registration of Sambandam may file a suit in a Civil Court, S. 9, 818; Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with, S. 10, 819.

to enter certificates of marriage in "The Marriage Certificate Book" under Malabar Marriage Act, S. 12, 820.

Fees payable to, under Malabar Marriage Act, S. 14, 820.

Marriage by, Act V of 1852, 873—886.

Sending copy of notice to marriage, when one party is a minor—Procedure on receipt of notice—Issue of certificate of notice given and declaration made—Declaration before issue of certificate, Ss. 15—18, 890, 891.

**Registrar—(Concluded).**

- To add number of entry to certificate, and send to Registrar-General, S. 36, 596.
- Notice of intended marriage before Marriage, S. 38, 597.
- Petition when Marriage, refuses certificate, S. 46, 602.
- Petition when Marriage, in Native State refuses certificate, S. 47, 603.
- Petition when, doubts authority of person forbidding marriage, S. 48, 603.<sup>c</sup>
- Reference when Marriage, in Native State doubts authority of person forbidding, S. 48, 603.

**Registrar-General, Certificates to be sent monthly to, S. 55, 606.**

- Keeping of register-book and deposit of extracts therefrom with, S. 62, 609.
- Establishment of general registry offices and appointment of, S. 6, 703.
- Superintendence of Registrars by, S. 10, 705.
- Duty of Registrars as to sending certified copies of entries in register books to, S. 24, 711.
- Permission to persons having custody of certain records to send them within one year to, S. 32, 715.

- Certificate to be forwarded to Marriage Registrar, copied and sent to, S. 34, 595.
- Registrar to add number of entry to certificate and send to, S. 36, 596.

**Registrar General of Births Deaths and Marriages, S. 3, 571.**

- Transmission of certified copies of certificates in marriage register to, S. 8A, 605.
- Transmission of certified copies of entries in marriage certificate book to, under Special Marriage Act, S. 13-A, 551.
- Transmission of certified copies of entries in marriage certificate book to the, S. 29, 713.
- Transmission of certified copies of certificates in marriage register to, S. 31, 714.

**Registrar of Births, Deaths and Marriages, See REGISTRAR**  
S. 3, 703.

**Registration, of marriage solemnized under Part V of Act XV of 1872, S. 54, 605.**

- of marriages between Native Christians, S. 59, 607
- Books in which marriages of Native Christians under Part I or Part III of Act XV of 1872 are registered, S. 64, 610.
- The Births, Deaths and Marriages, Act, 1886, 695—756.
- Mode of, 709—713.
- Grant of certificate of, of birth or death, S. 23, 711.
- Exceptional provision for, of certain births and deaths, S. 26, 712.
- The Births, Deaths and Marriages, Act XVI of 1886, Amendment Act, 1890, 759, 760.
- The Births, Deaths and Marriages, (Amendment) Act, 1911, 761, 762.
- The Bengal Muhammadan Marriages and Divorces, Act, I of 1876, 769—792.
- Lieutenant-Governor may grant licenses to register under Act I of 1876, S. 3, 772.
- of Muhammadan marriages—Copy of entry in Register—Evidence, F, 773.
- Refusal to register to be recorded under Bengal Act I of 1876, S. 20, 777, Appeal against refusal to register, S. 21, 777.
- Register of marriages as prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, 779, 780.
- Register of divorces other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, 780.
- Register of divorces of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, 781.
- Conditions subject to which a Sambandam may be registered as a marriage, S. 3, 811, 812.

**Registration—(Concluded).**

- at a private residence under Malabar Marriage Act, S. 13, 820.
- of Births, Deaths and Marriages Army Act, 1879, 843, 844.
- of Marriages solemnized by ministers of religion, 593—597.
- of marriages solemnized by Clergyman of Church of England, S. 23, 294; Quarterly returns to Archdeaconry—Contents of returns, S. 29, 594.
- and returns of marriages solemnized by Clergymen of Church of Rome, S. 30, 594
- and returns of marriages solemnized by Clergymen of Church of Scotland, S. 31, 595.
- Certain marriages to be registered in duplicate—Entries of such marriages to be signed and attested, Ss. 32, 33, 595.
- of marriages between Native Christians under Part I or III of Act XV of 1872, S. 37, 596.
- Proof of marriage—Non, effect of, K, 598.
- Registration of births and deaths*, 705—713.
- See REGISTRATION.
- Registration of establishment*, 706—709.
- Registration of marriages*, under Malabar Marriage Act, 815—821.
- Registration of Sambandam*, Persons entitled to object to,—Grounds on which objection may be taken—Procedure of Registrar if objection is taken—Procedure if no objection is taken, S. 8, 817,
- Person objecting to, may file a suit in a Civil Court, S. 9, 818; Registration to be delayed pending, final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, 819.
- Declaration to be signed before registration, S. 11, 819.
- Registry offices*, Establishment of general, and appointment of Registrars General, S. 6, 703
- General, of births, deaths and marriages, 703—705.
- Indexes to be kept at general, S. 7, 705.
- Registry of marriages*, certificate and, under Parsee Marriage Act, S. 6, 504.
- Reg. XVII of 1829 (Benjool Sati)*, 831—833.
- Reg. XXVI of 1827*, Muhammadan Law—Appointment of Kazi—Qualifications—Act XI of 1864—Office of Kazi not hereditary, B—E, 685.
- Functions of Kazi, N—S, 686, 687.
- Reg. I of 1830 (Madras Regulation.)*, 835—837.
- Relationship*, by half blood, effect of, on marriage, O, 199.
- Illegitimate, effect of, on marriage, P, 199
- by adoption, D, E, 201.
- Release*, Arrests of alimony, promise to, M, N, 309
- Relief*, See MATRIMONIAL RELIEF.
- to respondent in case of opposition on certain grounds, S. 15, 150.
- Two modes in which respondent may obtain affirmative, T, 151.
- Cases where affirmative, was allowed on cross-prayer, U—Y, 151, 152.
- Cases where affirmative, was not afforded on cross-prayer, Z, A, 152.
- Cross-prayer for affirmative—Petitioner not allowed to withdraw petition, E, 153.
- Notice of withdrawal of petition no bar to affirmative, being prayed for by respondent, F, 153.
- Age of parties—How affects right to, A, B, 152.
- Provided for by Divorce Act only applies to Christian marriages, Q—U, 197.
- Religious institutions*, Act XXI of 1850 not to affect usage of Hindu temple or other, M, N, 446.
- Usages of, not affected by S. 5 of Act XV of 1856, G, H, 474.

**Re-marriage, See, SECOND MARRIAGE.****See WIDOW RE-MARRIAGE.**

Just after a fortnight after decree nisi a nullity, *U, V, 177, 178*

Liberty to parties to marry again after divorce, *S. 57, 395.*

Provision as to, under Divorce Act, *394—396.*

English clergyman not compelled to solemnize marriages of persons divorced for adultery, *S. 58, 395.*

English Minister refusing to perform ceremony of second marriage to permit use of his church, *S. 59, 396.*

Widow,—Exclusion from temple—Ex-communication—Jurisdiction, *O, 449.*

The Hindu Widows' Act, 1956, *451—492.*

According to custom and independently of Act XV of 1856—Applicability of that Act, *E, 453.*

Rights of widow in deceased husband's property to cease on her, *S. 2, 460.*

Lost right of widow on, cannot revive, *G—K, 460, 461.*

By a Parsee save after divorce unlawful during life-time of first wife or husband, *S. 4, 503.*

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsee Marriage Act, not punishable, *R, 504.*

Second Marriage contracted by a Parsi husband while first wife was living, prior to the passing of the Parsi Marriage Act, *N—U, 516, 517.*

Liberty to parties to marry again under Parsi Marriage Act, *S. 43, 528.*

Penalty on married person marrying again under Special Marriage Act, *S. 15, 552.*

Liberty to parties to marry again after dissolution of marriage under Act XXI of 1866, *S. 19, 652.*

**Repeal, Of a statute, repealing another statute, *V, 16.***

By implication, *W, 16.*

Effect of, on right of action, *X, Y, 16.*

**Report of Select Committee, Speech in Council, if can be referred to in construing an Act, *A, 14.***

**Residence, Meaning of, *Q—T, 28, 29.***

In India necessary at time of presenting a petition under the Act, *28—38.*

Object of the legislature in fixing, as the text of jurisdiction under the Act, *U, V, 29.*

Meaning, *W—H, 29, 30.*

History of the Divorce bill as to jurisdiction based on, *C, 32.*

Falling short of domicile will not confer jurisdiction under English Law, *B, 35.*

Necessary to confer jurisdiction under Divorce Act, *R—U, 50.*

**Respondent, and co-respondent—One may be found guilty of adultery and the other not, *A—O, 60.***

Leading the life of a prostitute—Effect—Practice, *N, 104.*

When the adultery is committed by petitioner to the knowledge of, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, *135, 136.*

Relief to, in case of opposition on certain grounds, *S. 15, 150.*

Two modes in which, may obtain affirmative relief, *T, 151.*

Cases where affirmative relief was allowed on cross-prayer, *U—Y, 151, 152.*

Cases where affirmative relief was not afforded on cross-prayer, *Z, A, 152.*

Notice of withdrawal of petition no bar to affirmative relief being prayed for by, *F, 153.*

Death of, and co-respondent, *Z, 156.*

*Restitution of conjugal rights, See pp. 235—262.*

See DECREE FOR RESTITUTION OF CONJUGAL RIGHTS.

Disobedience of order for, *A*, 118.

Suits for nullity—Prayer for restitution—English practice, *S*, 151.

Suit for, —Right to declaration of nullity of marriage, *L*, 191.

Respondent in suit for restitution can also ask for nullity of marriage, *A*, 208.

Failure to comply with decree for, —Effect—English and Indian Law—Difference, *B*, 208.

Respondent in suit for, may ask for judicial separation, *Z*, 208.

Petition for, *S*, 32, 235.

Previous demand in writing necessary before restitution can be claimed in Court—English Law—Form of demand, *R—T*, 235, 236.

Motives of petitioner in asking for restitution are not material, *G, H*, 237.

Proof of marriage necessary before restitution can be decreed, *I*, 237.

Affidavit in support of the petition for, contents of—English Law and Practice, *T—W*, 238.

Provisions of the Code of Civil Procedure as to enforcement of decree for, *B—D*, 238, 239.

Refusal to comply with decree of—Effect—English Law, *E—I*, 239.

What is compliance by husband with decree for, *J—L*, 239.

Refusal to comply with decree for, by wife having separate estate—Effect, *M, N*, 239, 240.

Refusal to comply with decree for, by husband—Effect, *O*, 240.

Decree for, contents of, *P*, 240.

Form of decree for, *Q, R*, 240.

Decree for restitution should not decree possession of the person of the wife to husband, *S—W*, 240, 241.

Suit for, brought against a wife and certain persons said to be detaining her from her husband—Form of decree, *X*, 241.

Provisions relating to suits for, among Hindus, 241—249.

Provisions of Muhammadan Law relating to suits for, 249—253.

Provisions relating to suits for, among Parsees, 253, 254.

Provisions of Buddhist law relating to suits for, 254.

Answer to petition for, *S*, 33, 254.

Right to begin in a suit for, *A*, 255.

Ground for a petition for, *T*, 255.

Object of petition for, *U, V*, 255.

Suit for, instituted pending suit by respondent for dissolution or nullity or judicial separation, *W—Z*, 255.

Answer to a petition for—What is good answer to a petition for restitution, 255—258; What is not good answer, 258—260.

Separation deed containing a covenant not to sue for—Effect, *Z—A*, 260, 261.

Court cannot vary settlements after disobedience of order for, *V*, 327.

Decree for restitution, enforcement of, *Y—A*, 338.

Effect of change of religion on the claim for, among Hindus—Act XXI of 1850, *G, H*, 432, 433.

Suits for, by a Mahomedan convert to Christianity, *K*, 440.

Suit for, among Parsees, *S*, 36, 522—527.

Decree for restitution among Parsees how enforceable, *T—Z*, 524—526.

Suits for restitution in several systems of law and the modes of enforcing decrees therein, *A—H*, 526, 527.

No suit to enforce marriage or contract arising out of marriage when husband under 16, or wife under 14 years—Parsi Marriage Act, *S*, 37, 527.



*Restitution of conjugal rights—(Concluded).*

When convert deserted by his wife may sue for conjugal society—Act XXI of 1866, S. 4, 647; When convert deserted by her husband may sue, S. 5, 647; Court in which suit shall be brought, S. 6, 647, 648

*Restraint on Anticipation*, Decree of separation removes, G, 219.

Application of S 8 of Act III of 1874 to separate property of married woman subject to, 673—678

*Resumption of co-habitation*, after decree for judicial separation—Effect, F, 228.

*Retrospectivity of enactments*, Statutes, when retrospective, L—Q, 15.

*Return*, Offer to—Effect of on desertion, 96—98.

Registration and, of marriages solemnized by Clergymen of Church of Rome, S. 30, 594

Registration and, of marriages solemnized by Clergymen of Church of Scotland, S. 31, 593

*Reversal*, Petition for, of decree of judicial separation, contents of, A, 228

*Reversal of decree*, Petition for, of judicial separation, contents of, A, 228.

*Reversioner*, Suit by person born a Mahomedan claiming right as, in Hindu family, D, E, 444, 445.

*Review*, of order as to variation of settlements, C, D, 325.

*Revision*, of order regarding variation of settlements, E, 325.

Court of, powers of, I, 380.

*Revival*, See CONDONED OFFENCE, REVIVAL OF.

See REVIVAL OF CONDONED OFFENCE.

Condoned adultery and desertion of, A, 80.

Of condoned cruelty by subsequent cruelty, B, 80.

Acts that would revive condoned offences, C, 80.

of former acts of cruelty by subsequent threats, F, 80.

of condoned cruelty by adultery and condoned adultery by subsequent cruelty, Z, 80

Slight offence revives condoned offence, M, N, 117.

Of condoned offence by subsequent offence, 117, 118.

Of condoned adultery, O—U, 117, 118

Incestuous adultery condoned, of, V, 118.

Cruelty condoned, of, W, 118.

Cruelty and adultery—of one by the other, X, 118.

Condoned desertion, of, Y, 118.

Condoned bigamy, of, Z, 118.

*Revival of condoned offence*, See REVIVAL.

*Revival of suit*, Dismissal of suit if either party under age required by Act, or parties co-habiting, or respondent willing to co-habit, S. 23, 653, after such dismissal, S. 24, 653

*Right of suit*, Separated wife deemed spinster for purposes of contract and suing, S. 25, 220, 221.

No right of action for injury to property committed before date of protection order, L, 234.

Suits on behalf of lunatics under Divorce Act, S. 49, 361.

Suits by minors under Divorce Act, S. 49, 362.

Non-survival of, for divorce to executors or administrators, E, F, 179.

Person objecting to registration of Sambandam may file a suit in a Civil Court, S. 9, 818; Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, 819.

*Right to begin*, in a suit for restitution of conjugal rights, A, 265.

*Roman Catholic*. Marriage with deceased wife's sister—Christian of Indian domicile—Marriage valid, when, *C*, 200.

Part VI of Act XV of 1872 not to apply to,—Saving of certain marriages, *S*. 65, 611.

*Roman Catholic marriages*, See 197.

Dissolubility of, *F*, *G*, 24.

History of section 10, Divorce Act, with regard to, *X*, 56.

Saving of, from Act XXI of 1866, *S*. 34, 686.

*Rites*, Power to make, under Divorce Act, *S*. 62, 398.

Of procedure of Parsee Matrimonial Courts to be made by High Court, *S*. 51, 531

And orders under Act XV of 1865 (Parsee Marriage and Divorce) in force in Bombay, 533 536.

And orders made under Act III of 1872 (Special Marriage)—General, 556; Bengal, 557, Bombay, 557—559, U P, 559, 560, Punjab, 560.

Power to make, under Act XV of 1872, *S*. 83, 623.

Power to prescribe fees and, for Native States under Act XV of 1872, *S*. 84, 623.

And orders made under Act XV of 1872 (Christian Marriage), Bengal, 630—633; Bombay, 634, 635, U P., 635—638, Punjab, 639, 640.

Made under the Kazis' Act, Bengal, 690—693, Bombay, 693, 694.

Act VI of 1866, 717—719.

And orders made under Act VI of 1866—General, 719—730, Bengal, 730—745, Bombay, 745—751, Punjab, 752, 753, Madras, 754, 755, U.P., 756, 757.

Made under Act XIV of 1908, 766.

Under Bengal Act I of 1876 to be approved by Lieutenant Governor and published in Gazette, *S*. 19, 777.

Lieutenant-Governor may prescribe, under Bengal Act I of 1876, *S*. 24, 778.

Made under Bengal Act I of 1876, 781—792.

*Rules and principles*, Meaning of, *H*, *I*, 53.

*Rules and Regulations of the Divorce Court in England*, 856—878.

## S

*Sambandam*, *S*. 2, 809.

Its nature and incidents, *Z*, *A*, 806.

how differs from tali-kattu-Kilyanam, *B*, 806, 807.

Ceremonies if essential in, *C*, 807.

how contracted, Pudumuri form, *E*, *D*, 807, 808.

Conditions subject to which a, may be registered as a marriage, *S*. 3, 811, 812.

Notice of intention to register a, to be given to the Registrar, *S*. 5, 815.

Persons entitled to object to registration of a,—Grounds on which objection may be taken—Procedure of Registrar if objection is taken—Procedure if no objection is taken, *S*. 8, 817.

Person objecting to registration of, may file a suit in a Civil Court, *S*. 9, 818—

Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, *S*. 10, 819.

Registration of,—Declaration to be signed before registration, *S*. 11, 819.

*Sat*, The Bengal, Regulation, XVII of 1829, 831—833.

Declared illegal and punishable, *S*. 2, 832.

Zamindars, etc., responsible for immediate communication to police of intended sacrifice—Penalty in case of neglect, *S*. 3, 832.

**Sati—(Concluded).**

- Police how to act on receiving intelligence of intended sacrifice, S. 3, **832, 833.**
- Police how to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **833.**
- Declared illegal and punishable, S. 2, **835.**
- Zamindars, etc., responsible for immediate communication to police of intended sacrifice, S. 3, **835, 836.**
- Madras Regulation I of 1880, **835—837.**
- Penalty in case of neglect to communicate about, S. 3, **836.**
- Police how to act on receiving intelligence of intended sacrifice—How to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **836.**
- Discretion of Judge to admit to bail, or not of persons charged under Sati Regulation, S. 4, **837.**
- Magistrate how to proceed against parties concerned in, S. 4, **837.**
- Court of Faujdari Adalat may pass sentence of death in certain cases under Sati Regulation, S. 5, **837.**
- Saving*, From separate estate of married woman, C, D, **666.**
- Request of, of alimony, J, **667.**
- Saving clause*, how far guide in construing statute, D—G, **14.**
- Scandal*, Delay to avoid public, is reasonable, S, **141.**
- Seal*, Court, under Parsi Marriage Act, S, 20, **810.**
- (Government to provide, and books under Bengal Act I of 1876, S, 5, **773.**
- Searches*, in register-book and copies of entries, S 63, **610.**
- and copies of entries—Act XV of 1872, S 79, **621.**
- and copies of entries in register books, S. 25, **712.**
- of lists prepared by Commissioners and grant of certified copies of entries, S. 35, **716.**
- Fees for, and copies under Bengal Act I of 1876, S 16, **776.**
- Second appeal*, Custom against re-marriage of widow—Concurrent finding of lower Courts—Finding cannot be questioned in, IV, **458.**
- Second Marriage*, See RE-MARRIAGE.
- Effect of incontinency or, on right to dower, X, Y, **420.**
- Second trial*, Applicant (wife) found guilty in first trial—Alimony in, U, V, **277.**
- Secretary of State*, Certificates of certain marriages to be sent to, S. 81, **622.**
- Section*, S. 2, **496.**
- Secure*, Meaning of, Z, **297.**
- Security*, from husband for payment of permanent alimony, H, **308.**
- Sessin*, shall not be necessary to give title to dower, S 3, **421.**
- Select Committee*, Speeches in Council—Report of, it can be referred to in construing an Act, A, **14.**
- Senior Marriage Registrar*, Under Christian Marriage Act, S. 7, **580.**
- Sentence*, Court of Faujdari Adalat may pass, of death in certain cases under Sati Regulation, S. 5, **837.**
- Separated wife*, deemed spinster with respect to after-acquired property, S. 24, **217, 218.**
- deemed spinster for purposes of contract and suing, S. 25, **220, 221.**
- Separate estate*, Savings from, of married woman, C, D, **666.**
- Separate property*, Married women's earnings to be their, S. 4, **664.**
- Application of S. 8 of Act III of 1874 to, of married woman subject to restraint upon anticipation, **673—678.**

*Separate property*—(Concluded). J

Succession to, of a married man dying intestate—Malabar Marriage Act, S. 23, 326.

Succession to, of a married woman dying intestate—Malabar Marriage Act, S. 24, 328.

*Separation*, Being common both parties, if desertion, M, 142

*Separation deed*, See H, I, 311. G, 331. Deed of separation—Presumption of connivance, L, 109.

Containing a covenant not to sue for restitution of conjugal rights—Effect, Z, A, 260, 261.

Effect of, 260—262.

What is, B, C, 261.

Effect of covenants in, 261, 262.

Deeds of separation, effect of, 310.

Covenant in, to pay annuity, A, 310

Deeds of separation—Agreement to live separate, if good defence in suit for restitution among Parsis—Principles of English Law on the above subject applicable to Parsis, N—S, 523, 524.

*Service*, Suit under Act XXI of 1866 to be commenced by verified petition, S. 7, 648; On, of petition, citation to respondent, S. 8, 648, Form of citation, S. 9, 648; of citation, S. 10, 648.

Of notices under Malabar Marriage Act, S. 25, 629

*Service of petition*, Under Divorce Act, S. 50, 366, 367,

*Settlement*, See VARIATION OF SETTLEMENTS.

See 311- 337.

Covenant in marriage, Effect of, F, 219

Varying marriage, Z, 310

Power to order, of wife's property for benefit of husband and children, S. 39, 311 312.

History of English as to variation of D—F, 316

Who can apply for an order of variation of—Petitioner—Respondent to suit for dissolution—Respondent to nullity suit—Guilty party also may ask for variation—Guardian of petitioner's children—Petitioner's executor—Persons entitled to a benefit in remainder—Settlor—Guilty wife—Guilty husband—Trustee, when heard, J—D, 316, 317.

General principles as to variation of,—Examples of the same, H—Y, 318, 319. what is, A-1, B, 328.

Post-nuptial, what is, B-1—D, 328.

of wife's property for benefit of children under Parsi Marriage Act, S. 45, 530.

*Settlement of damages*, S. 39, 312.

Practice as to, R, 313.

*Shall*, Meaning of, Y—F, 11, 12.

*Signature*, Entry of birth or death to be signed by person giving notice, S. 22, 710, 711.

*Signature*, Entries under Bengal Act I of 1876 by whom to be signed, S. 11, 774, 775.

• *Sister*, suit for nullity of marriage—First wife being the uterine half, of second wife—Domicile, V, 197.

Marriage between two brothers and two, not void, U, 200.

*Sodomy*, Dissolution of marriage, E—K, 66.

Proof of, H, I, 66.

*Solemnisation of marriage*, Irregularities in, effect of, on marriage, J, 163.

Irregularities which have been held not to invalidate the marriage, 164, 165.

*Solemnisation of Marriage*—(Continued).

English clergyman not compelled to solemnize marriages of persons divorced for adultery, S. 59, **395**.

Penalty for solemnizing marriage contrary to section 4 of Parsi Marriage Act, S. 9, **506**.

Marriage how to be solemnized under Special Marriage Act—Place where marriage may be solemnized, Ss. 11, 12, **530**

Marriages under Christian Marriage Act to be solemnized according to Act, S. 4, **571**.

Persons by whom marriages may be solemnized under Christian Marriage Act, S. 8, **571**.

The persons by whom marriages may be solemnized under the Christian Marriage Act, **571—581**.

English Law regarding, **572—579**.

Requisites for a valid marriage when solemnized in England, *N, C*, **574, 575**.

must be in an established Church or public chapel or other registered building, unless by special license, *C*, **576**.

Modes in which marriages may be solemnized in England, *V*, **576**.

Grant and revocation of licenses to solemnize marriages under Christian Marriage Act, S. 6, **579**.

Solemnizing marriage without due authority—Penalty, S. 68, **613**.

under Hindu rites between a Native Christian and a Hindu by a person not authorised to perform marriages under S. 5 of Act XV of 1872, *N*, **616**.

Solemnizing marriage out of proper time, or without witnesses—Penalty, S. 69, **617**.

Solemnizing, without notice or within fourteen days after notice, marriage with minor—Penalty, S. 70, **617**.

Issuing certificate, or marrying, without publication of notice—Penalty, S. 71, **617**

Marrying after expiry of notice—Penalty, S. 71, **617**.

Solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice—Penalty, S. 71, **618**.

Persons authorized to solemnize marriage other than Clergy of Churches of England, Scotland, or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, S. 73, **618, 619**.

Penalty for solemnizing irregular marriages—Act II of 1892, S. 6, **644**

Notice of marriage intended to be solemnized under 55 & 56 Vict., c. 23, S. 2, **765, 766**.

Time and place at which marriages may be solemnized, **581—583**.

Marriages solemnized by Ministers of Religion licensed under Act XV of 1872, **583—593**.

S. 25, **592**.

Certificate void if marriage not solemnized within two months, S. 26, **593**.

Registration of marriages solemnized by ministers of religion, **593—597**.

Registration of marriages solemnized by Clergymen of Church of England, S. 28, **594**; Quarterly returns to Archdeaconry—Contents of returns, S. 29, **594**.

Registration and returns of marriages solemnized by Clergymen of Church of Rome, S. 30, **594**.

*Solemnisation of marriage—(Continued).*

- Registration and returns of marriages solemnized by Clergymen of Church of Scotland, S. 31, 595.
- Marriages solemnized by, or in the presence of, a Marriage-Registrar, 597—605.
- After issue of certificate, S. 51, 604.
- Saving under Act VII of 1909 of marriages solemnized according to other ceremonies, S. 4, 788.
- Solemnize*, Meaning of, O—Q, 616.
- Solicitor*, Order to pay alimony to, B—D, 311.
- Special Courts*, Constitution of, under Parsi Marriage Act, S. 15, 508.
- Specialty debts*, Priority to partial estates, charges and, S. 5, 422.
- Special license*, Where granted—English Law, C, 577.
- Special Marriage*, The, Act III of 1872, 537—560.
- Conditions upon which marriages under, Act may be celebrated, S. 2, 546.
- Specific performance*, of contract of betrothal, it can be granted, F, 459, 460.
- Speech in Council*, Report of Select Committee, if can be referred to in construing an Act A, 14.
- Spinster*, Separated wife deemed, with respect to after-acquired property, S. 24, 217, 218.
- Separated wife deemed, for purposes of contract and suing, S. 25, 220, 221.
- Spitting*, in the face, if cruelty, J, 74.
- Stamp*, on petition under Divorce Act—Petition to state absence of collusion or connivance—Statements to be verified, S. 47, 360.
- No, on affidavit, S, 372
- Statement*, Forms of petitions and, S. 46, 360
- Statement of Objects and Reasons*, how far guide to the intention of Legislature, U—Y, 13.
- Stating case to High Court*, No appeal under Act XXI of 1866; but Judge may state case raising question whether conversion has dissolved marriage, S. 29, 655; Case to state necessary facts and documents, and suit to be stayed, S. 30, 655; Case to be decided by three Judges, S. 31, 655.
- Statute*, Law relating to India concerning the subject of marriage and divorce, 839—853.
- St. 3 & 4 Will. IV, C. 105*, Dower in England previously to the passing of the Dower Act, W, 415—417
- Dower under the Dower Act, Jointure, X, 417.
- Provision of the Dower Act, Y—F, 418
- Right of dower, how defeated under the Dower Act, M—Q, 419
- Effect of the Dower Act, W, 420.
- St. 1, Geo. 4, c. 101 (Divorce Bills Evidence Act, 1820)*, 839, 840
- St. 31 & 32 Vict., c. 61 (Consular Marriage Act, 1868)*, 841.
- St. 33 & 34 Vict., c. 14 (Naturalisation Act, 1870)*, 842.
- St. 42 & 43 Vict., c. 8 (Registration of Births, Deaths and Marriages Act, 1879)*, 843, 844.
- St. 55 & 56 Vict., c. 23 (Foreign Marriage Act, 1892)*, S. 2—Notice of marriage intended to be solemnized under, 765, 766.
- See also, 845—852
- St. 57 & 58 Vict., c. 60 (Merchant Shipping Act, 1894)*, 853.
- Statute, construction of*, See 3—16.
- Court bound by the express provisions of the enactment, P—U, 3.
- Construction of statutes—Effect to be given to every word, if possible, V—X, 3, 4.

*Statute, construction of—* (Concluded).

- Plain meaning of words used must guide the Court, *Y-D*, 4.
- Where an enactment has no express provisions, Court to act according to justice, equity and good conscience, *H*, 5.
- Interpretation of doubtful language, *I-K*, 5.
- Construction of statutes—Inaccuracy in Act, *L*, 5.
- Preamble how far guide in construction of statutes, *M-X*, 5, 6.
- Recitals in Act or preamble, how far guide in construction, *Y*, 6.
- Marginal notes—How far guide in construction, *Z-D*, 6, 7.
- Punctuation, if guide in construction, *E, F*, 7.
- Headings, if guide in construction, *G, H*, 7.
- Illustrations, how far guide in construction of statutes, *I-U*, 7, 8.
- English authorities, value of, in interpreting Indian Acts, *V-X*, 8.
- American authorities, value of, *Y-B*, 8, 9.
- Divergence between several High Courts—Course to be adopted by subordinate Courts, *C, D*, 9.
- Meaning of words—Construction of words defined by the Legislature, *E-O*, 9, 10.
- Undefined words, construction of, *P-T*, 10.
- Judicially interpreted words occurring in enactments, construction of, *U*, 10.
- "Or"—"And"—Meaning, *V-X*, 10, 11.
- "May"—"Shall"—Meaning, *Y-F*, 11, 12.
- Pre-existing state of the law, how far guide in construction, *G-K*, 12.
- Acts in *pari materia*, how far guide in construction, *L*, 12.
- History of legislation on the subject how far guide in construction, *M, N*, 12.
- Statement of Objects and Reasons how far guide to the intention of Legislature, *U-Y*, 12.
- Speeches in Council, Report of Select Committee, if can be referred to in construing an Act, *A*, 12.
- Forms in which Bill came before Council, *B*, 12.
- Reasons for enacting law—Motives of parties, *C*, 12.
- Saving clause, how far guide in construing statute, *D-G*, 12.
- Proceedings in Council, if can be referred to in construing an Act, *Z*, 12.
- Privisos—Their effect on the section, *H-K*, 12, 15.
- Statutes, when retrospective, *L-Q*, 15.
- General later law, effect of, on earlier special one, *R-U*, 15.
- Repeal of a statute repealing another statute, *V*, 15.
- Repeal by implication, *W*, 15.
- Repeal, effect of, on right of action, *X, Y*, 15.
- Case where "and" is to be read as "or," *B*, 152.
- Statutes relating to marriage construction of, *W, X*, 181, 182.
- Construction of Parsi Marriage Act—English Law how far helpful, *G-L*, 404, 405.
- Statutes relating to—How interpreted, *L, M*, 566.
- Stay of proceedings*, practice as to, *G*, 32.
- Insanity of respondent, if ground for staying proceedings, *N-P*, 58, 59.
- Substituted service*, Service of demand—Practice of English Courts, *K-P*, 237.
- in matters under the Divorce Act, 369, 370.
- Succession*, Death of either party while protection order or judicial separation order is in force—Effects on rights of succession of the other party, *M-Q*, 220.
- Loss of caste—Under Oudh Estates Act I of 1869, *N*, 441.
- Widow's principle of—Effect of her re-marriage, *Q*, 461, 462.
- Right of re-married widow to succeed to son by former husband, *F*, 275.





## 1.—“Jurisdiction.”

## (1) Admission of petition for divorce—Jurisdiction of High Court.

The High Court at Calcutta has jurisdiction to admit a petition for divorce, where the parties are resident, and the adultery is committed, in the district of the 24 Pergannas. 3 B.L.R. (O.C.J.) 67. K

## (2) Objection to jurisdiction, when can be taken.

(a) When the parties have put in an absolute appearance, it is too late to plead to the jurisdiction. *Zycilinski v Zycilinski*, 2 Sw. and Tr. 420, 3 C. 31 L.J.P. & M. 37, *Garstin v Garstin*, 4 Sw. & Tr. 73. L

(b) Nor can the Court permit the respondent to withdraw such appearance, and to entertain appearance and protest, in order to enable him to plead to the jurisdiction. *Moore v. Moore*, 5 Ir R. Eq. 371. M

(c) Where a respondent wants to raise the question of jurisdiction the practice is that this appearance should be entered under protest. See *Garstin v. Garstin*, 34 L.J.P. & M. 45. N

(d) When a suit has been tried by a Court having no jurisdiction over the matter, the parties cannot, by their mutual consent, convert the proceedings into a judicial process; although, when the merits have been submitted to a Court, it may result that, having themselves constituted it their arbiter, the parties may be bound by its decision. 9 A. 191. O

(e) On the other hand, in a suit tried by a competent Court, the parties, having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. 9 A. 191. P

## (3) Power to award alimony where there is plea to jurisdiction.

It is competent to the Court to make an order awarding alimony *pendente lite*, to the wife, although there is a plea as to the jurisdiction of the Court. *Bonalds v. Bonalds*, L.R. 3, 19. 259 Q

## (4) Residence necessary to confer jurisdiction

(a) In order to confer jurisdiction a *bona fide* residence must be made out—*Manning v. Manning*, Times, 11th February, 1871, 40 L.J.P. and M. 18. R

(b) In this case although the marriage and adultery had both taken place abroad, yet the Court, on the husband's petition, pronounced a decree of dissolution of his marriage. As the domicile of the parties was English, it was held the jurisdiction of the English Court was complete. *Ratcliffe v Ratcliffe and Anderson*, 1 Sw Tr 467, 29 L. J. P. & M. 171. S

(c) In this case the parties were natural-born English subjects, and were married in England according to English laws. Held, the wife may sue for dissolution of her marriage, on the ground of her husband's bigamy with adultery committed abroad, even though he had acquired a foreign domicile, and were resident abroad during the suit. *Deck v. Deck*, 29 L. J. P. & M. 129, *Bond v Bond*, 29 L. J. P. & M. 143. T

(d) Where a petition is presented to a district Judge, the facts relied on giving jurisdiction to the Court should appear on the face of the record, and the Judge should inquire into such facts and set them out in his judgment. *Durand v. Durand*, 14 W.R. 416. U

2.—“*District Courts.*”

(1) Reason why District Courts were given jurisdiction in matrimonial causes.

On the question whether the District Courts should be allowed a jurisdiction in divorce cases, there was a difference of opinion. The main reason why the Select Committee had given this jurisdiction was that the refusal of it would amount to a denial of relief to large classes of persons affected by the Bill. It would be a mere mockery of Europeans and East Indians in distant cities, and Native Christians in mofussil villages, to tell them to come to the High Courts in the Presidency towns for judgments of divorce. It is however said that the District Courts are not equal to those duties. That argument is one which should be looked upon with great distrust. If it be established that certain new legal rights and remedies should be created for the benefit of any class of Her Majesty's subjects, and the Indian Courts are incompetent to administer them, the proper inference should be that the Courts should be reformed, not that the rights and remedies should be refused. But the charge is, in truth, often hastily made, and, moreover, there is nothing specially difficult in questions of divorce. They are important on account of their social importance, but they, for the most part, involve very simple questions of fact \* \* \* If, however, it be once granted that the District Courts must have jurisdiction, their exercise of it is, by this Act, fenced round with many safeguards. The High Court can call up at any time any case that presents special difficulty. \* \* \* The Act applies to the decrees of District Courts the same principle which is applied in India to capital sentences, and requires that they be confirmed by the High Court. And the High Court has full powers of calling for fresh evidence. See the speech by Hon'ble Mr Maine in the Legislative Council on 26th March, 1869, Fort St. George Gazette, March 31st, 1869, p 6

3.—“*And not otherwise.*”

- (a) The High Court cannot entertain a suit of a matrimonial nature otherwise than as provided by this Act. 13 B L.R. 109. W
- (b) Hence, it has no jurisdiction to make a decree of nullity on the ground that the marriage was invalid. 13 B.L R. 109. X

N.B.—As to the effect of using the words “and not otherwise,” see U.B.R. (1892-1896), Vol. II, 338 (341-342). X-1

5. Any decree or order of the late Supreme Court of Judicature at Calcutta, Madras or Bombay sitting on

Enforcement of decrees or orders made heretofore by Supreme or High Court.

the ecclesiastical side, or of any of the said High Courts sitting in the exercise of their matrimonial jurisdiction, respectively, in any cause or matter matrimonial, may be enforced and dealt with by the said High Courts, respectively, as hereinafter mentioned, in like manner as if such decree or order had been originally made under this Act by the Court so enforcing or dealing with the same.

6. All suits and proceedings in causes and matters matrimonial, which when this Act comes into operation are pending in any High Court, shall be dealt with and decided by such Court, so far as may be, as if they had been originally instituted therein under this Act.

7. Subject to the provisions contained in this Act the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules<sup>1</sup> which in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief.

(Notes).

General.

(1) Scope of the section.

- (a) This section does not apply to questions of procedure. 4 B.L.R. (O.C.J.), p. 51; 30 C. 489 (497) = 7 C.W.N. 504. Y
- (b) Questions of procedure in matrimonial causes, as in other proceedings, are governed by the Code of Civil Procedure. (*Ibid.*) See, also, S. 45, *infra* Z
- (c) But there are several points of procedure that arise under the Act for which the Civil Procedure Code makes no adequate provision. In such cases the Courts would, under this section, follow the practice of the English Courts. See Macrae on Divorce, pp. 22, 23. See, also, 19 B. 293. A
- (d) In one case the Bombay High Court applied Rule 158 of the English rules, and ordered a husband to give security for his wife's costs. (*Ibid.*) B
- (e) But, where a matter is provided for in the Civ. Pro. Code, the Courts are bound to follow it and are not at liberty to adopt the English rules in preference to the Code of Civil Procedure. 4 B.L.R. (O.C.J.) 51. C
- (f) The decisions of the Probate and Divorce Courts in England must be taken to be a guide to the Courts in India under the Indian Divorce Act, except when the facts of any particular case, arising out of the peculiar circumstances of Anglo-Indian life, constitute a situation such as the English Courts are not likely to have had in view. 4 C. 260. D
- (g) This section has no application to matters of procedure. 30 C. 489 (497); 4 B.L.R. (O.C.J.) 51; 7 C.W.N. 504. E
- (h) S. 32 of the Code of Civil Procedure, 1882, has no application to the case of substitution, dismissal, or addition of parties in Divorce proceedings. 30 C. 489 (496-497), 7 C.W.N. 504. F
- (i) The words "all proceedings under this Act between party and party" in S. 45 of the Act apply only to proceedings after the parties to the suit have been determined in accordance with the provisions of the Act, and especially of Ss. 10 and 11. 30 C. 489 (497); 7 C.W.N. 504. G

## 1.—“Principles and rules.”

## (1) “Rules and principles”—Meaning of.

(a) The expression “rules and principles” points rather to the rules and principles on which the Court deals with matrimonial causes in requiring a certain degree of evidence and other cognate matters. *Bailey v. Bailey*, Matrimonial suit No. 7 of 1896, 30 C. 490 (note) (491), 7 C.W.N. 504. H

(b) The principles and rules referred to in this section are not mere rules of procedure (as) the rules regulating appeals. They are the rules and principles which determine the cases in which the Court will grant relief to the parties appearing before it or refuse that relief—Rules of a quasi—substantive rather than of mere adjective law. 22 B. 618 (615). I

## (2) Practice as to filing written statements.

Where in a Divorce suit, the co-respondent *suo motu* filed a written statement only four days before the hearing and gave notice of it, only the day before, the High Court refused an application to take it off the file, holding that a party who tenders a written statement of his own accord is not bound to present it before the first hearing. 4 B.L.R. (O C J) 51. J

## (3) Previous decree for judicial separation—Dissolution of marriage—Evidence.

(a) In a suit for dissolution of marriage by reason of the cruelty and adultery of the respondent, the first charge and the marriage of the parties were held to be established by the production of a previous decree for judicial separation on account of cruelty and by proof of the identity of the parties. 22 C. 544, (*Bland v. Bland*, 35 L.J. P. & M. 104 F.) J-1

(b) In England it has been held that a decree for judicial separation does not bar a suit for dissolution of marriage. The decree in the previous suit is conclusive evidence in the other. *Bland v. Bland*, 35 L.J. P. & M. 104, 22 C. 544. K

## (4) Courts, whether can grant relief in case of polygamous marriage.

(a) By S. 7 of the Act, the High Court and District Court shall act and give relief on principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. 17 M. 235 (238). L

(b) It is clear that the Divorce Court in England would not grant any relief where the petitioner prays for a dissolution of a marriage, which when contracted was of a polygamous nature. 17 M. 235 (238); 3 Bom. L. R. 256. But see 18 C. 252. M

(c) The Divorce Court in England will not regard a polygamous marriage as a marriage at all. 17 M. 235 (238). N

(d) This Act does not contemplate relief in cases where the parties have been married under the rites and ceremonies of Hindu Law. In such a case, the District or High Court has no jurisdiction to entertain a suit for the dissolution of such a marriage. 17 M. 235 (238); 14 M. 382; 3 Bom. L.R. 856. But see 18 C. 252. O

## (5) Suit for judicial separation—Pleader's fee.

In a suit for judicial separation and alimony decided under this Act, the only basis for estimating the pleader's fees is ten times the amount of alimony for one year. 7 M.H.C. 394. P

N.B.—For further notes under this section, see “Practice of Courts for Divorce and Matrimonial causes” noted in the Appendix.

8 The High Court may, whenever it thinks fit, remove and try and determine as a Court of original jurisdiction any suit or proceeding instituted under this Act in the Court of any District Judge within the limits of its jurisdiction under this Act.

Extraordinary jurisdiction of High Court.

The High Court may also withdraw any such suit or proceeding, and transfer it for trial or disposal to the Court of any other such District Judge.

Power to transfer suits.

9. When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree thereon or order thereon,

Reference to High Courts.

the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.

If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in the case pending such reference and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference.

### III.—*Dissolution of Marriage.*

10. Any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery.<sup>1</sup>

When husband may petition for dissolution.

Any wife may present a petition to the District Court or to the High Court, praying that her marriage may be dissolved on the ground that, since the solemnization thereof, her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman<sup>2</sup>;

When wife may petition for a dissolution.

or has been guilty of incestuous adultery<sup>3</sup>,

or of bigamy with adultery<sup>4</sup>,

or of marriage with another woman with adultery<sup>5</sup>,

or of rape <sup>6</sup>, sodomy <sup>7</sup>, or bestiality <sup>8</sup>  
 or of adultery coupled with such cruelty <sup>9</sup> as without adultery  
 would have entitled her to a divorce *a mensâ et toro*  
 or of adultery coupled with desertion <sup>10</sup>, without reasonable  
 excuse, for two years or upwards <sup>11</sup>.

Every such petition shall state, as distinctly  
 Contents of peti- as the nature of the case permits, the facts on  
 tion. which the claim to have such marriage dissolved  
 is founded.

(Notes).

General.

(1) Scope of section—Mostly follows the English Law.

This section, with the exception of the clause that provides for a divorce in favour of the wife on the ground of her husband's conversion from Christianity and marriage with another woman, is taken from the English statute, and prescribes the grounds of divorce exactly as they are prescribed in English Law. See Speech by Hon'ble Mr. Maine in the Legislative Council on 26th Feb. 1869. Printed in Fort St. George Gazette Supplement, 31st March, 1869. Q

(2) English Law—Divorce on what grounds obtainable

The husband need only prove his wife's adultery.

But the wife must prove either incestuous adultery, or bigamy with adultery, or rape, or sodomy, or bestiality, or adultery and cruelty or adultery and desertion. Rape includes adultery. M C.A. 1857, S. 27, App. A. R

(3) Corresponding English Law.

The — is the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), S. 27, which provides that —

"It shall be lawful for any husband to present a petition to the Court praying that his marriage may be dissolved, on the ground that his wife has, since the celebration thereof, been guilty of adultery, and it shall be lawful for any wife to present a petition to the Court, praying that her marriage may be dissolved, on the ground that, since the celebration thereof, her husband has been guilty of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy, or bestiality, or of adultery coupled with such cruelty as would have entitled her to a divorce *a mensâ et toro*, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards; and every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded. provided that, for the purposes of this Act, incestuous adultery shall be taken to mean adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity or affinity, and bigamy shall be taken to mean marriage of any person, being married to any other person during the life of the former husband or wife, whether the second marriage shall have taken place within the dominions of Her Majesty or elsewhere."

## General—(Continued).

## (4) Reasons why divorce cannot be granted for simple adultery of husband.

(a) As to the reasons why a divorce is not allowed to the wife for the simple adultery of the husband, whereas it is allowed to the husband for the simple adultery of the wife, see Speech by Hon'ble Mr. Maine in the Legislative Council on 26th Feb., 1869, printed in the Fort St. George Gazette Supplement, March 31st, 1869, p. 7. T

(b) The reason why the adultery by itself is recognised as a ground for relief to the husband, whereas it is refused to the wife is, that such a provision is necessitated on grounds of expediency and of the peculiar position of European society in India and of the relation of the Indian Legislature to the English Parliament. It was thought desirable that the Indian Legislature would do well to follow as nearly as possible the precedent set by Parliament at Home, which had been approved generally by the country, and had been found to work well. The real truth was that the considerations from the moral and those from the social point of view were also important. From the moral point of view the equality of the sexes as regards the sin of adultery was the same both in the eyes of God and man. But the social considerations were entirely different. See Speech by Hon'ble Mr. Maine in the Legislative Council on 26th Feb., 1869, printed at Fort St. George Gazette Supplement, March 31st, 1869, pp. 8 and 9. U

(c) As to what those social considerations are, see (*Ibid*) Y

(d) Such social considerations are that to give such relief to the wife on the ground of her husband's simple adultery would,

(i) Facilitate the introduction of spurious offsprings into families.

(ii) The greater facilities one gives for divorce the greater facilities would be afforded for collusion and connivance.

(iii) Thus it will aggravate the very evils that it was hoped to cure. (*Ibid*) W

## (5) History of the section with regard to Roman Catholic marriage.

S. 10 of the Bill as originally framed excluded Roman Catholics from presenting petitions of divorce. The Select Committee on further consideration struck out this provision on the ground that it is wrong to deprive these persons of a right to free themselves from that which the law recognises as a civil contract, and that there is no reason why the Indian, should, in this respect, differ from the English Law. Report of Select Committee presented to the Governor-General in Council on 12th Feb., 1869. Fort St. George Gazette Supplement, 1869, p. 10. X

## (6) Suits by minors.

"Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court, and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in an ordinary suit." See Divorce Act, S. 49. Y

## General—(Continued).

## (7) Suits on behalf of lunatics.

When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the Committee or other person entitled to his or her custody. See Divorce Act, S. 48. Z

## (8) Committee can sue on behalf of insane person—English law.

- (a) "A duly appointed committee of a person, found by inquisition to be of unsound mind, may take proceedings as petitioner, intervener, or respondent." Browne and Powles on Divorce, Seventh Edition, 1905, p. 25; *Baker v. Baker*, 6 P.D. 12; 49 L.J.P. 83. A
- (b) And if, no Committee be appointed, the Registrar will assign a guardian *ad litem* to such person for the purpose of carrying on the proceedings. Browne and Powles on Divorce, Seventh Edition, 1905, p. 25. B
- (c) But this ought not to be done where there is a *bona fide* and substantial dispute as to the unsoundness of mind of a party to a divorce suit. *Fry v. Fry* (or *Routh v. Fry*), 15 P.D. 50; 59 L.J.P. 43; 62 L.T. 501. C

## (9) Suits for dissolution of marriage, defences in.

"In a suit for dissolution of marriage, the defences open to a respondent or co-respondent may be divided into two classes—*first Absolute Bars*, i.e., such as being established to the satisfaction of the Court, are a complete answer to the petition, so that the Court can exercise no discretion, but is bound to dismiss the petition; *second, Discretionary Bars*, i.e., such as being established, leave to the Court a discretion as to the decree." Browne and Powles on Divorce, Seventh Edition, 1905, p. 29. D

**N.B.**—The Absolute Bars are dealt with in Ss. 12 and 13 of the Act, and the Discretionary Bars are dealt with in S. 14 of the Act.

## (10) Absolute defences.

There are but four absolute defences.—

1. Denial of facts alleged in the petition
2. Connivance.
3. Condonation.
4. Collusion.

See Matrimonial Causes Act, 1857 (20 & 21 Vic., c. 85), Ss. 29 and 30. E

## (11) Discretionary defences.

Discretionary defences are.—

1. Adultery of petitioner.
2. Unreasonable delay in presenting or prosecuting the petition.
3. Cruelty to the other party to the marriage.
4. Desertion or wilful separation from the other party before the alleged adultery without excuse.
5. Wilful neglect or misconduct, such as to have conduced to the adultery complained of.

See Matrimonial Causes Act, 1857 (20 & 21 Vic., c. 85), S. 31. F



## General—(Continued).

- (12) **Wife's ante-nuptial incontinence cannot be pleaded in defence of wife's adultery.**

Where a suit for dissolution of marriage has been instituted on the ground of the wife's adultery, the ante-nuptial incontinence of the wife cannot be pleaded as a defence although the adultery and the ante-nuptial incontinence are alleged to have been committed with the same person. *Fitzgerald v. Fitzgerald*, 32 L.J., P. & M. 12. G

- (13) **Compounding of suits for dissolution of marriage.**

(a) A suit for dissolution of marriage may be compromised. *Sterbini v. S.*, 39 L.J., P. & M. 82. H

(b) If the husband or wife has agreed, for good and valuable consideration, uninfluenced by fraud or mistake, to withdraw from a suit for dissolution, such party cannot afterwards, in violation of such agreement, sue in respect of the misconduct upon which the former suit was based, the right to complain in respect thereof having been bargained away. *Sterbini v. Sterbini*, 39 L.J., P. & M. 82; *Hooper v. Hooper*, 3 S. & T. 251, *Bowley v. Rowley*, L.R., 1 H.L. 63, 35 L.J., P. & M. 110. I

- (14) **Agreement to compromise suits for dissolution of marriage.**

An agreement for good consideration to compromise a suit for dissolution is binding if it has not been obtained by fraud or duress. *Sterbini v. Sterbini*, 39 L.J., p. 82, 22 L.T. 552. J

- (15) **Abatement of suit.**

(i) **DEATH OF PETITIONER.**

On the death of the petitioner at any time before decree absolute, a suit for dissolution of marriage will abate. *Stanhope v. Stanhope*, 11 P.D. 103, 55 L.J., P. & M. 36, *Grant v. Grant and Bowles*, 2 S. & T. 522; 31 L.J., P. & M. 174, *Beavan v. Beavan*, 2 S. & T. 58; 28 L.J., P. & M. 127. K

(ii) **DEATH OF RESPONDENT**

The suit will also abate on the death of the respondent at any time before the decree absolute. *Brocas v. Brocas*, 2 S. & T. 383; 30 L.J., P. & M. 172. L

(iii) **DEATH OF CO-RESPONDENT.**

A suit for dissolution of marriage does not abate on the death of a co-respondent pending the suit. *Sutton v. Sutton and Peacock*, 32 L.J., P. & M. 156. M

- (16) **Insanity of respondent if ground for staying proceedings.**

(a) The insanity of the respondent at the time of institution of the suit is no ground for staying proceedings therein. *Mordaunt v. Moncreiffe*, L.R., 2 H.L. (Sc.) 374, 43 L.J., P. & M. 49. N

(b) Nor is a mere plea of insanity a sufficient answer to a suit for dissolution. *Yarrow v. Yarrow*, (1892), p. 92. O

(c) The following observations of Butt, J., in *Hanbury v. H.*—are also worthy of being noted:—"It may be that a person is so insane as to necessitate his or her confinement in an asylum or some other place of permanent detention, and the disease may be such that there is no

## General—(Concluded).

hope of recovery or amelioration such as will allow of his or her discharge. When a disease of that sort seizes upon a person, and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that, in regard to an act committed in such a state of insanity, a plea of insanity might not be an answer. But I think it is very different with regard to intermittent and recurrent insanity." *Hanbury v. Hanbury*, 1892, p. 222. P

## (17) Petition for divorce—Court-fee.

The Court-Fee Stamp on a petition for dissolution of marriage is one of Rs. 20 (Court-fees Act, 1870, 2nd Sch., Art. 20). Q

## (18) Judicial separation may be granted in a suit for divorce.

(a) In a suit by a wife for dissolution of marriage, the Court can grant judicial separation if the facts proved are only sufficient to entitle her to the latter. *Smith v. Smith*. 1 S. & T. 359. R

(b) In order to pass a decree for judicial separation, there must be an amendment of the petition into one for judicial separation. *Rowley v. Rowley*, 4 Sr. & Tr. 137. S

(c) If in such a case she refuses to amend her petition by praying for judicial separation, the petition will be dismissed. *Rowley v. Rowley*, 4 S. & T. 137; 12 L.T. 565. T

## (19) Decree of judicial separation granted on ground of cruelty—Divorce on ground of subsequent adultery.

Where a wife has obtained a decree of judicial separation on the ground of her husband's cruelty, she can obtain a divorce on the ground of his subsequent adultery. *Bland v. Bland*, L.R., 1 P. & D. 237; 35 L.J., p. 104. U

## (20) Decree for judicial separation granted on ground of husband's adultery—Divorce on ground of subsequent cruelty.

If the wife has obtained a decree of judicial separation, by reason of his adultery, she may afterwards institute a suit to dissolve the marriage, on the ground of his adultery committed subsequently to the decree for judicial separation, coupled with his cruelty to her during the co-habitation. *Green v. Green*, L.R., 3 P. & D. 121; 43 L.J., p. 6; 29 L.T. 251. Y

## I.—"Adultery."

## (1) Adultery, what is.

Adultery, in divorce law, is the act of sexual intercourse by a husband with any woman not his wife,—by a wife with any man not her husband. W

## (2) Suit for dissolution—Adultery of husband by itself not sufficient.

Adultery alone is not a sufficient ground for a wife to frame a petition for asking a dissolution of marriage. The adultery must be coupled with one of the other reasons given in section 10 of the Act. 8 Ind. Cas. 1188. X

## (3) Adultery must have been actually committed.

For purposes of relief, adultery which is charged must have been committed. See Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), S. 27; compare *Styles v. Styles and Jackson*, (1890), 62 L.T. 613. Y

## 1.—“Adultery”—(Continued).

## (4) Mere connection without consent does not constitute adultery.

Moreover, although a wife may have had connection with a co-respondent, that does not constitute adultery on her part, unless she consents to the act. *Long v. Long and Johnson*, (1890), 15 P.D. 218. **Z**

## (5) Respondent and co-respondent—One may be found guilty of adultery and the other not.

(a) A co-respondent or respondent may be found guilty of adultery, although the respondent or co-respondent be found not guilty. *Long v. Long and Johnson*, (1890), 15 P.D. 218; and see *Crawford v. Crawford*, (1896), 11 F.D. 150, 151. **A**

(b) Thus, where a wife was found guilty on her own confession, the Court ordered the co-respondent to be dismissed from suit. *Crawford v. Crawford*, (1896), 11 P.D. 150, 151. **B**

(c) Again, in an undefended case, the jury decided the issue as to a co-respondent's adultery in his favour, although the wife gave evidence against him. *Miller v. Miller*, (1907), Times, 23rd July; see *Miller v. Miller and Fowler*, (1905), Times, 8th, 9th, 10th March. **C**

## (6) Consummation of marriage not necessary to constitute adultery.

It is immaterial when a party is charged with adultery that the marriage has not been consummated, unless perhaps, the offender seeks, in answer, to avoid the marriage on that ground. *Patrick v. Patrick*, (1820), 3 Phillm. 496; *Waters v. Waters and Gentle*, (1875), 33 L.T. 579; *Serrell v. Serrell and Bamford*, (1862), 2 Sw. & Tr. 422. **D**

## EVIDENCE OF ADULTERY.

## (1) Proof of adultery—Direct evidence not necessary.

It is not necessary, in order to succeed on a charge of adultery, to prove the direct fact, and indeed direct evidence is apt to be disbelieved. See *Alexander v. Alexander and Amos*, (1860), 2 Sw. and Tr. 95. **E**

## (2) Prior conduct of party charged to be considered

In one case the Court refused to believe a wife, who had behaved with propriety for twenty years, guilty of a flagrant act. *Alexander v. Alexander and Amos*, (1860), 2 Sw. & Tr. 95. **F**

## (3) Surrounding circumstances to be considered.

In nearly every case in which adultery is alleged the fact is inferred from circumstances, which lead to it, by fair inference, as a necessary conclusion. *Allen v. Allen and Bell*, (1894), p. 248. C.A., approving *Loveden v. Loveden*, (1810), 2 Hag. Con 1. **G**

## (4) Solitary witness to prove adultery to be scrutinized—Character of witness to be considered.

“The Court will closely scrutinize a case where only a single witness is called to prove a charge of this nature, particularly if that witness be a loose woman, with whom the adultery is alleged to have been committed.” *Evans v. Evans*, (1844), 1 Rob. Eccl. 165; *Simmons v. Simmons*, (1847), 1 Rob. Eccl. 566. **H**

## (5) Paid detectives—Value of their evidence.

The Court look with strong suspicion on the evidence of paid detectives. *Sopwith v. Sopwith*, (1859), 4 Sw. & Tr. 248; and see *Worsely v. Worsely and Worsely*, (1904), 20 T.L.R. 171. **I**

## 1.—“Adultery”—(Continued).

## (6) Evidence of husband or wife to be corroborated.

The evidence of the husband or the wife alone must be corroborated either by a witness or, at least, by strong surrounding circumstances. *Curtis v. Curtis*, (1905), 21 T.L.R. 676; *Getty v. Getty*, (1907), p. 384. J

## (7) Corroboration specially required where there is an admission by respondent.

Especially corroboration would be required to support the evidence of the husband or wife as to the adultery of the other party, the presence of witnesses notwithstanding, where the respondent has made admissions, or a confession. *White v. White and Jerome*, (1890), 62 L.T. 663; *Robinson v. Robinson and Lane*, (1859), 1 Sw. & Tr. 363. K

## (8) Case where wife's diary admitting misconduct was disbelieved.

In one case, although the wife's diary admitted misconduct, the petition was dismissed. *Robinson v. Robinson and Lane*, (1859), 1 Sw. & Tr. 362. L

## (9) Admission of co respondent is no conclusive proof of adultery.

Even where a co-respondent has also confessed, a decree will be granted only if the Court is satisfied that there is no ground for suspicion. *Williams v. Williams and Padfield*, (1865), L.R. 1 P. & D. 29. M

## (10) Presumption of adultery—What raises a presumption in case of wife may not in case of a husband.

(a) Adultery is presumed if a married woman goes to a brothel with a man. X Vol. Laws of England, Vol. XVI, p. 478. N

(b) But the fact of a married man doing so may not raise an irrebuttable presumption against him. *Astley v. Astley*, (1828), 1 Hag. Ecc. 714; *Williams v. Williams*, (1798), 1 Hag. Con. 299, 302. O

(c) But in such a case the onus would be on him and it would scarcely be discharged by the denial of himself and of a woman with whom he was alone. *Astley v. Astley*, (1828), 1 Hag. Ecc. 714; *Williams v. Williams*, (1798), 1 Hag. Con. 299, 302. P

## (11) Birth of child—Impossibility of husband being the father.

(a) If a wife give birth to a child, of which her husband could not possibly be the father, that is sufficient proof of adultery. Laws of England, Vol. XIV, p. 479. Q

(b) Cases, however, sometimes arise where there is a doubt, but the presumption is in favour of legitimacy, though after more than nine months after a decree or order of separation, the presumption is reversed. *Hetherington v. Hetherington*, (1887), 12 P.D. 112; and see *St. George's Westminster v. St. Margaret's Westminster*, (1706), 1 Salk. 123. R

## (12) Letters of wife—Evidentiary value.

The letters, before suit, of a wife tending to show that her child is a bastard are admissible in evidence as part of the *res gestae*, although she could not be put into the witness box for the purpose of proving that fact. *The Aylesford Peerage*, (1885), 11 App. Cas. 1. S

## (13) Letters written by wife to medical man, not privileged.

So, too, “letters written by her to a medical man as to the state of her health are evidence thereof, and the doctor may be compelled to produce them.” *Atkinson v. Atkinson*, (1825), 2 Add. 468. T

## 1.—“Adultery”—(Concluded).

## (14) Letters by wife to her solicitor.

But the communication made by a party to a divorce suit to his or her solicitor is generally privileged, because the suit is a civil, not a criminal, proceeding. *Branford v. Branford*, (1878), 4 P. D. 72; *Mordaunt v. Moncreiffe*, (1874), L. R. 2 Sc. & Div. 374. U

See also S. 126, Evidence Act I of 1872.

## (15) Observations of Judge at Criminal trial not evidence in Civil suit.

The observations of a Judge at a criminal trial are not evidence against a respondent to whom they are addressed. *Coffey v. Coffey*, (1898), 67 L.J., p. 86. Y

## (16) Judge's notes of evidence.

Except by consent, the Judge's notes of the evidence of witnesses, since deceased, in a previous matrimonial suit are not evidence in a suit for dissolution. *Conrad v. Conrad*, (1867), L.R. 1 P. & D. 391, 514, and see *Ling v. Ling and Croker*, (1856), 1 Sw. & Tr. 180. W

## (17) Decree nisi for dissolution of marriage—How far evidence of adultery.

A decree nisi for dissolution of marriage is evidence of adultery in subsequent proceedings, but, as against a co-respondent only if it states that he has committed adultery. See *Ruck v. Ruck*, (1896), p. 152. Laws of England, Vol. XVI, pp. 478, 479. X

## (18) Official short-hand writer's notes—Evidentiary value.

A transcript of the official short-hand writer's notes is not evidence of adultery in a suit for dissolution of marriage. *Nottingham Guardians v. Tomkinson*, (1879), 4 C.P.D. 343. Y

## 2.—“Her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman.”

## (1) English Law.

This provision as to the conversion of the husband from Christianity and his subsequent marriage with another woman being a ground of a decree for dissolution of marriage is not found in the English Law. See Speech of the Hon'ble Mr. Maine in the Legislative Council on 26th Feb., 1869. Z

## (2) Reason for this provision in the section.

(a) As to the reason for the provision that a wife may have a divorce on the ground that since the marriage, her husband has exchanged Christianity for some other religion and has gone through a form of marriage with another woman.—The provision necessitated by a judgment of the High Court at Madras in 3 M.H.C. App. 7.—See Speech by Hon'ble Mr. Maine in the Legislative Council on 26th Feb., 1869, Fort St. George Gazette Suppt., March 31st, 1869, p. 6. A

(b) The Select Committee have provided in this section that a wife may obtain a divorce when, subsequent to the marriage, the husband has changed his religion and taken another wife, in which case, when the new religion permits a plurality of wives, the High Court of Madras has held that he does not commit bigamy within the meaning of the Penal Code. See Report of Select Committee presented to the Council of the Governor-General of India on 13th August, 1868, Fort St. George Gazette, Suppt., p. 99. B

2.—“*Her husband has exchanged his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman*”—(Concluded).

- (8) The Madras High Court Ruling in consequence of which this provision was enacted.

The— is that a Hindu Christian convert relapsing into Hinduism and marrying a Hindu woman cannot be convicted of bigamy on the ground that he has another wife living, whom he married while professing Christianity. 3 M.H.C. App. 7. G

### 3.—“*Incestuous adultery.*”

- (1) Incestuous adultery, how defined in the English statute.

“Incestuous adultery is defined to be adultery committed by a husband with a woman whom, if his wife were dead, he could not lawfully marry, by reason of her being within the prohibited degrees of consanguinity or affinity.” Matrimonial Causes Act, 1857 (20 & 21. Vict., c. 85), S. 27; *Sherwood v. Ray*, 1 Moore P.C. 355. D

- (2) Prohibited degrees of consanguinity or affinity contemplated by the law.

(a) The—do not include a woman so related to one with whom the husband has had illicit intercourse. *Wing v. Taylor* (falsely calling herself Wing), (1861), 2 Sw. & Tr. 278; and *Pagan v. Pagan*, (1866), L.R. 1 P. & D. 223. E

(b) Affinity is not established by mere carnal intercourse without marriage. Thus “in a case where a man had had carnal intercourse with the mother of the woman whom he married, before his marriage, and that to the knowledge of such woman, *held*, that the said marriage was not null and void by reason of his affinity with the woman.” *Wing v. Taylor* (falsely calling herself Wing) 2 Sw. and Tr. 278; 30 L.J.P. & M. 258, *Sherwood v. Ray*, 1 Moo P.O. 355, note. F

(c) But both legitimate and illegitimate relations are included in this definition. *Horner v. Horner*, 1 Hagg. Con. C. 352 (1799). See also *Woods v. Woods*, (1840), 2 Curt. 521; *R. v. St. Giles-in-the-Fields*, (1847), 11 Q.B. 173. G

(d) It also includes a wife's sister during the life of such wife for as long as that marriage subsists, or even, it would seem, if it has been dissolved and the man has re-married. Deceased Wife's Sister's Marriage Act, 1907, (7 Edw. 7, c. 47), S. 3 (1) *Ibid.*, S. 3 (2); Compare *D'Etcheqoyen v. D'Etcheqoyen*, (1908), 25 T.L.R. 85. H

- (3) Law of prohibited degrees in England.

The English law of the prohibited degrees is found in the statutes of Henry VIII, 25 Hen. 8, c. 22, S. 4; 28 Hen. 8, c. 7, S. 11; 32 Hen. 8, c. 38. See *R. v. Chadwick*, 11 Q.B.R. 232; 17 L.J.R. (N.S.), M.C. 33. See, also, Coke, 2 Inst. 683, 17 C. 324. I

- (4) Prohibited degrees in this country.

The—are not necessarily those prohibited by the English Law. See 12 C. 706; 17 C. 324. J

See, also, on this subject, S. 19 and notes, *infra*.

## 4.—“Bigamy with adultery.”

## (1) Bigamy with adultery, what is.

(a) “Bigamy with adultery” in this section means adultery with the person with whom the bigamy is committed; and consequently proof of adultery with that person should be given, *e.g.*, some evidence that they lived together as man and wife. It would not be sufficient to prove a bigamous marriage with one woman and adultery with another. *Horne v. Horne*, 27 L.J. P. & M. 50. K

(b) In order to constitute bigamy, there must be such a marriage as, but for the former marriage, would constitute a valid marriage. *Burt v. Burt*, 2 Sw. & Tr., 88; 29 L.J. P. & M. 133. L

## (2) Bigamy with adultery—English Law.

(a) “The marriage of any person, being married, to any other person during the life of her or his husband or wife, whether the second marriage shall have taken place within the dominions of His Majesty or elsewhere, followed by co-habitation with such other person, constitutes the statutory offence of bigamy with adultery.” Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), S. 27; Russell’s (Earl) Trial, (1901), A.C. 446; *Horne v. Horne*, (1858), 2 Sw. & Tr. 49. M

(b) The second marriage must be one which, but for the former marriage would be valid. *Burt v. Burt*, (1860), 2 Sw. & Tr. 88; and see pp. 278 etc., *ante*. N

## (3) Bigamy with adultery—Proof of adultery and bigamy with same woman necessary.

In a suit for dissolution of marriage on the ground of bigamy with adultery, there should be proof of adultery and bigamy with the same woman. *Horne v. Horne*, 2 S. & T. 48. See, also, *Ellam v. Ellam*, 58 L.J.P. 56; 61 L.T. 33. O

## (4) Bigamy, proof of, for purposes of Criminal Law and Divorce proceedings.

(a) The criminal offence of bigamy is complete, although the subsequent marriage be void, on the ground of consanguinity or the like, or though the banns were fraudulently published in a fictitious name; but in the Divorce Court it is necessary to prove such a marriage as, but for the former marriage, would be valid. *R. v. Brown*, 1 C. & K. 144; *R. v. Penson*, 5 C. & P. 412; *Burt v. Burt*, 2 S. & T. 88; 29 L.J.P. 133; 2 L.T. 439. P

(b) As to what is bigamy in Criminal Law, see S. 494, Penal Code. Q

## (5) Proof of bigamy.

And the act of bigamy charged must be proved; proof of the conviction will not suffice. *March v. March*, 28 L.J.P. 30. R

## (6) Bigamy when second marriage is void for consanguinity.

The offence of bigamy with adultery may be complete, although the subsequent marriage be void for consanguinity. *Reg. v. Brown*, 1 C. & K. 144. See, also, 19 P.R. 1876, Cr. S

## (7) Bigamy when second marriage has not been formally celebrated.

The fact that the formal requirements have not been complied with for the second marriage is no bar to its constituting bigamy. *Reg. v. Penson*, 5 C. & P. 412. T

4.—“*Bigamy with adultery*”—(Concluded).(8) *Bigamy taking place abroad.*

When the bigamy is alleged to have taken place abroad, or in a colony, it is necessary that the Marriage Laws of that country should also be proved. *Burt v. Burt*, 2 Sw. & Tr. 88. U

(9) *Adultery not presumed from bigamy.*

Adultery will not be inferred from a charge of bigamy alone. *Bonaparte v. Bonaparte*, 65 L.T. 795. Y

5.—“*Marriage with another woman with adultery.*”

## Necessity for this provision.

S. 494 of the Penal Code provides that it would not amount to bigamy where a person contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge. Consequently a man marrying under the above circumstances cannot be held to be guilty of bigamy. This section provides that, in such a case, if the person after the second marriage co-habits with the party to the second marriage or with any other woman, the wife would be entitled to apply for dissolution of marriage just in the same manner as if he were guilty of bigamy with adultery. See Rattigan on Divorce, 1897, p. 24. W

6.—“*Rape.*”(1) “*Rape*”—Definition of.

“A man is said to commit ‘rape’ who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions.—

“First—against her will;

“Secondly—without her consent;

“Thirdly—with her consent, when her consent has been obtained by putting her in fear of death or of hurt;

“Fourthly—with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself to be, lawfully married;

“Fifthly—with or without her consent, when she is under twelve years of age.

“Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

“Exception.—Sexual intercourse by a man with his own wife, the wife not being under twelve years of age; is not rape.” Indian Penal Code, S. 375. X

(2) *Rape, what is.*

Rape is the act of having unlawful and carnal knowledge of a woman by force and against her will. Russell on Crimes, 5th ed. Vol. 1, p. 858, and note (a). See *Collins v. C.*, 9 P.D. 23, 53 L.J. Mat. 116, 83 W.A. 170; *Coffey v. C.F.*, 1898, 169 and 78 L.T., N.S. 796. Y



## 6.—“Rape”—(Concluded).

## (3) Proof of rape—Proof of conviction for rape not sufficient.

(a) Where there has already been a conviction, proof of such conviction is not sufficient; at the hearing the offence must be proved *de novo*. *Virgo v. Virgo*, 69 L.T. 460. Z

(b) The rape must be proved; the proof of a conviction will not suffice. *Browne and Powles on Divorce*, 7th ed., 1905, p. 27. R

## (4) Conduct short of rape may amount to cruelty.

Conduct short of rape may form a good foundation for a charge of cruelty. *Bosworth v. Bosworth*, (1901), compare *Thompson v. Thompson*, (1901), 85 L.T. 172. B

## (5) Wife's adultery no excuse for rape by husband.

The Court granted a decree nisi for dissolution of marriage to a wife whose husband had committed rape, although she herself had previously been found guilty of adultery. *Collins v. Collins*, 9 P.D. 231; 53 L.J.P. 116. C

## (6) Conviction for indecent assault no bar to suit for dissolution on ground of rape.

A wife may obtain a divorce from her husband for rape, though he has been prosecuted and convicted for an indecent assault only. *Coffey v. Coffey*, (1898) P. 169, 67 L.J.P. 86; 78 L.T. 796. D

## 7.—“Sodomy.”

## (1) Sodomy, what is.

Sodomy is the act of carnally knowing any animal, or being a male, of carnally knowing any man or any woman *per anum*. Mr. Justice Stephen's Digest of Criminal Law, p. 108. E

## (2) Dissolution of marriage—Sodomy committed by husband upon his wife without her consent.

(a) A carnal knowledge against the order of nature committed by a man with a woman is sodomy within the meaning of S. 10 of the Divorce Act. 68 P.R. 1882. F

(b) And when it is committed by a husband upon his wife, she not being consenting party, the husband is guilty of “sodomy” within the meaning of S. 10, so as to afford valid grounds for a petition for dissolution of marriage. 68 P. R. 1882. G

## (3) Proof of sodomy.

(a) The evidence in support of a charge of sodomy should be cogent and corroborated. *N. v. N.*, 3 Sw. & Tr. 238. H

(b) In cases where there is merely oath against oath, without any further evidence, direct or circumstantial, to support the charge of sodomy no conviction can be maintained. *N. v. N.*, 3 Sw. & Tr. 238. I

## 8.—“Bestiality.”

## (1) Attempt to commit sodomy or bestiality.

(a) An attempt to commit either sodomy or bestiality is apparently sufficient to found a decree of judicial separation. *Bromley v. Bromley*, (1793), 2 Add. 158, n. J

(b) Charges so grave must be fully corroborated, whether alleged in the greater or less degree. *N. v. N.*, 1 (862), 3 Sw. & Tr. 234. K

8.—“*Bestiality*”—(Concluded).

## (2) Unnatural offence by husband with wife.

Where a husband forced his wife and committed an unnatural offence with her, this enabled her to obtain a decree of dissolution. *C. v. C.*, (1905), 22 T.L.R. 26. L

## (3) Unnatural offences criminal offence—Punishment.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. See Indian Penal Code, S. 377 M

-“*Cruelty*.”-

## (1) “Cruelty” what is.

Cruelty in law may be defined as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. *Russell v. Russell*, (1897), A. C. 395, *Per Lord Davey*, at p. 467. See, also, *Evans v. Evans*, (1790), 1 Hagg. Con. 35. N

## (2) What constitutes legal cruelty.

In order to constitute cruelty the acts committed must be referable to permanent causes so as to endanger the future safety of the wife's person or health. *Plowden v. Plowden*, 23 L.T. 266, 18 W.R. 902 Eng. O

## (3) What constitutes legal cruelty—Case-law reviewed.

(a) The following observations of Lopes, L.J., in *Russell v. Russell* are worthy of being noted.—“To constitute legal cruelty” there must be danger to life, limb or health, bodily or mental, or a reasonable apprehension of it. We propose to test this definition by some of the more important cases that have been decided on the subject—*Evans v. Evans* (1 Hagg. Cas. 38), decided by Lord Stowell in 1790, is the leading case on the subject. As we read that case, no husband could be found guilty of legal cruelty towards his wife unless he had either inflicted bodily injury upon her, or had so conducted himself towards her as to cause actual injury to her mental or bodily health, or so as to raise a reasonable apprehension that he would either inflict actual bodily injury upon her, or cause actual injury to her mental or bodily health. In a word, he must so have conducted himself towards her as to render future co-habitation more or less dangerous to her life or limb, or mental or bodily health. There are some expressions in that most admirable judgment of Lord Stowell to which we would wish to refer. At page 30 the learned Judge says.—“What merely wounds the mental feelings is in few cases to be admitted, when they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent, surely, in any state of life, but they are not that

## 9.—“Cruelty”—(Continued).

cruelty against which the law can relieve.” At page 39, the learned Judge sums up what he had previously said thus —“These are negative descriptions of cruelty ; they show only what is not cruelty, and yet, perhaps, the safest definition that can be given under the infinite variety of possible cases that may come before the Court. But, if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. Bever, from Clarke and the other books of practice, is a good general outline of the cannon law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger to life, limb or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a Divorce without proof of a reasonable apprehension of bodily hurt. I say an apprehension, because, assuredly, the Court is not to wait till the hurt is actually done, but the apprehension must be reasonable.” This was the state of the law in 1790, and we venture to say that the doctrine there enunciated as to what constituted legal cruelty has never been materially altered. At that time no amount of want of civility, rudeness, insult or abuse, however gross, which did not affect life, limb, or mental or bodily health, or where there was not a reasonable apprehension of its so doing, was considered by the ecclesiastical tribunals to amount to legal cruelty, and that though the parties were at the time co-habiting. So far as we can ascertain, the authority of the case *Evans v. Evans* has never been questioned—. Before the Divorce and Matrimonial Act, 1857, and since the passing of that Act, the same rule with regard to what constitutes legal cruelty has been followed by Sir Cresswell Cresswell, Lord Penzance and Sir James Hannen, and Sir Charles Butt in December, 1891, at the trial of the case of *Russell v. Russel*, when the present petitioner sued for a judicial separation on the ground of cruelty, said, in laying down the law to the jury, that cruelty had been very often defined as injury causing danger to life or limb or health,\* and it is, generally speaking, where the continuation of the conduct charged would be likely to produce injury, either bodily or mental, or injury to health without any physical violence, that this Court interposes to protect the wife. There is no case in the books where words alone, however violent, however galling, and even if imputing a crime of the most disgraceful kind, have been held *per se* to constitute legal cruelty, and this when the parties were co-habiting as husband and wife. The case of *Bray v. Bray* (1 Hagg Ecccl. 167) is a case which, so far as we can discover, has never been cited or followed as an authority, and is contrary to *Gale v. Gale*, subsequently referred to. *Bray v. Bray* was a decision only with regard to admitting an article. *Russel v. Russel*, (1895) P. (C. A.) 15 ; 64 L. J. P. & M. 105. The learned Lord Justice in the above case after referring to some of the more important cases on the subject, proceeds to consider the observations of Lord Brougham in the case of *Patterson v. Patterson*

## 9.—“Cruelty”—(Continued).

(9 H.L. case 308).—Lord Brougham, at p. 328, says “that if a man were continually charging his wife with every sort of immorality and criminal conduct, and there was not a shadow of foundation for the charges, made before her family, her friends, relatives and servants, and in the face of the world, there was little doubt that what then rested only upon opinions would ultimately assume the form of decisions, and that to such injurious treatment, making the marriage state impossible to be endured, and rendering life almost unbearable, the Courts of the country would extend the remedy of a divorce *a mensa et thoro*. These, however, were *obiter dicta*, and were not necessary for the decision.—Again, at p. 318, Lord Brougham says this.—“That the ground of the remedy is confined to personal violence is not the law of England and certainly not the law of Scotland.—It is not true that the law of England either requires actual injury to the person or threat of such injury.” We presume that this means that a reasonable apprehension of danger to life, limb or health, bodily or mental, will suffice without any actual injury or threat of it.” [cf. *Munshi Buzloor Rahim v. Shumssoonam Begam*, XI, M 1. App 551; and *Milford v. Milford*, L.R., 1 P & D. 295, 36 L.J.P & M. 30 and in App. 37 L. J. P & M. 77; *Russel v. Russel*, (1895), P. (C.A) 315, 64 L. J. P & M. 105]. P

(b) In the opinion of the majority of the Court, therefore, and upon the weight of authority, to constitute legal cruelty there must be danger to life, limb, or health, bodily or mental, or a reasonable apprehension of such danger. See *Russell v. Russell*, 1895, P. (C.A.) 315. Q

(c) In one case the Court granted a decree nisi for dissolution to a wife where no acts of physical violence had been committed by the respondent. *Bethune v. Bethune*, (1891), Prob. 205, 60 L.J.P. 18, 63 L.T. 259. R

## (4) Who may be guilty of cruelty—Any of the parties may.

Either of the parties to the marriage may be guilty of this offence. *Kirkman v. Kirkman*, (1807), 1 Hagg. Con. 409, *Furlonger v. Furlonger*, (1847), 5 Notes of Cases 422, 425. S

## (5) What is cruelty in husband is cruelty in wife.

What would be cruelty if practised by a husband towards his wife would generally be cruelty if practised by a wife towards her husband. *Furlonger v. Furlonger*, 5 Notes of Cases 425 (1847). T

## (6) Tests to determine what is legal cruelty.

(a) Apprehension of danger to life, limb, or health are the ordinary criteria of legal cruelty. It is a question of fact. *Westmeath v. W.*, 2 Hagg. E.R. Supp. 55; *Evans v. E.*, 1 Hagg. C.C 39. Provided such a question comes before a jury, the presiding judge directs them as to what is legal cruelty, preparatory to their finding. *Tomkins v. T.*, 1 Sw. & Tr. 170. U

(b) In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status. *Tomkins v. Tomkins*, (1858), 1 Sw. & Tr. 168. Y

## 9.—“Cruelty”—(Continued).

- (c) In some cases one act may be so grievous as by itself to constitute cruelty, although this is seldom the case. *Smallwood v. Smallwood*, (1861), 2 Sw. & Tr. 397. *Reeves v. Reeves*, (1862), 3 Sw. & Tr. 189. W

## (7) Text of cruelty—Acts must be such as to render further co-habitation unsafe.

To constitute legal cruelty the acts must be of such a nature as to show that further co-habitation is unsafe. *Curtis v. Curtis*, 1 S. & T. 192; 27 L.J. P. & M. 73; in app., 28 L.J. P. & M. 55; *McKeever v. McKeever*, 11 Ir. R. Eq. 26. X

## (8) Causes and motives for husband's misconduct immaterial.

Whatever may be the cause or motive of a husband's misconduct, towards his wife the court is bound to protect the wife if it finds that further co-habitation with such husband would be unsafe, unless she is herself greatly to blame. *Curtis v. Curtis*, 1 S. & T. 192; 27 L.J. P. & M. 73; in app., 28 L.J. P. & M. 55; *McKeever v. McKeever*, 11 Ir. R. Eq. 26. Y

## (9) In determining whether an act constitutes cruelty regard must be had to the status of the parties.

- (a) In determining whether an act or acts constitute cruelty in law, regard must be had to the position of the parties, their mental condition and their social status. See laws of England, Vol. XVI, p. 474. Z

- (b) What may be cruelty in high class people may not be cruelty in a low class people. *Tomkins v. Tomkins*, (1858), 1 Sw. & Tr. 168. A

- (c) In a case where blows were alleged to constitute the acts of cruelty alleged, it was pointed out that the jury must have regard to the station in life which the parties had. *Tomkins v. Tomkins*, (1858), 1 Sw. & Tr. 168. B

- (d) “Blows between parties in the lower, and higher stations of life were different aspects.” *Per Sir Cresswell in Tomkins v. Tomkins*, (1858), 1 Sw. & Tr. 168. C

## (10) Ground of interference by Court in cases of cruelty.

The ground of the Court's interference is the wife's safety, and the impossibility of her fulfilling the duties of matrimony in a state of dread. *Milford v. Milford*, 1 P. & M. 295. D

## (11) Cruelty committed by an insane person.

Cruelty committed by an insane person has been held to be no ground for a judicial separation. *Hall v. Hall*, 3 S. & T. 347; 33 L.J.P. 65, 9 L.T. 810. E

N.B.—The remedy lies in the restraint of the insane husband, not the release of the wife. *Hall v. Hall*, (1864), 3 Sw. & Tr. 347. F

- (b) But as long as such insane person is at liberty, and there is danger of further cruelty, the Court scarcely entertains the question of sanity. *Hanbury v. Hanbury*, (1892), p. 222; compare *Baron v. Baron*, (1908), 24 T.L.R. 273. G

- (c) The following observations of Butt, J. in *Hanbury v. Hanbury*, may also be noted :—“If it can be shown that the insanity is of such a nature that it will produce violence on the part of the husband, and endanger

## 9.—“Cruelty”—(Continued).

the safety of the wife, though it need not entail the permanent incarceration of the man, but only his restraint from time to time,—if the mania is recurrent, and comes on suddenly from time to time, she may be placed in great jeopardy. In such a case I can well conceive that, although in some instances, insanity may be one of those misfortunes which must be taken by a wife with her husband for better or for worse, and though it may assume the form of a disease, yet, if it is such as to imperil the wife's safety, she is entitled to the protection of this Court. Assuming for the moment that these attacks were not brought on the respondent by his own self-indulgence, assuming that they were the result of hereditary disease, I should still be disposed to hold that acts of cruelty committed in one of these fits of mania would entitle the wife to the remedy which she asks—separation from her husband.\* The ordinary protection which she is supposed to obtain by proceedings in lunacy is a delusion, because it does not protect her against the return home of her husband, who is liable at any moment to become a lunatic.” *Per Butt, J., Hanbury v. Hanbury, (1892), pp. 224, 225.* H

## (12) Violence committed under the influence of an acute disorder, such as brain fever.

Acts of violence committed under the influence of an acute disorder, such as brain fever, where, the disorder having been subdued, there was no danger of their recurrence, were held not to be ground for a decree of judicial separation. *Curtis v. Curtis, 1 S. & T. 192; 28 L. J. P. 55.*

(13) Husband suffering from delirium tremens. I

Where the husband was suffering from attacks of delirium tremens it was held that the wife was entitled to protection. *Marsh v. Marsh, 1 S. & T. 312; 28 L.J.P. 13.* J

(14) Cruelty is a question of fact. •

—; and the court must direct the jury, in cases coming before them, to find whether the facts proved constitute legal cruelty or not. *Tomkins v. Tomkins, 1 Sw. & Tr. 168.* K

## (15) Cruelty on the part of the wife—Protection of husband.

(a) The wife may be guilty of cruelty as much as the husband. *Furlonger v. Furlonger, 5 Notes of Cases (1847) 422, 425.* L

(b) There may be cases where the husband stands in real need of a reparation to protect him from his wife's conduct. See *Prichard v. Prichard, 1864, 3 Sw. & Tr. 523.* M

(c) The following observations of Lushington, J. in *Furlonger v. Furlonger* may also be noted.—“Generally speaking that would be cruelty if practised by a wife towards her husband which would be held to be cruelty if done by him towards her. I say generally speaking, for I think there must be some distinctions necessarily founded on the great difference between the sexes, and the power of the husband in ordinary circumstances to protect himself from the wife's violence; still, the same great rule of danger to life or limb must prevail; in these, as in all other cases of the same genus, necessary protection is the foundation of all separation.” *Per Dr. Lushington in Furlonger v. Furlonger, 5 Notes of Cases 425, White v. White, 1 S. & T. 591. (Prichard v. Prichard, 3 S. & T. 523 = Pickard v. Pickard, 33 L. J. P. & M. 168. M*

## 9.—“Cruelty”—(Continued).

## (16) Instance where protection was afforded to husband.

Such protection has been afforded to the husband in the following cases:—

Where the husband passively bore his wife's foul language and blows for many years, and in the end she drove him away from her chapel with abuse and blows, which caused him to fall in a fit. *White v. White*, (1859), 1 Sm. & Tr. 591. H

## (17) Doctrine of constructive or cumulative cruelty in case of wife's acts.

(a) The doctrine that acts which in themselves do constitute cruelty may amount to cruelty under the special and aggravated circumstances of the case apply as well to the wife as to the husband. See *Cochrane v. Cochrane*, (1910), 27 T. L. R. 107. O

(b) The following acts have been held to constitute cruelty on the part of the wife under the special circumstance of each particular case.—

(i) Drunkenness on the part of the wife. *Green v. Green*, (1864), 33 L.J. (P. M. & A.) 64. P

(ii) Obstruction of meals. (*Ibid.*) Q

(iii) Her unkindness to the husband when ill. (*Ibid.*) R

## (18) Points to be considered when husband seeks relief on ground of wife's cruelty.

In a suit by a husband for judicial separation on the ground of cruelty, the question is not simply whether the husband's safety is endangered, but the Court will also consider whether the wife's conduct may not endanger her safety by provoking her husband to retaliate. *Forth v. Forth*, 36 L.J.P. 122, 16 L.T. 574. S

## (19) Provocation as defence to cruelty.

(a) A wife was not entitled to a decree on the ground of her husband's cruelty, if he had been provoked into the acts complained of by her. *Wallscourt v. Wallscourt*, 5 No. of Ca. 121 (1847); *Waring v. Waring*, 2 Hagg. Con. C. 153 (1813). T

(b) But it would be otherwise if the violence of his retaliation had been out of proportion to the provocation received. *Best v. Best*, 1 Add. 411, (1823); *Taylor v. Taylor*, 2 Lee 172 (1755). U

## (20) Constructive cruelty.

— is confined to cases of cruelty practised by a husband upon the children in the presence of their mother, and ought not to be applied to cases of mere neglect, nor where the wrong-doer is the wife *Manning v. Manning*, 6 Ir. R. Eq. 417, and 7 Ir. R. Eq. 520. Y

## (21) Evidence of cruelty.

(a) A decree of judicial separation on account of cruelty, properly proved, is accepted as *prima facie* evidence of that cruelty. *Bland v. Bland*, (1866), L.R. 1 P. & D. 237. W

(b) A Judgment in an English Court is not conclusive as to anything but the point decided. *Castrique v. Imrie*, (1870), L.R. 4 H.L. 414; *Per Blackburn, J.*, at p. 434. X

(c) Proof that a wife has made complaints about her husband is admissible in evidence. *Berry v. Berry and Carpenter*, (1898), 78 L.T. 688. Y

## 9.—“Cruelty”—(Continued).

- (d) For this purpose a certificate of a husband's summary conviction for cruelty to his wife, which has the same evidential effect as a decree of judicial separation, though not the depositions then taken, may be used to corroborate her allegations of cruelty. *Harriman v. Harriman*, (1909), 25 T.L.R. 291, C.A. *Judd v. Judd*, (1907), p. 241. Y 1

## \*(22) Communication of disease—Evidence—New trial.

In support of a charge of cruelty, evidence was given that the wife was infected with disease, and that she had not been unchaste before marriage or unfaithful after it, but there was no evidence, beyond the presumption arising from the state of the wife, that the husband had ever suffered from the disease. The husband positively denied that he ever was diseased. The jury found that the husband was guilty of cruelty. *Held* (by the Full Court. Willes, J., dissenting), that there was no sufficient evidence to support the verdict, and a rule was made absolute for a new trial on payment of costs. *Morphett v. Morphett*, 1 P. & M. 702. Z

## EXAMPLES.

## I.—Acts amounting to legal cruelty.

## (1) Wilful communication of a venereal disease.

- (a) The wilful communication of a venereal disease was held to be cruelty. *Ciocci v. Ciocci*, 1 Sp. Ecc. & Ad. 121 (1853). See, also, 14 Bur. L. R. 173. A
- (b) If a husband, knowing that he is in such a state of health that by having connection with his wife he will run the risk of communicating the venereal disease to her, recklessly has connection with her, and thereby communicates the disease to her, he is guilty of cruelty. *Boardman v. Boardman*, 1 P. & M. 233. B
- (c) But the disease must have been actually communicated. *Ciocci v. Ciocci*, 1 Sp. Ecc. & Ad. 121 (1853). C
- (d) Where the wife sued, under S. 10 of the Indian Divorce Act (IV of 1869), for dissolution of her marriage with her husband (who filed a written statement, but did not appear at the hearing of the case) by reason of the cruelty and adultery of her husband and deposed that he suffered from a contagious and loathsome disease, which he communicated to her, *held* on medical evidence, that it must be presumed that the husband recklessly or wilfully communicated it to his wife; for, when a husband, being a competent witness, does not come forward to assert his ignorance, the Court will hold the wilful intention proved. 14 Bur. L. R. 173. D

## (2) Communication of a venereal disease must be wilful.

- (a) The communication of a venereal disease to the wife must have been wilful on the part of the husband to establish it as cruelty. *Brown v. Brown*, L.R., 1 P. & D. 46; 35 L.J.P. 13, 13 L.T. 645. See, also, *Morphett v. Morphett*, L.R., 1 P. & D. 702; 38 L.J.P. 23; 19 L. T. 801/E
- (b) But that wilfulness may be presumed from the surrounding circumstances. *Brown v. Brown*, L.R., 1 P. & M. 46; 35 L.J.P. 13, 18 L.T. 645. See, also, *Morphett v. Morphett*, L.R., 1 P. & D. 702; 38 L.J.P. 23; 19 L.T. 801. F



## 9.—“Cruelty”—(Continued).

## I.—Acts amounting to legal cruelty—(Continued).

(c) The wilfulness may also be presumed from circumstances, the condition of the husband, and the probabilities of the case, after such explanations as he may offer. (*Ibid.*) G

(d) The following facts must be proved by the party to whom the disease has been communicated —

(i) That the person having the disease himself, knew, either from medical advice or from the obvious character of the symptoms, that he had an infectious disease, and (ii) that it existed in such a stage and form that connection was distinctly dangerous *Morphett v. Morphett*, L.R., 1 P. 702; 38 L.J.P. & M. 23. H

(e) In the absence of actual proof of the existence of disease, it is incumbent upon the other party in the medical evidence adduced in support of the charge to lay the foundation for a scientific conclusion which should take the place of such proof, and from which the jury could find, first, that the charge of knowledge is true, and through that the charge of wilfulness. *Morphett v. Morphett*, L.R., 1 P. 702, 38 L.J.P. & M. 23. I

## (3) Spitting in the face.

Spitting in the face was held to amount to legal cruelty, *D'Aguilar v. D'Aguilar*, 1 Hagg. 775, But see *Choborn's Case*, Httley, 149. See, also, *Saunders v. Saunders*, 5 No. of Ca. 408 (1847). J

## (4) Spitting in the wife's face.

(a) Spitting in the wife's face, combined with other acts not of great violence, was held to amount to cruelty. *Waddell v. Waddell*, 2 Sw. & Tr 584; 31 L.J.P. 123, 6 L.T. 552. K

(b) If such act was not objected to at the time, less weight would be attached to it when brought. (*Ibid.*) L

## (5) Neglect, coldness and insult producing an attack of melancholia.

(a) Neglect, coldness and insult, producing an attack of melancholia, were held to amount to legal cruelty *Walmesley v. Walmesley*, 69 L.T. 152. See, also, *Auboury v. Auboury*, 72 L.T. 295 (1895). M

(b) No general rule could be laid down as to what amount of mere insults on the part of a husband towards a wife—in the absence of acts of physical violence—will amount to legal cruelty, but that each case must be decided on its own merits. (1891) P. 189, 60 L.J.P. 20; 64 L.T. 35. N

## (6) Habitually insulting conduct.

Cruelty was established by proof of habitually insulting conduct and violent temper and threats. *Palmer v. Palmer*, 2 Sw. & Tr. 61, 29 L.J.P. 124; 2 L.T. 363. O

## (7) Acts of unprovoked violence.

Repeated acts of unprovoked violence by a wife will be regarded as cruelty, although they may not inflict serious bodily injury on the husband. *Pritchard v. Pritchard*, 3 Sw. & Tr. 523, 10 L.T. 789; S.C., *nom. Pichard v. Pichard*, 33 L.J.P. 158. P

## 9.—“Cruelty”—(Continued).

## I.—Acts amounting to legal cruelty.—(Continued).

- (8) Act of violence being of such a character as to found apprehension of further violence.

Where one act of violence is of such a character as to found a reasonable apprehension of further violence in case of co-habitation, the wife is entitled to [the protection of the Court *Reeves v. Reeves*, 3 S. & T. 139, 32 L.J.P. 178; 8 L.T. 174. Q

- (9) Threats of actual violence.

Threats of actual personal violence sometimes constitute cruelty, and the Court does not wait to act until such threats are carried into effect. See *Bostock v. Bostock*, (1858), 1 Sw. & Tr. 221; *Barrett v. Barrett*, (1903), 20 T.L.R. 73. *D'Aguilar v. D'Aguilar (Baron)*, (1794) 1 Hagg. Ecc. 773, 775, *Kirkman v. Kirkman*, (1807), 1 Hagg. Con. 409; *Knight v. Knight*, (1865), 34 L.J. (P. M. & A.) 112; *Sarkies v. Sarkies*, (1894), Times, 28th June. R

N B.—In the last case the husband conceived an aversion to the bride and wished her to divorce him.

- (10) Fits of mania.

Where a husband who has been confined in an asylum is subject to recurring fits of mania which may endanger the safety of the wife, she is entitled to a decree *Hanbury v. Hanbury*, (1892), Prob. 222. 61 L.J. P. 115. S

- (11) Where a husband spread a false report about his wife

Where a husband spread a false report about his wife, the effect of which was to injure her health, he was held to be guilty of legal cruelty. *Jeapes v. Jeapes*, 89 L.T. 74 (1903). T

- (12) Where a husband by his behaviour to his wife led a passer-by to take her for a common prostitute

Where a husband by his behaviour to his wife in a public street, led a passer-by to take her for a common prostitute and insult her, such act was held to constitute cruelty. *Milner v. Milner*, 4 S. & T. 240; 31 L.J. P. 159. See, also, *Knight v. Knight*, 4 S. & T. 103, 34 L.J.P. 112; 11 L.T. 252. U

- (13) Charge of adultery and of the birth of the child.

A false———of which he is not the father, is cruelty, if the wife's health suffers in consequence. *Jeapes v. Jeapes*, 89 L.T. 74. Y

- (14) Wife charging husband with false charge of unnatural offence.

Where a wife persisted in bringing against her husband by word of mouth, and in letters written to members of his family and others, a charge of having committed an unnatural offence, the charge not being true nor believed by her to be true, held that she had not been guilty of such cruelty as would entitle her husband to a decree of judicial separation. *Russell v. Russell*, (1895), P. 315, 64 L.J.P. 105, 73 L.T. 295. W

- (15) Cruelty to children

Acts of cruelty to children may amount to cruelty to the wife, when committed by the husband in the presence of the wife and for the purpose

## 9.—“Cruelty”—(Continued).

## I.—Acts amounting to legal cruelty—(Concluded).

of giving her pain. *Suggate v. Suggate*, 1 Sw. & Tr. 489; 28 L.J.P. 46. See, also, *Birch v. Birch*, 42 L.J.P. 23; 28 L.T. 40; *Manning v. Manning*, 6 Ir. Rep. Eq. 417; 7 *Ibid.* 520; *Sant v. Sant*, L.R. 5 P.C. 370; 49 L.J. P.C. 73; 30 L.T. 415. X

## (16) Undue exercise of martial authority.

If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree, and during such a length of time, as to injure her health and render a serious malady imminent, although there be no actual physical violence, such as would justify a decree, it is legal cruelty, and entitles her to a judicial separation. *Kelly v. Kelly*, 2 P. & M. 31, 59. Y

## (17) Conviction of husband—Consequent break-down of wife's health.

A husband may be guilty of legal cruelty towards his wife by the mere fact of being criminally convicted, if the disgrace and shock arising out of such conviction causes a break-down of the health of his wife. *Thompson v. Thompson*, 85 L.T. 172 (1901), *Bosworthuck v. Bosworthuck*, 86 L.T. 121 (1902). Z

## II.—Acts not amounting to legal cruelty.

## (1) Gallings words.

“There is no case in the books where words alone, however violent, however galling..... have been held *per se* to constitute legal cruelty” *Russell v. Russell*, P.D. C.A. 1895, p. 315. A

## (2) Drunkenness.

(a) The Court has refused to interfere where the wife suffered great misery from her husband's drunkenness, but there was no violence *Hudson v. Hudson*, 3 S. & T. 314. B

(b) And even where habitual drunkenness has been coupled with a series of annoyances and extraordinary conduct, and acts of considerable violence, the Court has held that legal cruelty was not committed *Brown v. Brown*, 14 W.R. 318. *Scott v. Scott*, 29 L.J.P. 64. C

(c) But a husband's constant intoxication coupled with some slight acts of violence, and an attempt to cut his wife's throat, was held to constitute cruelty. *Power v. Power*, 4 S. & T. 173; 34 L.J.P. 137 13 L.T. 824. D

(d) If a woman marry a drunkard, with full knowledge that he is a drunkard, she is not on that account to be held to take, without redress, the risk of anything that may happen to her, as the consequence of his drunken habits. *Walker v. Walker*, 77 L.T. 715 (1898). E

## (3) Communication of a cutaneous complaint.

Wilful communication of a cutaneous complaint, if it stood alone, was held insufficient for a sentence of separation. *Chesnut v. Chesnut*, 1 Sp. Ecc. and Ad. 198 (1854); *Neeld v. Neeld*, 4 Hagg. 263 (1831). F

## (4) Single act of violence.

(a) A single act of violence by a husband towards his wife will not, unless it produces any considerable injury to the person of the wife, constitute

9.—“Cruelty”—(Continued).

II.—Acts not amounting to legal cruelty—(Continued).

cruelty in the legal sense of the term, is not, although unwarrantable, sufficient to found a decree of judicial separation. *Smallwood v. Smallwood*, 2 S. & T. 397; 31 L.J. P. & M. 8. G

- (b) But if from the single act of violence a reasonable apprehension may arise that further violence to the wife would result in case of co-habitation, the wife can claim the protection of the Court. *Reeves v. Reeves*, 3 S. & T. 139; 32 L.J.P. & M. 178. H

- (c) The learned Judge in that case *Smallwood v. Smallwood* wrote, “That the conduct of the respondent was unwarrantable is true, but I have examined the cases referred to and find in each of them not merely one violent act committed under excitement and not producing any considerable injury to the person but repeated acts furnishing such evidence of *sacvitia* as warranted the Court in concluding that the wife could not co-habit in safety with such a husband and was, therefore, entitled to the protection of the Court.” 8 Ind. Cas. 1188. I

- (d) The evidence showed that the parties quarrelled whilst living together and that the respondent struck the petitioner and the latter struck the former back in self-defence and left him and lived with her brother. *Held*, that the petitioner had not proved sufficient cruelty to entitle her to a divorce. 8 Ind. Cas. 1188. J

- (e) Again if the general conduct of the husband towards his wife be of such a character as to degrade the wife, and subject her to a course of annoyance and indignity injurious to her health, the Court may hold such conduct to amount to legal cruelty although the evidence of actual violence may not be sufficient to warrant a finding of legal cruelty. *Knight v. Knight*, 4 S. & T. 103; 34 L.J. P & M. 112. K

- (f) A single act of cruelty, provided it is of sufficient gravity, may be enough to constitute cruelty. *Holden v. Holden*, 1 Hagg. Con. C. 458 (1810). See, also, 8 Ind. Cas. 1188. L

(5) False charge of adultery.

A—by a husband against his wife, though made maliciously will not by itself constitute legal cruelty. 4 A. 374. M

(6) Charge of immorality.

- (a) A—by her husband against his wife will not by itself amount to legal cruelty. *Durrant v. Durrant*, 1 Hagg. Eccl. Rep. 752. N

- (b) Nor is the conduct of the husband bringing a groundless and malicious charge against his wife's chastity. *Brown & Powell on Divorce*, 7th Ed. 1905, p. 58 O

(7) Charge of having committed incest.

- (a) A charge of having committed incest is not by itself sufficient to constitute legal cruelty. *Gale v. Gale*, 2 Rob. Ecc. Rep. 421. But in *Bray v. Bray*, 1 Hagg. Eccl. 167. P

- (b) “It is not possible to conceive cruelty of a more grievous character (except perhaps, great personal violence) than an accusation of incest made by a husband against his wife.” *Per Sir John Nicholl in Bray v. Bray*, 1 Hagg. Eccl. 167; But see, also, *Gale v. Gale*, 2 Rob. Ecc., Rep. 421. Q

## 9.—“Cruelty”—(Continued).

II.—Acts *not* amounting to legal cruelty—(Concluded).

## (8) Cruelty to child

—, to wound its mother's feelings, is not sufficient to constitute cruelty to her unless it was such as to injure her health *Birch v. Birch*, (1873), 42 L. J. P. & M. 23. **R**

## (9) Where the acts alleged to constitute cruelty were confined to three days in a married life of three years

—, it was held that the legal offence of cruelty was not established. *Plowden v. Plowden*, 23 L.T. 266, 18 W.R. 902 Eng. **S**

## (10) The following acts also have been held, each by itself not to constitute legal cruelty :—

(a) Want of civility, **.**

(b) Actual rudeness, **.**

(c) Insult, bad language or abuse. See *D'Aquila v. D'Aquila*, 1 Hagg. 775, *Kennick v. Kennick*, 4 Hagg. 129 and other cases cited in Brown and Powell on Divorce, 7th Ed 1905, p. 58. **T**

**N.B.**—But words of menace raising a reasonable apprehension of bodily harm would amount to cruelty. (*Ibid.*) **U**

(d) Attempt by husband to debauch his own female servants. *Durant v. Durant*, 1 Hagg. E.R. 769 **V**

(e) Insulting a wife in the street, so grossly as to cause her to be taken to be a prostitute, was formerly allowed to be cruelty, but according to recent rulings this would not by itself amount to cruelty. *Milner v. Milner*, (1861), 4 Sw. & Tr. 240. **W**

(f) Nor spitting in her face would so amount *Cloborn v. Cloborn*, (1629), Het 149, *D'Aquila (Lady) v. D'Aquila (Baron)*, *supra*, *Saunders v. Saunders*, (1847), 1 Rob. Eccl. 549, 562 **X**

(g) Nor such conduct as would justify her refusal to co-habit, is, by itself, a sufficient cause for relief *Russell v. Russell*, *supra*, (1897), A.C. 395, compare *Holmes v. Holmes*, (1755), 2 Lee 116 **Y**

(h) Nor would drunkenness, *per se*, amount to cruelty. *Chesnutt v. Chesnutt*, *supra*, *Scott v. Scott*, (1860), 29 L.J. (P. M. & A.) 64 (wife's); *Hudson v. Hudson* (1863), 3 Sw. & Tr. 314, but see the more modern view expressed in *Walker v. Walker*, 31 L. J. P. & M. 117 **Z**

**N.B.**—But a wife or husband is entitled to the protection of the Court against acts of cruelty, committed by a husband or wife, when under the influence of drink. *March v. March*, (1858), 1 Sw. & Tr. 312; *Power v. Power*, (1865), 34 L. J. (P. M. & A.) 137, *Walker v. Walker*, *supra*. **A**

## III.—Acts that amount to cruelty under special circumstances.

(1) Certain acts, each in itself not cruel may accumulate and amount to cruelty.

(a) Continued acts of ill-usage, none of them, in themselves, sufficient to support a charge, may accumulate until a case of cruelty arises. *Power v. Power*, (1865), 34 L.J. (P. M. & A.) 137. **B**

(b) Such acts, however, if only continued for a short time, may be due to circumstances of the moment, and cause no real danger to the life, health, or even future happiness of the wife or husband. *Plowden v. Plowden*, (1870), 23 L.T. 266, *Oliver v. Oliver*, (1801), 1 Hagg. Con. 361, *Per Sir William Scott*, at p. 371. **C**

## 9.—“Cruelty”—(Continued).

## III.—Acts that amount to cruelty under special circumstances—(Continued)

- (c) Sometimes, acts which will not under ordinary circumstances amount to cruelty have been held to be such, under the peculiar circumstances in which the acts charged were committed. The following acts are examples.
- (i) The communication of a venereal disease. See *Doan v. Doan*, 1 P. & D. 231; *Brown v. B.*, (*Ibid.*) 46, *Collett v. C.*, 1 Curt. 778, *Crocci v. C.I.E. & A.* 121, *Morphy v. M.*, 1 P. & D. 702. D
  - (ii) Spitting. See *D'Aquila v. D.A.* 1 Hagg. E.R. supp. 776, and *Waddell v. W.*, 31 L.J. Mat. 123. E
  - (iii) Where a blow was aimed which missed its object. *D'Aquila v. D.A.*, ante, *Holden v. H.*, 1 Hagg. 458. E
  - (iv) Adultery in the household. *Cousen v. C.*, 34 L.J. Mat. 139. G
  - (v) Excessive marital intercourse. *Evans v. E.*, 1 Hagg. C.R. ante. H
  - (vi) Insults and violent temper, etc., causing mental anguish, *Knight v. K.*, 34 L.J. Mat. 112, *Power v. P.*, 31 L.J. Mat. 138, *Sarkiss v. S.*, Times, June 28, 1884. H
  - (vii) Enforcing the wife's prostitution. *Coleman v. C.*, 35 L.J. Mat. 37. H
  - (viii) Leading others to think that the wife was a prostitute. *Milner v. M.*, 31 L.J. Mat. 159. K
  - (ix) The husband's madness. *Cutts v. C.*, 27 L.J. Mat. 86, *Martin v. M.*, 29 L.J. Mat. 106, *Dysart v. D.*, 1 Rob. 116, *Holden v. H.* ante, *Hull v. H.*, 3 Sw. & Tr. 349, *White v. W.*, 1 Sw. & Tr. 592. L
  - (x) Drunkenness on the part of the husband. *Marsh v. M.*, 28 L.J. Mat. 13, *Hudson v. H.*, 3 Sw. & Tr. 314, 33 L.J. Mat. 6. M
  - (xi) Husband's constant drinking. *Power v. Power*, (1865), 34 L.J. (P. M. & A.) 137. N
  - (xii) Blows inflicted on the wife which are not of a serious nature (*Ibid.*) O
  - (xiii) Inflicting bruises on the wife. (*Ibid.*) P
  - (xiv) Pretending to cut wife's throat. (*Ibid.*) Q  
See also, Laws of England, Vol XVI, p. 474 note. R
  - (xv) Threats by the husband. *Birch v. B.*, 42 L.J. Mat. 24, *Carpenter v. C.*, *Miller, J.R.* 160, *Hulme v. H.*, 2 Add. 27, *D'Aquila v. D.A.*, 1 Hagg. E.R. Supp. 775. S
- (d) The following also have been held not to be valid grounds for relief except on the grounds of cumulative or constructive cruelty—
- (i) Mere vulgar, or even obscene, abuse. *D'Aquila (Lady) v. D'Aquila (Baron)*, (1794), 1 Hagg. Ecc. 773, 775, *Dysart (Earl) v. Dysart (Countess)*, (1844), 1 Rob. Eccl. 106, *Chesnutt v. Chesnutt*, (1851), 1 Ecc. & Ad. 196, and see *Barlee v. Barlee*, (1822), 1 Add. 301, 305. T
  - (ii) Or false accusations of adultery. *Durant v. Durant*, (1825), 2 Rob. Eccl. 733; *Walker v. Walker*, (1898), 77 L.T. 715 (pre-marital); *Jeapes v. Jeapes*, (1903), 89 L.T. 74. U
  - (iii) False accusation of incestuous adultery. *Gale v. Gale*, (1852), 2 Rob. Eccl. 421; *Bray v. Day*, (1828), 1 Hagg. Ecc. 163. V
  - (iv) False accusation of unnatural practices. *Russell v. Russell*, (1895), P. 315, C. A., (1897) A.C. 395. W

## 9.—“Cruelty”—(Continued).

## III.—Acts that amount to cruelty under special circumstances—(Continued).

## Attempts of husband to debauch his own female servants.

- (v) The attempts of a husband to debauch his own female servants “are a strong act of cruelty, perhaps not alone sufficient to divorce, but which might weigh, in conjunction with others, as an act of considerable indignity and outrage to his wife’s feelings.” *Popkin v Popkin*, 1 Hagg. 766. X, Y

## MISCELLANEOUS.

## (1) Revival of condoned cruelty by adultery and condoned adultery by subsequent cruelty.

In the Divorce Court, as in the Ecclesiastical Courts, cruelty will revive condoned adultery and *Vice Versa*. *Palmer v. Palmer*, 2 S. & T. 61, 29 L.J.P. 124, 2 L T 363. Z

## (2) Condoned adultery and desertion—Revival of.

Condoned adultery may be revived by subsequent desertion, and condoned desertion by subsequent adultery. *Blandford v. Blandford*, 8 P.D. 19; 52 L.J.P. 17; 48 L.T. 238. A

## (3) Revival of condoned cruelty by subsequent cruelty

Subsequent cruelty was held to revive condoned adultery. *Moore v. Moore*, (1892), p 382; 62 L.J.P. 10, 67 L T. 530 B

## (4) Acts that would revive condoned offences.

Slighter acts than would suffice to found an original suit are sufficient to revive condoned cruelty. *Cooke v. Cooke*, 3 S. & T. 26, 32 L.J.P. 154 8 L.T. 644, on appeal 3 S. & T 246. C

## (5) Condoned adultery revived by undue familiarities with stranger.

Condoned adultery might be revived by familiarities falling short of actual adultery. *Winscome v. Winscome*, 3 S. & T. 380; 33 L.J.P. 45, 10 L. T. 100, *Ridgway v. Ridgway*, 29 W.R. 612. D

## (6) Harsh treatment revives condoned cruelty.

So also harsh and degrading treatment, short of personal violence, would revive former acts of cruelty. *Curtis v. Curtis*, 1 S. & T. 192. E

## (7) Revival of former acts of cruelty by subsequent threats.

Subsequent threats, which satisfy the Court that further co-habitation would be attended with danger to the party threatened, but not otherwise will revive former acts of violence. *Bostock v. Bostock*, 1 S. & T. 221, 27 L.J.P. 86. F

## (8) Habitual unkindness revives condoned cruelty.

Habitual unkindness, without blows, was held to revive condoned cruelty. *Mytton v. Mytton*, 11 P.D. 141, 57 L.T. 92. G

## 10.—“Desertion.”

## (1) Desertion, what constitutes.

- (a) Desertion, according to this Act, “implies an abandonment against the wish of the person charging it.” 4 C. 260 (276)=3 C.L.R. 484. G-1
- (b) There is a great difficulty in giving a precise definition of desertion, and cases may arise in which it will be difficult to say whether the facts

## 10.—“Desertion”—(Continued).

proved do or do not constitute desertion within the meaning of the statute. *Thompson v. T.*, 27 L J Mat. 65, *Graves v Graves*, 33 L.J. Mat. 70. H-I

- (c) “To desert is to forsake or abandon. But what degree or extent of withdrawal from his wife’s society constitutes a forsaking or abandonment of her? This is easily answered in some cases, not so easily in others, for the degree of intercourse which married persons are able to maintain with each other is various. It depends on their walk in life, and is not a little at the mercy of external circumstances. . . . From these considerations it is obvious that the test of finding a home for the wife and living with her is not universally applicable in pronouncing ‘desertion’ by the husband, nor does any other criterion suitable to all cases present itself.” *Williams v. Williams*, 3 Sw. & Tr. 548. J
- (d) ‘Desertion means abandonment and implies an actual withdrawal from a co-habitation that exists, the word carries with it an idea forsaking or leaving, and is hardly satisfied by the negative position of standing apart.’ *Fitzgerald v Fitzgerald*, L.R. 1 P & D. 697 K
- (e) It means something equivalent to leaving a wife destitute. *Haswell v. Haswell and Sanderson*, 29 L.J. Mat. 24, *Cudlipp v. Cudlipp*, 27 L.J. Mat. 61, *Ashope v. Ashope*, 29 L.J. Mat. 27, *Harris v. Harris*, 31 L.J. Mat. 6 L
- (f) The husband must go away against the will of the wife. M. C. A. 1884, 47 and 48 Vict. c 68, App. A. See, also, S. 3 of this Act M
- (g) In order to constitute desertion, there must be deliberate purport of abandonment of “conjugal society.” *Macqueen on Divorce*, p 202, cited in argument 4 C 260 (265) = 3 C L.R. 484 N
- (h) To amount to desertion, the withdrawal from co-habitation must be voluntary. *Beavan v. Beavan*, 2 S. & T. 652, 32 L J P & M. 36. O
- (i) To constitute desertion, the act relied on must be done against the will of the person setting up the desertion. Evidence of separation only tends to prove desertion. *Ward v Ward*, 1 S.L.T. 185, cited in argument in 4 C 260 (266) = 3 C L R 484. P
- (j) As long as a husband treats his wife as a wife by maintaining a degree and measure of intercourse according to his means, he cannot be said to have deserted. *Williams v Williams*, 3 S.L.T. 547, cited in argument in 4 C 260 (266) = 3 C L R 484 Q
- (k) No one can desert who does not actually and wilfully bring to an end an existing state of co habitation. *Fitzgerald v Fitzgerald*, 1 P & M. 694, cited in 3 C 485 (491) = 3 C L R 552 R
- (l) If the state of co-habitation had ceased to exist, whether by the adverse act of husband and wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed. *Fitzgerald v Fitzgerald*, 1 P & M. 694. S
- m) The refusal by either of the request of the other, to resume conjugal relations, does not constitute the offence of desertion. *Fitzgerald v. Fitzgerald*, 1 P. & M. 694. T
- n) A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce in which she failed. They never afterwards resumed co-habitation, and neither



10.—“Desertion”—(Continued).

of them took any step for the purpose of bringing about a reconciliation. The conduct of the husband in holding aloof from the wife, and making no demand for co-habitation, was held not to constitute desertion. *Fitzgerald v. Fitzgerald*, 1 P. & M. 694. U

(a) Mere absence does not necessarily cause a breach of co-habitation. 3 C. 185 (191)=1 C.L.R. 552 Y

(p) It is desertion if one party to a marriage, without the consent or against the will of the other, wilfully, without cause or reasonable excuse, makes the other live apart for two years or more. *Smith v. Smith*, (1859), 1 Sw. & Tr. 359, *Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D 694, *Beer v. Beer*, (1906), 54 W.R. 561; *Thompson v. Thompson*, (1858), 1 Sw. & Tr. 231. W

(q) As regards what constitutes desertion, see also *Williams v. Williams*, 3 S. & T. 547 and *Lawrence v. Lawrence*, 2 S. & T. 575, cited in argument in 4 C. 260 (265)=3 C.L.R. 484. X

(2) English decisions to be referred to in deciding whether an act constitutes desertion.

(a) Abandonment is not defined in the Act, but the Indian Statute adopts the view taken by the Courts in England in construing the English Act. 4 C. 260 (276)=3 C.L.R. 484. Y

(b) The expression “against the wish” is capable of two meanings. It may be construed either as contrary to an actually expressed wish of the person charging, and notwithstanding the resistance or opposition of such person, or it may mean simply an act done when the wish of the person affected by it is the other way. 4 C. 260 (276)=3 C.L.R. 484. Z

N.B.—All the English cases seem to put the stronger and more definite construction upon the words 4 C. 260 (276)=3 C.L.R. 484. A

(c) As the Indian Legislature has adopted the language of the English decisions, our Courts ought to interpret them in the same way as do the English Courts. 4 C. 260 (276)=3 C.L.R. 484. B

(d) The decisions of the Probate and Divorce Courts in England ought to guide the Courts in India, except in cases involving peculiar circumstances of Anglo-Indian life. 4 C. 260=3 C.L.R. 484. C

(3) Intention to desert.

In every case of desertion, there must be an intention to desert. The question of intention is one of fact, or of inference from facts, necessarily varying with the position of the parties. *French-Brewster v. French-Brewster and Gore*, (1889), 62 L.T. 609, *Lawrence v. Lawrence*, (1862), 2 Sw. & Tr. 575, *Williams v. Williams*, (1864), 3 Sw. & Tr. 547. D

(4) Desertion implies abandonment and want of consent.

(a) Desertion by the Indian Divorce Act, implies “an abandonment against the wish of the person charging it,” which, in effect, introduces into the Indian Statute the view of the English Courts in their construction of the English Act 4 C. 260=3 C.L.R. 484. E

(b) The abandonment, in desertion, must be against an actively expressed wish of the person charging and, notwithstanding the resistance or opposition of such person. 4 C. 260=3 C.L.R. 484. F

## 10.—“Desertion”—(Continued).

## (5) Desertion, commencement of.

- (a) Desertion commences when the intention to desert is complete. *Gatehouse v. Gatehouse*, (1867), L.R. 1 P. & D. 331. **G**
- (b) In the above case desertion was held to begin when the husband repudiated his wife in favour of a mistress. *Gatehouse v. Gatehouse*, (1867), L.R. 1 P. & D. 331, followed in *Stickland v. Stickland*, (1876), 35 L.T. 767. **H**
- (c) Desertion begins when the husband makes up his mind to abandon the wife and live with another woman. *Gatehouse v. Gatehouse*, L.R. 1 P. & D. 331, cited in argument in 4 C. 260 (265). **I**
- (d) It is difficult to conceive a desertion of which the person deserted is unconscious. It must be taken to commence when the person deserted becomes aware of it. 4 C. 260 (279). **J**
- (e) Desertion commences not at the time when the husband and wife ceased to co habit, but at the time when the husband made up his mind to abandon the wife. *Gatehouse v. Gatehouse*, 1 P. & M. 331. **K**

## (6) Desertion implies a prior living together.

Desertion at any rate implies that the parties are living together at the time when the desertion takes place. *Per Stephen, J. in Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D. 694. **L**

## (7) Previous co habitation not necessary to desertion.

Previous co habitation is not necessary to establish the offence of desertion. *De Lanbenque v. De Lanbenque*, 1899, p. 42. **M**

## (8) Desertion once begun not stopped by subsequent imprisonment.

- Desertion, once begun, may continue although imprisonment, or the fear of it, may prevent return *Drew v. Drew*, (1888), 13 P.D. 97. **N**

## (9) What is desertion in one may not be desertion in another.

- (a) The facts which constitute desertion vary with the circumstances and mode of life of the parties. *Williams v. Williams*, 3 S. & T. 547. **O**
- (b) So long as a husband treats his wife as a wife by maintaining such degree and manner of intercourse with her as might naturally be expected from a husband of his calling and means, he cannot be said to have “deserted” her. *Williams v. Williams*, 3 S. & T. 547. **P**
- (c) The absence of a husband in his ordinary occupation as a mariner does not constitute desertion. *Ex parte Albridge*, 1 S. & T. 88. **Q**
- (d) But a person who is not a mariner nor one whose occupations require his absentsing himself from the wife, can have no such excuse. (*Ibid.*) **R**

## (10) Husband not entitled to forcibly shut up wife.

A husband is not entitled to prevent his wife from leaving him by forcibly shutting her up. *R v. Jackson*, (1891), 1 Q.B. 671, C.A. **S**

## (11) Proof of desertion.

- (a) A wife is bound, when seeking to prove desertion, to give evidence of conduct on her part, showing unmistakably that such desertion was against her will. 4 C. 260=3 C L.R. 484. **T**
- (b) The facts relied on to prove desertion must be something beyond mere adultery; and the wife would be bound to give evidence of conduct on

## 10.—“Desertion”—(Continued).

her part, showing, unmistakably, that the desertion was against the will. In order to obtain a divorce, a wife, if she cannot prove cruelty, must prove desertion in addition to adultery, and this cannot mean adultery plus adultery. 4 C. 260=3 C.L.R. 484. U

## (12) Evidence of marriage.

The bare assertion of the petitioner is not sufficient proof of her marriage in order to satisfy the requirements of the Act. 16 M. 455 (456). Y

## (13) Decision in undefended cases, value of.

In the Divorce Division, decisions in undefended cases without argument have not been treated as binding. *Smith v Smith*, (1905), p. 249. W

## (14) Courts cannot consider past desertion.

Courts cannot take into consideration an actual desertion in past years which has been terminated by a return to co habitation. *Ex parte Albridge*, 1 S. & T. 83. X

## (15) Petition for dissolution of marriage—Decree for judicial separation.

Where a husband and wife separated, purely for reasons of convenience, but with no intention of a permanent separation, and the husband was living in adultery with another woman, during the entire period of separation, unknown to the wife, and once, in the interval, communicated his willingness to assist her in securing a divorce, and where the wife, though not openly consenting to the separation, was never anxious to resume conjugal relations with her husband, it was held that she was entitled only to judicial separation, and not to a decree for dissolution of marriage, as all the facts relied upon by her as desertion amounted only to a prolonged systematic adultery. 4 C. 260=3 C.L.R. 484 Y

## (16) Dissolution—Desertion before the adultery complained of.

The Court will not dissolve a marriage on the ground of the wife's adultery when satisfied that before the date of the adultery complained of, the husband deserted her without reasonable excuse. *Yeatman v. Yeatman*, 2 P. & M. 187. Z

## (17) Decree for restitution disobeyed—Effect.

A decree of restitution of conjugal rights, if disobeyed, entitles the petitioner to a decree of judicial separation. M.C.A. 1884, C. 68, App. A; and *Oldroyd v Oldroyd*, 1896, p. 175. A

## EXAMPLES.

## A.—Acts amounting to desertion.

## (1) Going abroad to India and ceasing to correspond with wife.

(a) Where the husband, being in difficulties in the first instance, enlisted and went to India, but never, after discharge, corresponded with his wife or contributed to her support, he was held guilty of desertion. *Henty v. Henty*, 33 L.T. 263. See, also, *Smith v. Smith*, 58 L.T. 639. B

(b) A husband left his wife to serve in the army abroad, but ceased after a time to correspond with her or to contribute anything to her support. Held, that though he left her for a legitimate purpose, his subsequent

## 10.—“Desertion”—(Continued).

## A.—Acts amounting to desertion—(Continued).

conduct clearly showed his desire to break off all association with her, and that, therefore, he had deserted her. *Henty v. Henty*, 33 L.T.N.S. 263; 24 W.R. Dig. 91. C

## (2) Absence after stipulated time.

If absence for a time be agreed to, and that time be exceeded, desertion may afterwards arise *Basing v. Basing*, (1864), 3 Sw. & Tr. 516. D

## (3) Bringing to an end an existing state of conjugal intercourse.

Co-habitation does not necessarily imply continued residence daily and nightly under one roof. Circumstances, such as domestic service, business duties, may separate husband and wife, and there may yet be an existing state of co-habitation, and the husband or wife who brings this state of things to an end may become guilty of desertion. *Bradshaw v. Bradshaw*, (1897), p. 24, 66 L.J.P. 31, 75 L.T. 391; *Huxtable v. Huxtable*, (1899), 68 L.J.P. 83, *Kay v. Kay*, (1904), p. 382, 73 L.J.P. 108, 91 L.T. 360 E

## (4) Constructive desertion.

While if one spouse be forced by the conduct of the other to leave home, that may, in due time, become desertion by the offender. *Graves v. Graves*, (1864), 3 Sw. & Tr. 350. F

N.B.—This is sometimes called “constructive desertion.”

## (5) Involuntary absence.

For a case in which . was held to constitute desertion. *Townsend v. Townsend*, 3 P. & M. 129 G

## (6) Failure to comply with a reasonable condition before return of the deserting party.

If either husband or wife fail to comply with a reasonable requirement, insisted upon by the other as a condition of return to co habitation, desertion will continue, although it would be otherwise if the condition were unreasonable. *Dallas v. Dallas*, (1874), 43 L.J. P. & M. 87, *Dickinson v. Dickinson*, *supra* H

## (7) Refusal of husband to abandon his bad habits.

The husband's refusal to abandon his bad habits which compelled the wife to leave his house was held to amount to desertion. *Gibson v. Gibson*, 29 L.J.P. & M. 25 cited in argument in 4. C. 260 (264) = 3 C.L.R. 484. I

## (8) Occasional visits, no excuse for desertion.

Living secretly with another woman, and occasionally visiting his wife without intercourse, may amount to desertion. *Garcia v. Garcia*, (1888), 13 P.D. 216. J

## (9) Payment of allowance to deserted wife no excuse for desertion.

- A husband must not abandon the society of his wife altogether without good cause, and even if, after doing so, he pays her an allowance regularly, that is no answer to the charge of desertion *Macdonald v. Macdonald*, 4 S & T. 242. K

## (10) Desertion, inference of, from letters and actions.

For a case where desertion was inferred from the husband's letters and actions, see *Lawrence v. Lawrence*, (1862), 2 Sw. & Tr. 575. L

10.—"Desertion"—(Continued).

A.—Acts amounting to desertion—(Continued).

- (11) Words of an injured wife uttered in disgust not to be taken as evidence of intention.

The husband leaving his wife and expressing his intention not to return to co-habitation was held to amount to desertion; although, the wife, after desertion, made use of casual expressions purporting that she did not desire to see him. *Meura v Meura*, 35 L.J. P. & M. 33 cited in argument, 1 C. 260 (264) = 3 C.L.R. 481. **M**

- (12) Separation, innocent at first may become desertion afterwards.

(a) Though the separation be not desertion in its inception, it may become such afterwards *Gatehouse v. Gatehouse*, L.R. 1 P. & D. 331, 36 L.J.P. 121; 16 L.T. 34, *Stickland v. Stickland*, 35 L.T. 767. See, also, *Cudlipp v. Cudlipp*, 1 S. & T. 229, 27 L.J.P. 61. **N**

(b) Where a husband leaves his wife, in the first instance, for some good purpose, with her consent, and afterwards breaks off all connection with her and lives in adultery, such conduct amounts to adultery. *Gatehouse v. Gatehouse*, L.R. 1 P. & D. 331; 36 L.J.P. 121, 16 L.T. 34; *Stickland v. Stickland*, 35 L.T. 767. See, also, *Cudlipp v. Cudlipp*, 1 S. & T. 229, 27 L.J.P. 61. **O**

B.—Acts not amounting to desertion.

- (1) Where the husband's separation is merely to follow his calling in life.

Where a husband leaves his wife merely to follow his calling in life as a sailor, he is not guilty of desertion, and, if he were, a return of co habitation would put an end to it, so that a subsequent absence would have to be judged upon the evidence relating to it alone. *Ex parte Albridge*, 1 Sw. & Tr. 88. **P**

- (2) Absence on business.

(a) Mere absence on business does not amount to desertion. *Henty v. Henty*, 33 L.T. 263. **Q**

(b) But the nature and extent of such absence and the conduct of the husband during the absence must be considered (*Ibid*) **R**

(c) Where a husband having fallen into difficulties, enlisted and went with his regiment to India, where he was subsequently discharged, and ceased to correspond with, or contribute to the support of, his wife, his conduct was held to amount to desertion of his wife. *Henty v. Henty*, (1875), 33 L.T. 263. **S**

- (3) Husband leaving a wife in order to avoid arrest.

(a) Where the husband left the wife to avoid arrest, but was imprisoned, and was afterwards unable to support her, held there was no desertion. *Townsend v. Townsend*, (1873), L.R. 8 P. & D. 129, 131. **T**

(b) But where the husband was in difficulties and got himself enlisted, but was subsequently discharged, his not returning after such discharge would be desertion. *Henty v. Henty*, (1875), 33 L.T. 263. **U**

- (4) Imprisonment of husband and release—wife not willing to resume co habitation.

(a) A husband separated from his wife, with her consent, to avoid arrest for theft, and was afterwards imprisoned. After his release he desired to

10.—“Desertion”—(Continued).

B.—Acts not amounting to desertion—(Continued).

return to co habitation with his wife, but she refused. The Court held that he had not deserted her. *Townsend v. Townsend*, L.R. 3 P. & D. 129; 42 L.J.P. 71, 29 L.T. 254. Y

(b) Where a husband deserted his wife and was subsequently sentenced to penal servitude, and before his time expired the wife petitioned for dissolution, on the ground of adultery with desertion, the Court held that desertion was established. *Astrove v. Astrove*, 29 L.J.P. 27. See, also, *Drew v. Drew*, 13 P.D. 97, 57 L.J.P. 64, 58 L.T. 943. W

(5) Withdrawal from the wife's society under pressure of circumstances.

(a) The withdrawal from the wife's society under pressure of circumstances is not abandonment against her will. *Townsend v. Townsend*, L.R. 3 P. & M., 129 cited in 3 C. 485 (491)=1 C. L. R. 552. X

(b) But subsequent events may change the original separation into a desertion. 3 C. 485 (491)=1 C. L. R. 552 *Fitzgerald v. Fitzgerald*, L.R. 1 P. & D. 694. Y

(6) Absence from ill-health

A husband and wife were co-habiting in Jamaica, where the husband held an appointment, when the wife was obliged to come to England in consequence of ill-health. The husband afterwards, in 1851, asked her to return, and provided funds for her passage, but her health was not sufficiently re-established to enable her to accept his offer. She had no further communication with him, but in 1856 he made her an allowance, which he continued to pay until 1860. Held, that as she had never made any offer to return to him after refusing his offer in 1851, he had not deserted her. *Keech v. Klock*, 1 P. & M. 641. Z

(7) Temporary separation for mutual convenience.

(a) A mere temporary separation between husband and wife for mutual convenience does not effect a cessation of co habitation, or alter the marital relations. *Chudley v. Chudley*, 69 L.T. 617. But see, also, *Fitzgerald v. Fitzgerald*, L.R. 1 P. 694. A

(b) “There are cases in which the parties may have innocently ceased for a time to be actually living together, separated by the calls of everyday life or the exigencies of public duty, and the husband or the wife, taking advantage of the separation, may have purposely rejected all subsequent opportunities of coming together again, and thus may constitute ‘desertion.’ For, in truth, in such cases, the state of co habitation was not, in the first instance, wholly relinquished, but only suspended till a fitting occasion for its resumption, and purposely to reject all such occasions is practically to abandon it.” *Per Lord Penance in Fitzgerald v. Fitzgerald*, L.R. 1 P. 694 B

(8) Neglecting opportunities of consorting with wife.

Mere—is not necessarily to desert her. *Williams v. Williams*, 3 S. & T. 547; 38 L.J.P. 172 C

(9) Neglect to pay allowance.

Neglect or refusal to pay an allowance under a deed does not constitute desertion. *Pape v. Pape*, (1887), 20 Q.B.D. 76. D

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## (10) Offer of compensation to deserted wife—Effect of.

Where a husband left his wife and offered her 100 £, on condition that she would not molest him in future, and she accepted the money the Court held there was no desertion. *Cooper v. Cooper*, 33 L.T. 264. *Buckmaster v. Buckmaster*, L.R. 1 P. & D. 713; 38 L.J.P. 73; 21 L.T. 231. E

## (11) Living apart of the spouses.

The mere living apart of the spouses is not desertion in either. *Ward v. Ward*, 1 Sw. & Tr. 185. F

## (12) Mere living with another woman.

The mere fact of a man leaving his wife to go and live with another woman does not necessarily constitute desertion. *Ward v. Ward*, 1 S.M.T. 185. 27 L.J.P. & M. 63. G

## (13) Wife alleging husband's adultery and leaving him.

Where the wife alleging that her husband was guilty of adultery refused to live with him, and the husband never returned, it was held that there was no desertion on his part. *Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D. 694. H

## (14) Intermittent intercourse, effect of.

Intermittent intercourse usually prevents systematic absences from becoming desertion. *Farmer v. Farmer*, (1884), 9 P.D. 245, but see *Thurston v. Thurston*, (1910), 26 T. L. R. 388. I

## (15) Suit for divorce, failure of—Parties not resuming co habitation afterwards

Where a wife instituted a suit for divorce, in which she failed, and the parties never afterwards resumed co-habitation, the Court held there was no desertion by the husband. *Fitzgerald v. Fitzgerald*, L.R. 1 P. & D. 694, 38 L.J.P. 14, 19 L.T. 575. See, also, *Taylor v. Taylor*, 44 L.T. 31. J

## (16) Refusal to return—Effect of

If a party who has brought about a separation wishes to put an end to it, and is refused, the process is a suit for restitution of conjugal rights; for the other party's refusal of a request to return does not constitute desertion. *Kay v. Kay*, *supra*, *Per Gorell Barnes, J.*, at p. 390. K

(17) Refusal of *bona fide* offer to return, effect of.

(a) A wife who has refused a *bona fide* offer of her husband to return cannot, even if he has committed adultery, allege desertion. *Lodge v. Lodge*, (1890), 15 P.D. 159. L

(b) An offer to return, however, must be distinct and *bona fide*, but, when so made and neglected, the onus of proof is shifted from the party making such offer. *Keech v. Keech*, (1868), L.R. 1 P. & D. 641; *Fitzgerald v. Fitzgerald*, (1869), L.R. 1 P. & D. 694, *Cudlipp v. Cudlipp*, (1858), 1 Sw. & Tr. 229. M

## (18) Party to an unconsummated marriage may be guilty of desertion.

There may be desertion even where the marriage has never been consummated. *De Laubenque v. De Laubenque*, (1899), p. 42; *Lee Shires v. Lee Shires*, (1910), 54 Sol. Jo. 874. N

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## (19) Other cases held to be no desertion.

In the following cases it was held that there was no desertion—

- (i) Where a husband and wife parted of necessity,
- (ii) Where the husband left home to seek employment,
- (iii) Where the wife left her husband on account of her health. *Thompson v. Thompson*, 1 S & T 231; 27 L.J.P. 65. *Keech v. Keech*, L.R. 1 P. & D. 641, 39 L.J.P. 7, 19 L.T. 462. O

## (20) Desertion cannot commence when parties live apart.

Desertion cannot have its inception when the parties are living in a state of separation. *Fitzgerald v. Fitzgerald*, L.R. 1 P. & D. 694. *Pape v. Pape*, (1887), 20 Q.B.D. 76, *Per Stephen, J.*, at p. 79. P

## A—ELEMENTS OF DESERTION

## I. WANT OF CONSENT OF THE PARTY DESERTED.

## (1) Separation on consent is no desertion.

- (a) Where the parties separate by mutual consent, it is no desertion in either. *Taylor v. Taylor*, 14 L.T. 31, see, also, 3 C. 485 Q
- (b) In order to constitute “desertion” there must be an active withdrawal from an existing cohabitation, and when once cohabitation has ceased to exist by mutual consent desertion is impossible—at least, until it has been resumed—even though the one party has called upon the other to resume cohabitation and the other party has refused. *Reg v. Le Resche*, 65 L.T. 602 R
- (c) Where the separation is the act of the wife or where the wife, of her own free will, assents to a complete separation, there can be no desertion. 3 C. 485 = 1 C.L.R. 552. S
- (d) But, where all attempts of the wife to live with her husband, notwithstanding his gross misconduct, were completely thwarted by the husband and where the wife had done, not only all that any woman could reasonably be expected to do, but, from a legal point of view, enough to show that the separation was neither brought about by her, nor in accordance with her wishes, she is entitled, on the ground of desertion, to a decree for dissolution of marriage, and not for judicial separation alone. 3 C. 485 = 1 C.L.R. 552. T
- (e) Where, two years and two months after a husband left his wife, a deed of separation was executed by the parties, by which she agreed to live apart from him, but there was no covenant not to sue or condone past offences, the Court granted the wife a judicial separation on the ground of desertion. *Moore v. Moore*, 12 P.D. 193, 56 L.J.P. 104, 57 L.T. 568. U

## (2) Consent obtained by fraud is no consent.

If a husband, determining to abandon his wife, were fraudulently, by a show of an agreement which he never intended to fulfil, to induce her to consent to a separation, such consent would be no answer to the charge of desertion. *Crabb v. Crabb*, 1 P. & M. 601. Y



## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## I.—WANT OF CONSENT OF THE PARTY DESERTED—(Continued).

## (3) Conduct evidencing consent to separation.

(a) Where the wife, during a period of a separation of sixteen years never applied to the husband for a renewal of cohabitation, *held* she could not charge her husband with desertion. *Thompson v. Thompson*, 1 Sw. & Tr. 231. W

(b) Where a man left his wife in full possession of the family house, and subsequently, with her assent, visited his children there, but did not remain or return to cohabitation with his wife or hold any communication with her, it was held that his conduct was not evidence of desertion, but rather of separation by mutual consent. *Taylor v. Taylor*, 44 L T 31. X

## (4) Consent wrung by misconduct, no consent.

(a) A husband none the less “deserts” his wife because she uses expressions to the effect that she has no wish to see him again, when such expressions have been wrung from her by her husband’s misconduct, if the desertion be otherwise proved. *Meara v. Meara*, 35 L J. P. & M. 33. Y

(b) Where a wife reproached her husband for his connection with another woman, and, on his replying that he wished to go away and live with the woman in question, told him that he could go if he liked, but made him swear to return when he became tired of the other, it was held that the husband, who had never returned, had been guilty of desertion. *Harland v. Harland*, 32 L J. P. & M. 65. Z

**N.B.**—For a case where a wife obtained relief as for desertion, in which case it did not appear that the desertion was “contrary to the wife’s will.” See *Macqueen on Divorce*, pp 306-307 cited in argument in 4 C. 260 (265). **N.B.** But see the definition of Desertion in the Act.

## (5) Words of consent uttered in disgust, no evidence of consent.

Where the wife said to her husband “go to your mistress if you like, and when you are sick of her come back to me” it was held that such words did not necessarily imply a consent on the part of the wife. *Harland v. Harland*, (1863), 32 L J. (P.M. & A.) 65. A

## (6) Wife forced to leave home by husband’s misconduct.

In the following cases although it was the wife that left the husband, yet the Court found that it was the husband who deserted the wife, as the circumstances of the case were such that the wife had to leave the husband’s home owing to his misconduct.—

## (1) NEGLIGENCE BY HUSBAND AND HIS BRINGING A MISTRESS INTO THE HOUSE.

Where the husband neglected the wife and brought a mistress into the house, on which the wife left the husband’s abode, *held* it was the husband that deserted the wife, not the wife, the husband. *Graves v. Graves*, (1864), 3 Sw. & Tr. 350. B

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## I.—WANT OF CONSENT OF THE PARTY DESERTED—(Continued).

## (ii) REFUSAL BY HUSBAND TO DISCHARGE SERVANT WITH WHOM HE HAD COMMITTED ADULTERY

Where the husband refused to discharge a servant with whom he had committed adultery, and the wife left the husband in consequence of such conduct on his part, *held* that her conduct did not amount to desertion. *Pizzala v. Pizzala*, (1896), Times, 5th June; *Koch v. Koch*, (1899), p. 221. C

## (iii) HUSBAND COMMITTING ADULTERY

(a) A wife is not bound to stay with her husband who persists in adultery. It is not material whether the adultery is committed at home or abroad. *Sickert v. Sickert*, (1899), p. 278. D

(b) If a wife, owing to her husband's conduct, is not bound to go back, she is entitled to treat the separation as desertion. *Failes v. Failes*, (1906), p. 326. E

(c) A husband “deserts” his wife although the wife has been compelled by his conduct to leave the house. *Dickenson v. Dickenson*, 62 L.T. 330. F

## (7) Husband forced to leave wife owing to her misconduct.

If the wife's conduct has been such that the husband cannot reasonably be expected to live with her, he cannot be said to desert her without reasonable cause, although her conduct may not actually amount to a matrimonial offence. *Russell v. Russell*, (1895), p. 315, 64 L.J. P. & M. 105, *Oldroyd v. Oldroyd*, 65 L.J. P. & M. 113. G

## (8) Where husband came and went as visitor.

In a case where the husband came and went as a visitor, it was held that there was no desertion. *Taylor v. Taylor*, (1881), 44 L.T. 31. H

## (9) Wife accepting money on condition of her not objecting to husband's separation.

A husband having refused to cohabit with his wife, or to provide a house for her, offered her £100 on condition that she would not molest him in future by insisting on her conjugal rights. She agreed to the condition, and received the money, and they never afterwards cohabited.—The Court held that these facts did not constitute desertion on the part of the husband. *Buckmaster v. Buckmaster*, 1 P. & M. 713. I

## (10) Husband in prison—Wife unwilling for conjugal intercourse—No desertion in husband.

A husband having committed thefts, separated from his wife with her knowledge and consent, for the purpose of avoiding arrest. He was afterwards arrested and imprisoned. Whilst he was in prison, he kept up a correspondence with his wife and made repeated endeavours to induce her to return to cohabitation. She refused, and the cohabitation was never resumed. The wife having presented a petition for dissolution on the ground of adultery coupled with desertion, the Court held that there was no desertion, the separation being involuntary on the part of the husband. *Townsend v. Townsend*, 8 P. & M. 129. J

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## I.—WANT OF CONSENT OF THE PARTY DESERTED—(Continued).

## (11) Deed of separation, effect of.

The execution of a deed of separation by the wife is inconsistent with a charge of desertion. *Crabb v. Crabb*, 1 P. & M. 601. K

## (12) Fraudulent deed is of no effect.

But a deed the execution of which was induced by fraud is of no effect. (*Ibid.*) L

## (13) Deed of separation never acted upon.

For a case in which it was held that the husband was guilty of desertion although there was a deed of separation, never acted upon, had been executed by the wife See *Coch v. Coch*, (1864), 3 Sw & Tr. 514. M

## (14) Agreement to live apart signed by parties before marriage

Where there was an agreement to live apart signed by the parties before marriage, it was held that it was not open to the husband to rely on such agreement and that a separation from him against the will of wife amounted to desertion on his part *Dagg v. Dagg*, (1882), 7 P. & D. 17. N

## (15) Resumption of cohabitation, effect of, on deed of separation

A deed of separation is avoided by a resumption of cohabitation by the parties. *Scholey v. Goodman*, 1 C. & P. 36; 8 Moore 350. O

## (16) Separation by consent may subsequently become desertion.

A separation by consent may, without reunion, subsequently become a desertion by the husband 4 C. 260 = 9 C L R 484. (3 C. 485, R). P

## (17) Court to be informed of deed of separation.

(a) If a deed of separation is, or has been, in existence, the Court should be informed of it, even though the party whose interest it apparently is to produce it does not do so *Kennedy v. Kennedy*, (1907), p. 49. Q

(b) For the Court is at liberty to consider its effect in cases of restitution of conjugal rights, or of divorce. *Kennedy v. Kennedy*, (1907), p. 49, *Dowling v. Dowling*, (1898), p. 228. R

## (18) Court to enquire whether the deed was intended to be acted upon.

Where the respondent has so acted as to make a deed practically a nullity, the Court may be thereby influenced so to treat it, *Waller v. Waller*, (1910), 26 T.L.R. 223. S

## (19) Wife bargaining away her rights, effect of.

(a) Where the wife had bargained away her right to relief, she could not establish a charge of desertion. *Nott v. Nott* (Law Rep. 1 P & M. 251) distinguished. *Parkinson v. Parkinson*, 2 P & M. 25. T

(b) Where a wife consented for a certain sum of money, and where she had executed a deed of separation, it was held that she had bargained away her relief. *Buckmaster v. Buckmaster*, (1859), L.R. 1 P. & D. 713. *Parkinson v. Parkinson*, (1869), L.R. 2 P. & D. 25. U

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## I.—WANT OF CONSENT OF THE PARTY DESERTED—(Concluded).

## (20) Cause of desertion—Maintenance of wife during separation.

(a) A husband who withdraws from cohabitation with his wife may be guilty of the offence of “desertion” although he continues to support her. *Yeatman v. Yeatman*, 1 P. & M. 489. Y

(b) The fact of the husband continuing to supply his wife with funds was held not to be a sufficient answer to a charge of wilful desertion. *Macdonald v. Macdonald*, 4 S. & T. 242, *Yeatman v. Yeatman*, L.R., 1 P. & D. 489, cited in argument in 4 C. 260 (264) and (265) = 3 C.L.R. 484. W

## 21) Allowance by wife to husband after his desertion—Deed of separation.

After a husband had deserted his wife, he wrote to her asking for assistance to save him from starving, but he refused to return to her or to allow her to come to him. She consented to make him an allowance, and a few months after the desertion they both signed a deed of separation, whereby the payment of the allowance was secured to him. The deed was not carried into effect, but she paid the allowance to him for three months, and then stopped it, because she thought that by continuing the payment she was encouraging him to keep apart from her. She afterwards wrote and asked him to resume cohabitation, which he refused to do. More than two years having elapsed since the commencement of the desertion, she filed a petition —*Held*, that as she never consented to his remaining apart from her, the desertion for two years and upwards was established. *Nott. v. Nott*, 1 P. & M. 251. X

## II. WANT OF REASONABLE EXCUSE FOR DESERTION.

## (1) The separation must be unreasonable.

The desertion of the husband or wife must be without reasonable cause. See  
• S. 3 *infra*. Y

## (2) Reasonable excuse must be grave and weighty.

A “reasonable excuse” for leaving a wife must be grave and weighty. *Yeatman v. Yeatman*, L.R. 1 P. & D. 489, 37 L.J.P. 37, 18 L.T. 415; (*Ibid.*) L.R., 2 P. & D. 187, 39 L.J.P. 77, 23 L.T. 283. Z

## (3) Examples of cases where there was held to exist reasonable excuse for separation.

## (i) SEPARATION DUE TO EXIGENCIES OF BUSINESS.

A separation due to the exigencies of business or professional or public duties is a separation with reasonable cause. *Ex parte Aldridge*, 1 S. & T. 88; *Davies v. Davies and Hughes*, 3 S. & T. 221; 32 L.J.P. & M. 111. A

## (ii) MATRIMONIAL OFFENCE.

(a) Any matrimonial offence, such as adultery, cruelty, &c., which would be an answer to a suit for restitution of conjugal rights, is a reasonable excuse. *Haswell v. Haswell*, 1 S. & T. 502; 29 L.J.P. 21; 1 L.T. 69. B

## 10.—“Desertion”—(Continued).

## B.—Acts not amounting to desertion - (Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## II.—WANT OF REASONABLE EXCUSE FOR DESERTION—(Continued).

(b) But a conviction of either party for any other criminal offence which is not of a matrimonial nature will not justify the other party deserting the convicted person. See *Williamson v. Williamson*, (1882), 7P.D. 76. C

## (iii) WIFE REFUSING TO ALLOW HUSBAND TO HAVE INTERCOURSE.

A wife has no right, without cause, to refuse to allow her husband to have sexual intercourse with her; and if she refuses to live under the same roof with him, except upon his undertaking not to exercise his full marital rights, he is justified in separating himself from her, and is not guilty of desertion if he does so. On the other hand, such conduct as above described amounts to “desertion” on the part of the wife. *Synge v. Synge*, (1900), p. 180, 69 L.J.P. 106, 83 L.T. 224; affirmed on appeal, (1901), p. 317, 70 L.J.P. 97, 85 L.T. 83. D

## (iv) CONFESSION OF ADULTERY BY WIFE.

Confession of adultery by the wife which confession the husband had good grounds to believe is reasonable excuse for his leaving her. *Faulkes v. Faulkes*, 64 L.T. 834. E

## (v) WIFE ALLOWING INDECENT LIBERTIES TO BE TAKEN WITH HER.

The fact that the wife has allowed indecent liberties to be taken with her is reasonable excuse for her husband to leave her. *Haswell v. Haswell*, 1 S. & T. 502; 29 L.J.P. & M. 21. F

## (vi) WIFE'S REFUSAL TO CONSUMMATE MARRIAGE.

The persistent and unreasonable refusal by the wife to consummate the marriage is also a reasonable excuse for desertion by husband. *Ousey v. Ousey and Atkinson*, L.R., 3 P. 223, 43 L.J.P. & M. 35. G

See also Rattigan on Divorce, 1897, p. 66 G-1

## (vii) HUSBAND INDUCED TO MARRY UNDER FALSE REPRESENTATIONS OF THE WIFE'S MEANS AND CONDITION.

For a case where a husband, who had been induced to marry his wife by her false representations as to her means and condition, was held not to have been guilty of desertion, though he had left his wife without support for seven years. See *Kennedy v. Kennedy*, 62 L.T. 705. H

## (viii) THE FOLLOWING HAVE ALSO BEEN HELD TO BE REASONABLE EXCUSES FOR THE HUSBAND LIVING APART FROM THE WIFE.—

(a) Habitual drunkenness on the part of the wife. *Beer v. Beer*, (1906), 54 W.R. 564. I

(b) Wife's refusal of intercourse. *Synge v. Synge*, (1900), p. 180 affirmed, (1901), p. 317, C.A. J

(c) Where a husband found his wife submitting to with undue familiarities with a stranger. *Haswell v. Haswell*, 1 Sw. & Tr. 502. K

(d) Where a girl of sixteen, who had married a man twenty years older than herself without the consent of her family, was removed by them to the Continent, and never saw her husband again. *De Terreauz v. De Terreauz*, 1 Sw. & Tr. 555. L

## 10.—"Desertion"—(Continued).

7

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Continued).

## II.—WANT OF REASONABLE EXCUSE FOR DESERTION—(Continued).

(c) Where the parties had separated after a few months of married life, owing to non-consummation of the marriage through the fault of the wife. *Haswell v. Haswell*, 1 S. & T. 502, 29 L.J.P. 21; 1 L.T. 69. *Du Terreaux v. Du Terreaux*, 1 S. & T. 555, 28 L.J.P. 95. *Ousey v. Ousey*, L.R., P. & D. 223. M

## (4) Examples of cases where there was held to exist no reasonable excuse for desertion.

## (i) FRAILTY OF TEMPER AND HABITS.

Mere frailty of temper and habits which are distasteful to a husband are not sufficient ground for depriving a wife of the protection of his home and society. *Yeatman v. Yeatman*, L.R. 2 P. & D. 489; 37 L.J.P. 97, 18 L.T. 415, (*Ibid.*), L.R. 2 P. & D. 187; 39 L.J.P. 77, 23 L.T. 283. N

## (ii) HABITUAL INTEMPERANCE AND VIOLENCE OF TEMPER.

Intemperance, gross and habitual, and violence of temper, uncontrolled and persistent, are not sufficient reasons to justify a husband in going away and leaving his wife without support. *Heyes v. Heyes*, 13 P.D. 11, 51 L.J.P. 22, 57 L.T. 815. O

## (iii) WIFE RUNNING HUSBAND INTO DEBT.

A husband is not justified in leaving his wife, who up to the time of such separation was a virtuous woman, because she has run him into debt. *Holloway v. Holloway and Campbell*, 5 A. 71. *Starbuck v. Starbuck*, 59 L.J.P. & M. 20. P

## (iv) HUSBAND MAKING AMPLE ALLOWANCE TO WIFE.

A husband is not justified in leaving his wife because of his making ample allowance to her. *Yeatman v. Yeatman*, L.R. 1 P. 489; *Macdonald v. Macdonald*, 4 S. & T. 242. Q

## (v) DEED OF SEPARATION OBTAINED FROM WIFE WITHOUT REASONABLE CAUSE.

The fact that the wife has agreed to a deed of separation, which the husband has obtained from her without reasonable cause, is not a sufficient excuse for the husband leaving the wife. *Dagg v. Dagg and Speke*, 7 P.D. 17, 51 L.J.P. & M. 19. R

## (vi) CONVICTION OF EITHER PARTY OF CRIMINAL OFFENCE.

The conviction of either party of a Criminal offence is no sufficient reason for the other party refusing to resume cohabitation. *Williamson v. Williamson and Bates*, 7 P.D. 76; 51 L.J.P. & M. 54. S

**N.B.**—But it would be otherwise if the offence were a matrimonial offence. (*Ibid.*). See, also Rattigan on Divorce, 1897, pp. 64, 65. T

## (vii) WIFE DECLINING TO SUBMIT TO UNREASONABLE CONDITION.

Where a husband left his wife, and refused to return to her unless she wrote a letter exonerating a certain lady of whom she had good reason to be jealous, but she refused to do so, though she was willing to live with

## 10.—“Desertion”—(Continued).

B.—Acts *not* amounting to desertion—(Continued).

## A.—ELEMENTS OF DESERTION—(Concluded).

## II.—WANT OF REASONABLE EXCUSE FOR DESERTION—(Concluded).

her husband, and pressed him to return to her, which he declined to do; the Court held his conduct amounted to desertion. *Dallas v. Dallas*, 43 L.J.P. 87; 31 L.T. 271. U

## (viii) HUSBAND LEAVING WIFE WHO HAD BEEN PROSTITUTE.

A —, and whom he knew to be such when he married her, and with whom he lived unhappily for some time is no reasonable excuse for his deserting her. *Coulthart v. Coulthart*, 28 L.J.P. 21. Y

## B.—OFFER TO RETURN—EFFECT OF.

(1) *Bona fide* offer to return before two years have expired, effect of.

Before the two years' absence is completed a *bona fide* offer to resume cohabitation will deprive a separation of the character of desertion. *Lodge v. Lodge*, 15 P.D. 159; 59 L.J.P. & M. 84; *Keech v. Keech*, L.R., 1 P. 641; 38 L.J.P. & M. 7. W

## (2) Offer to be made in good faith.

(a) Such offer must be *bona fide*, and in order to judge whether it is so the Court will regard the whole conduct of the party making it. *Harris v. Harris*, 15 L.T. 448. X

(b) A husband and wife parted for a time by mutual agreement. Subsequently the husband offered to return to his wife, but she, having discovered that he had committed adultery, refused to receive him, and sent him a letter to the effect that she would never live with him again. The Court held, that there being no proof that the husband's offers to live with her again were not *bona fide*, his conduct did not amount to desertion. *Lodge v. Lodge*, 15 P.D. 159, 59 L.J.P. 84; 63 L.T. 467 Y

## (3) Question of good faith is for the jury to decide.

Whether a husband's offers to return to his wife are *bona fide* or not is a question of fact for the jury. *French Brewster v. French Brewster*, 62 L.T. 609. Z

(4) Letters of husband professing willingness to return—*Bona fide*.

Where, the husband wrote letters to his wife professing his willingness to return, the Court should consider whether the conduct of the husband was that of a man honestly intending to resume cohabitation, or whether the real and only object of his letters was to evade the consequences which might ensue, and to deprive the wife of the remedy to which she would be entitled on the completion of the two years' absence. *French Brewster v. French Brewster*, 62 L.T. 609. A

(5) Offer to return after the expiry of two years. •

(a) On the other hand, when the desertion, without reasonable cause, for two years, is once completed, the deserted wife has a complete right to relief of which she cannot be deprived even by a *bona fide* offer to resume cohabitation made by the husband subsequently to the completion of the two years. *Cargill v. Cargill*, 1 S. & T. 235; 27 L.J.P. & M. 69. B

## 10.—“Desertion”—(Continued).

## B.—Acts not amounting to desertion—(Continued).

## B.—OFFER TO RETURN—EFFECT OF—(Continued).

- (b) When the wife brings a suit on the ground of desertion, the husband is not at liberty to intercept the wife's remedy, where her right has once accrued. See *Cargill v Cargill*, 27 L. J. P. & M. 69 cited in argument in 4 C. 260 (264) = 3 C.L.R. 484. **C**
- (c) When the offence of desertion has once been completed, the person deserted has a complete right to relief, although the other party has made, subsequently, a *bona fide* offer to return. *Cargill v. Cargill*, 4 Jur. N.S. 764 cited in argument in 4 C. 260 (264) = 3 C.L.R. 484. **D**
- (d) Adultery, coupled with desertion without reasonable cause, is a compound offence giving a right to a dissolution of the marriage, no part of which could be blotted out without condonation by the wife. *Cargill v. Cargill*, 4 Jur. N.S. 764 cited in argument in 4 C. 260 (264) = 3 C.L.R. 484. **E**
- (e) Where a husband has been guilty of adultery, and of desertion for two years and upwards, his offer to return to cohabitation, even if *bona fide*, will not disentitle the wife to sue for dissolution of marriage, for she is not, in any case, under any obligation to condone the adultery. *Basing v Basing*, 3 S. & T. 516, 33 L. J. P. & M. 150. **F**

## (6) Offer to return by husband continuing adulterous intercourse.

- (a) A husband may be guilty of desertion, even though he is willing to return to cohabitation, if at the time he is so willing he is actually cohabiting with another woman. *Edwards v. Edwards*, 62 L. J. P. & M. 33; and the cases cited therein. **G**
- (b) A wife is not obliged to live with a husband who persists in an adulterous intercourse. \* If she be willing to live with him if he gives it up, and he persists in it, the same condition of things is produced as if he had left her in the first instance. *Sickert v Sickert*, (1899), p. 278; 68 L.J.P. 114, 81 L.T. 495. See also *Dickinson v Dickinson*, 62 L.T. 330, *Graves v. Graves*, 3 S. & T. 350, 33 L.J.P. 66, 10 L.T. 273; *Wynne v. Wynne*, (1898), p. 18; 67 L.J.P. 5, *Koch v Koch*, (1899), p. 224, 68 L.J.P. 90, 81 L.T. 61, *Pizzala v Pizzala*, 68 L.J.P. 91, n. H.

## (7) Offer to return by husband—Wife may insist on reasonable conditions.

- (a) If the husband offers to resume cohabitation, the wife is entitled to annex a reasonable condition to her acceptance of the offer. *Gibson v. Gibson*, 29 L. J. P. & M. 25. **I**
- (b) And her refusal to accept the offer except upon such condition will not deprive her of her right to sue on the ground of desertion. *Gibson v. Gibson*, 29 L. J. P. & M. 25; *Graves v. Graves*, *supra*. **J**
- (c) A condition that her husband gives up an adulterous connection is reasonable. *Alexander v Alexander*, 51 P. R., 1869. **K**
- (d) The wife left her husband without reasonable cause at Delhi in 1853. The husband then came to Lahore, and within a year after the original desertion the wife agreed to join her husband on getting from him Rs. 60 for travelling expenses from Delhi to Lahore. This the Court found to be a reasonable sum for the journey. The husband did not



10.—“*Desertion*”—(Concluded).

## B.—Acts not amounting to desertion—(Concluded).

## B.—OFFER TO RETURN—EFFECT OF—(Concluded).

send the money, and the wife found her own way to Lahore. She afterwards at Lahore offered to re-join her husband who was then cohabiting with another woman, on condition that he discontinued the cohabitation. This he refused. Held that a *prima facie* case of desertion for two years and upwards was not made out 51 P.R. 1869. L

11.—“*Two years or upwards.*”

## (1) Desertion coupled with adultery—English Law.

Desertion without reasonable excuse, coupled with adultery, is a compound offence, giving a right to relief by dissolution of the marriage. See M.A. 1857, S. 27. M

## (2) Desertion without adultery.

Desertion itself without cause for two years and upwards, without the adultery, is ground for a judicial separation. Sect 16, *Cargill v. Cargill*, 27 L.J. Mat. 70, *Basing v. Basing*, 33 L.J. Mat. 150. N

## (3) Desertion not proved to have continued for two years—Practice—English Law.

(a) Where the adultery was proved, but the evidence of desertion fell short of the required period by several months, the hearing was adjourned, and after the lapse of required time the respondent not having returned to cohabitation—the petitioner filed a supplemental petition charging desertion, on proof of which, the Court granted a decree *nisi*. *Wood v. Wood*, 13 P.D. 22, 57 L.J. P. & M. 48, cf. sect. 54, *post*. O

(b) Where both adultery and desertion are charged, if the wife proves the adultery, but fails to prove desertion for two years, it is competent for the Court to decree judicial separation, although the petition only prays for a dissolution. *Smith v. Smith*, 1 S. and T. 359, 28 L.J. P. & M. 27. P

(c) In such a case the petitioner must amend the petition by praying for judicial separation. If he or she refuses to do so, the petition would be dismissed. *Rowley v. Rowley*, 4 Sw & Tr. 137. Q

## Miscellaneous.

## (1) Decree based merely on admissions and without recording evidence.

(a) A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence 17 B. 624 (625). R

(b) To hold the adultery of the husband proved on his mere admissions would be imprudent and contrary to public policy. 17 B. 624 (625); *Williams v. Williams and Padfield*, L.R. 1, p. 20, see, also, 3 C. 688. S

(c) Where a District Judge grants a decree for dissolution of marriage merely on admissions, and without recording evidence, it was held that the case should be sent back to the District Court for further inquiry and evidence. 17 B. 624 (626). T

**Miscellaneous—(Concluded).**

**(2) Danger of collusion to be guarded against Delay.**

The danger of collusion between the parties must always be borne in mind, and especially when there has been a delay of several years in applying to the Court for relief. 17 B. 624 (625), 3 C. 688. **U**

**(3) There must be some proof of marriage.**

To give the Court jurisdiction there must be some proof of the fact of marriage. *Patrickon v. Patrickon*, L. R. 1, p. 86, cited in 17 B. 624 (625). **Y**

**(4) Petitioner's Christian religion should also be proved.**

There must also be proof that the petitioner is a Christian by religion. So also his place of residence 17 B. 624 (625). **W**

**(5) Delay in bringing suit to be explained by petitioner.**

Under S. 16 of the Act, it lies on the petitioner to explain the delay in bringing suit for dissolution of marriage, where such delay exists. 17 B. 624 (626). **X**

**(6) Burden of proof in suits for dissolution of marriage.**

In a suit for dissolution of marriage, the burden of proving marriage, residence, and the alleged adultery and desertion lies on the petitioner. 17 B. 624 (626). **Y**

**(7) Pleading desertion—Practice as to**

Where the petitioner alleges adultery and desertion, but there is no averment that the desertion was an abandonment against the wish of the petitioner it is wrong for the Court to decree dissolution of marriage. 17 B. 624 (625) **Z**

11. Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer <sup>1</sup> a co-respondent to the said petition, unless he is excused from so doing on one of the following grounds, to be allowed by the Court<sup>2</sup>:—

1.—That the respondent is leading the life of a prostitute<sup>3</sup>, and that the petitioner knows of no person with whom the adultery has been committed ;

2.—That the name of the alleged adulterer is unknown<sup>4</sup> to the petitioner although he has made due efforts to discover it ;

3.—That the alleged adulterer is dead <sup>5</sup>.

**Notes.**

**General.**

**(1) Corresponding English Law.**

The Matrimonial Causes Act, 1857 (20 & 21, Vict., c. 85), S. 28, provides that --

“ Upon a petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused

**General—(Continued).**

from so doing; and on every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent; and the parties, or either of them, may insist on having the contested matters of fact tried by a jury as hereinafter mentioned."

**(2) Practice of the English Courts under the section.**

The following rules of the Divorce Court regulate the procedure of the English Courts on this subject —

"Upon a husband filing a petition for dissolution of marriage on the ground of adultery, the alleged adulterers shall be made co-respondents in the cause, unless the Judge Ordinary shall otherwise direct."

"Application for such direction is to be made to the Judge Ordinary on motion founded on affidavit."

"If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition." See Rules 4, 5, and 6 of the Divorce Court Rules.

**(3) Reason for making alleged adulterer a co-respondent**

The—has thus been stated in judicial decisions —

"The interests of the petitioner and the respondent are not all that the Court has to consider. The person or persons with whom the respondent is alleged to have contracted a guilty relationship require their interests to be watched over, and, in the public interest, collusion between the parties, connivance, and other matters, have to be carefully guarded against, and the presence of parties whose interests conflict with the petitioner's may assist the Court in dealing with these matters." *Jones v. Jones*, (1896), p. 165; 65 L.J. P. & M. 101.

**(4) Reason for making alleged adulteress a co-respondent.**

The same reasoning as above would justify a provision enabling the Court, when it saw fit, to make an alleged adulteress a respondent to a suit by a wife against her husband. *Ibid*, see Rattigan on Divorce, 1897, p. 69.

**(5) All known adulterers are to be joined.**

All adulterers who are known must be joined as co-respondents. *Quicke v. Quicke* 2 Sw. & Tr 419.

**(6) All reasonable efforts to be made to find them out.**

(a) All reasonable efforts to discover the adulterer's name and identity must be made. *Evans v. Evans*, 28 L.J. Mat. 20.

(b) If known and joined, such person might be able to prove facts in his own or in the wife's interest, which would defeat the petitioner's case. *Evans v. Evans*, 28 L.J. Mat. 20.

## General—(Continued).

## (7) All alleged adulterers to be made co-respondents.

(a) The husband, filing a petition for dissolution, must make all the alleged adulterers co-respondents, unless otherwise directed by the Court. M C A. 1857, s. 28, App. A., and D.R. 4, App. B., *Carrier v. Carrier and Watson*, 34 L.J. Mat. 47. H

(b) On the wife's petition for divorce, the Court has power to direct that the persons with whom the husband is alleged to have committed adultery shall be made co-respondents (*Ibid*) I

## (8) Husband not compelled to charge every adulterer.

It is not necessary that the husband, should charge adultery in the petition with every person with whom his wife may have committed adultery. *Hufiler v. Hunter*, 28 L J P. & M. 3. J

## (9) But every person charged with adultery to be made co-respondent.

But he must make every person whom his petition charges with such adultery a co-respondent, unless he is specially excused from doing so by the Court. *Carrier v. Carrier and Watson*, 4 S. & T. 94, 34 L J. P & M. 47. K

## (10) Charge of adultery with persons, of whom some are known and some unknown—Practice

Where the petition in an undefended suit alleged adultery with two persons who were made co-respondents, and also with certain unknown persons, the Court ordered the paragraphs of the petition referring to the unknown persons to be struck out. *Peacock v. Peacock*, 6 R. 656. L

## (11) Where petition charges adultery with a person unknown.

(a) Where a petition charges adultery with a person unknown, leave must be obtained to dispense with making him a co-respondent in the suit. *Pitt v. Pitt*, 37 L J P 24, *Tollemache v. Tollemache*, 25 L.J P. 2. M

(b) This is so although adultery is charged against other persons who have been made co-respondents in the suit *Slaytor v. Slaytor*, 1897, p. 85, 66 L.J.P. 97, 77 L. T. 141, see, also, *Penty v. Penty*, 7 P. D. 12; 51 L J.P. 24, 47 L T 131. N

## (12) Corespondent, dismissal of, from suit before hearing.

It is open to the Court to dismiss a co-respondent from the suit before the hearing, and this, too, irrespective of his consent. *Wheeler v. Wheeler and Howell*, L R., 2 P. 353, 41 L J. P. & M. 33. O

## (13) Affidavit to dispense with co-respondent—Practice as to.

(a) The Court will not dispense with a co-respondent on the affidavit of the petitioner only *Leader v. Leader*. 32 L J P 136 P

(b) It must be corroborated by the affidavit of some one who has either assisted in the endeavour to trace the co-respondent, or who can depose as to the facts stated in petitioner's affidavit. *Jeffreys v. Jeffreys*, 2 P. D. 90; 46 L J.P 80; *Barber v. Barber*, (1896), p. 73, 65 L. J. P. 58. Q

(c) But upon a motion to dispense with a co-respondent, an affidavit of the petitioner is indispensable, except of course under very special circumstances. *Drinkwater v. Drinkwater*, 60 L.T 893. R

## General—(Concluded).

## (14) Persons implicated by petitioner may intervene.

- (a) It is always open to the persons implicated by the petitioner as an adulterer or an adulteress to intervene as co-respondent. See *Dixon's Law and Practice in Divorce*, 4th Ed., p. 112. S
- (b) But this power is very rarely exercised. (*Ibid.*) T

## EXAMPLES.

- (i) A lady sought, and was permitted, to intervene as a co-respondent, in a suit in which the husband was alleged to have committed adultery with her. *Bell v. Bell*, 8 P.D. 217 ; 32 W R. Div. 154. U
- (ii) A person who was alleged to have committed adultery with the petitioning wife was allowed to intervene. *Wheeler v. Wheeler and Rhodes*, 14 P.D. 154. Y
- (iii) A wife sued for dissolution. The husband counter-charged her with adultery with A, but did not pray for a dissolution. The Court allowed A. to intervene. *Wheeler v. Wheeler and Rhodes*, 14 P.D. 154. *Curling v. Curling*, 14 P.D. 13. W
- (c) Where, in such a case, the husband does not claim cross-relief, the alleged adulterer cannot intervene now. *Harrop v. Harrop*, 1898, p. 61. X
- (d) A person, against whom adultery with the respondent is alleged in a general charge, is usually entitled to be made a co-respondent. *Codrington v. Codrington and Anderson*, 3 Sw. & Tr. 369. Y
- (e) He has a right to appear and clear his character if he can. *C. v. C. and W.*, 34 L.J. Mat. 47. Z
- (15) Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene.
- (a) A person who has been charged by the husband, in his answer to a petition by the wife for divorce, with having committed adultery with the wife, is entitled to intervene. 4 C.W.N. 506. A
- (b) Section 15 of the Indian Divorce Act permits the respondent to obtain in the suit the same relief which he would have been entitled to if he had himself presented his petition. S 11 of the Indian Divorce Act provides that before a petition by a husband seeking dissolution of his marriage on the ground of the wife's adultery can be granted, he is bound to make the alleged adulterer a party to the suit. Taking these two sections together the Legislature may be taken to have intended that the respondent should be entitled to bring before the Court the parties whose presence is necessary to entitle him to the relief he seeks. If then the respondent is entitled to apply to have the person he charges with committing adultery with his wife made a party to the suit, it would seem to follow that the person so charged may also apply to intervene. 4 C.W.N. 506. B

## 1.—“Alleged adulterer”

Every allegation of adultery involves “an alleged adulterer.”

When a petition alleges adultery there is an “alleged adulterer” within the meaning of this section. See *Pitt v. Pitt*, L.R. 1, p. 464. C

## 2.—“To be allowed by the Court.”

:

## (1) Discretion of court to dispense with co-respondent—English and Indian Law—Difference.

The court has a discretion to allow or not an application by the petitioner to dispense with the co-respondent. The same is also the practice in the English Courts. But while this Act specifies the grounds on which the court may exercise its discretion the English Statute is more generally worded and states that the co-respondent may be dispensed with “on special grounds to be allowed by the Court.” It would appear that the Courts in England have a wider discretion in the matter than the Courts in this country. See Rattigan on Divorce, 1897, pp. 68, 69.

D

## (2) Discretion of the Court under the section, how to be exercised.

The discretion given to the Court by this section to excuse the petitioner from making a co-respondent should be exercised on the principles laid down by or to be gathered from the Act and the rules, and the circumstances of each particular case, and cannot be fettered by any rule of practice. *Saunders v. Saunders*, (1897), p. 89; 66 L.J.P. 57; 76 L.T. 330 Court of Appeal. See, also, *Edwards v. Edwards*, (1898), 67 L.J.P. 1.

E

## (3) Delay, no ground to dispense with co-respondent.

(a) Delay is not a ground for dispensing with a co-respondent, but it enables him to apply to dismiss the petition. *Hancock v. Hancock and S.*, L.R. 1 P & D 334.

F

(b) The Court has no right to dismiss a co-respondent from a suit on the ground of delay in prosecuting the suit. *Hancock v. Hancock*, L.R. 1 P & D. 334, 36 L.J.P. 86

G

## (4) Applications to dispense with co-respondent—Practice as to.

Applications to dispense should be made as soon as possible, but, except under special circumstances, they will be allowed even after the respondent has filed an answer to the petition, never after issue joined. *Jeffreys v. Jeffreys*, 2 P.D. 90; 46 L.J. Mat. 80; 25 W.R. 513 and *Robinson v. Robinson and L*, 1 Sw and Tr. 386.

H

## (5) Affidavit in support of motion to dispense with co-respondent.

(a) The—should satisfy the Court that the petitioner has made every reasonable endeavour to ascertain the name of the adulterer and has been unable to do so *Brown and Powell on Divorce*, 7th Edn., 1905, p. 260.

I

(b) It should also set out what means he had adopted to obtain the required information. (*Ibid*)

J

## (6) Such affidavit must be supported by one from another person.

• The petitioner must support his application to dispense with the co-respondent by at least one affidavit besides his own, corroborating it. *Pitt v. Pitt*, L.R. 1 P. & D. 464; *Leader v. Leader*, 32 L.J. Mat. 186; *Barber v. Barber*, 1896, p. 73.

K

## (7) Where adulterer is absent abroad.

Absence abroad is not a sufficient reason for dispensing with an adulterer. *C. v. C. and W.*, 34 L.J. Mat. 47.

L

**2.—“To be allowed by the Court”—(Concluded).**

**(8) Co-respondents' right to be heard in appeal.**

A suit for divorce was brought by the husband against the wife, on the ground of adultery. The co-respondent appeared in that suit. The respondent appealed on the ground (*inter alia*) that, on the evidence, the Court ought to have held that the adultery was not proved. *Held* that, in that appeal, the co-respondent was not entitled to be heard in opposition to the appeal. 5 B L R. 71. **M**

**3.—“That the respondent is leading the life of a prostitute.”**

**(1) Respondent leading the life of a prostitute—Effect—Practice.**

To dispense with the necessity of making an alleged adulterer a co-respondent upon the ground mentioned above, it is not enough to show that the wife is leading the life of a prostitute, the petitioner in his affidavit must also state that he knows of no one with whom the adultery has been committed. *Quicke v Quicke*, 2 S. & T. 419, 31 L.J. P & M. 28. **N**

**(2) Suit for divorce—Prostitute—Connivance**

(a) In a suit for a divorce the additional co-respondent is not necessary when the wife is leading the life of a prostitute, and the petitioner knows of no person with whom the adultery was committed. 3 B L R. Ap. 9. **O**

(b) But where the wife has not been living a life of promiscuous intercourse with all who seek her, but has been living with separate persons, perhaps in succession, and is able to attribute her respective children to a father, such a life is not a life of prostitution within the meaning of the Act. (*Ibid.*) **P**

(c) In such a case the Court refused to allow the petition to be amended by the addition of the names of the co-respondents, on the ground that the petitioner allowed his wife to remain in adultery for fourteen years without taking any steps to obtain a separation. (*Ibid.*) **Q**

**(3) Wife living in a brothel.**

When a wife is living in a brothel, the Court readily dispenses with a co-respondent on application, unless the adulterer's name is known. *Hooke v. Hooke*, 27 L J. Mat. 61 and *Quicke v. Quicke*, 31 L.J. Mat. 28. **R**

**(4) Wife delivered of child of which her husband is not the father.**

If the wife has been delivered of a child, which cannot possibly be the petitioner, he must equally show that he cannot ascertain who the father is. *Hunter v. Hunter*, 28 L.J.P. 3. **S**

**(5) Petitioner knowing the name of the adulterer even when wife is leading the life of a prostitute.**

(a) Even if the petitioning husband shows that the wife is leading the life of a common prostitute, he will not be allowed to dispense with making a co-respondent, if he knows the name of any man with whom she has committed adultery. *Hooke v. Hooke*, 1 S. & T. 183, 26 L.J.P. 61; *Quicke v. Quicke*, 3 S. & T. 419, 31 L.J.P. 28; 5 L.T. 690. **T**

(b) “When a pregnant wife, in answer to enquiries by her husband, who was not the father of the child, gave the name of a man of whom he knew nothing, and he had no other information, he was directed to see the wife and report to the Court before leave would be given to dispense with the co-respondent. *Grove v. Grove*, 78 L.T. N.S. 89. **U**

## 4.—“That the name of the alleged adulterer is unknown etc.”

## (1) Name of alleged adulterer not known—Effect.

(a) If the petition charges adultery with certain persons, of whom some are known but some are unknown to the petitioner, the petitioner must obtain an order from the Court to be excused from making the unknown persons co-respondents. *Penty v. Penty*, 7 P. D. 59; 51 L.J. P. & M. 24, but see *Peacock v. Peacock*, 6 R. 656 and *Hunter v. Hunter*, 28 L. J. P. & M. 8. Y

(b) The mere fact that the petitioner knows the name of a person who, he is informed, was his wife's paramour, is not *per se* a ground for compelling him to make such person a co-respondent, when the petitioner is convinced that he cannot obtain evidence to prove the man's guilt. *Saunders v. Saunders*, (1897), p. 89; 13 T.L.R. 328, C.A. But see also *Jones v. Jones*, (1896), p. 165 noted *infra*. W

## (2) Where there are charges against unknown persons—Practice.

(a) “Where there are charges against unknown persons as well as the co-respondent on the record, the Court orders the paragraphs relating to the unknown persons to be struck out” *Peacock v. Peacock*, 6 R. 656. X

(b) If a petition alleges adultery with persons unknown, the order of the Court must be obtained dispensing with them, though there may be other known adulterers cited as co-respondents. *Penty v. Penty*, J. and S., 7 P D. 19. Y

## (3) Adulterer's name being known after filing petition—Practice.

Petitioners who do not know the names of the alleged adulterers when filing the petition, but come to know them subsequently must supply them as soon as they ascertain them. *Muspratt v. Muspratt*, 31 L.J. Mat. 28; 36 L.J. Mat. 18. Z

## (4) Petitioner being unable to obtain evidence against adulterer.

(a) “The mere fact that the petitioner is unable to obtain evidence against a man who is alleged to have committed the adultery charged with his wife, although he has evidence that she has committed the adultery with him, is not of itself a sufficient special ground for exempting the petitioner from making that man a co-respondent.” *Jones v. Jones*, (1896), p. 165; 65 L.J. P. & M. 101. But see, also *Saunders v. Saunders*, (1897), p. 89 noted, *infra*. A

(b) No hard-and-fast rule should be laid down in such cases, and the Court is not bound to compel a petitioner, who knows the name of his wife's alleged paramour, to make such paramour a co-respondent. *Saunders v. Saunders*, (1897), p. 89, see *Jones v. Jones*, (1896), p. 165. B

(c) “Where the relief sought is on the ground of adultery alleged to have been committed with a man who is alive, and whose name and identity are known to the petitioner, the Court will not excuse the petitioner from making him a co-respondent merely because he cannot obtain sufficient evidence.” *Jones v. Jones*, (1896), p. 165; 65 L. J.P. 101. *Cornish v. Cornish*, 15 P.D. 131, 59 L.J.P. 84; 62 L.T. 667; except under very special circumstances. See *Bagot v. Bagot*, 52 L.T. 612, *Payne v. Payne*, 60 L.T. 238, *Gill v. Gill*, 60 L.T. 712, C



4.—“*That the name of the alleged adulterer is unknown etc.*”—(Concluded).

(5) Where adulterer's identity is lost through neglect.

Where the adulterer's identity is lost through neglect an application to dis-  
pense with the co-respondent will be refused. *Jeffreys v. Jeffreys*,  
2 D. P. 90; 46 L.J. Mat. 80; 25 W.R. 518. D

5.—“*That the alleged adulterer is dead.*”

Death of co-respondent whilst suit is pending.

“Where a co-respondent dies whilst the suit is pending, it would seem that  
the proper course is to apply by motion to strike his name out of the  
petition.” *Walpole v. Walpole*, (1901), p. 86, 70 L.J.P. 23; 84 L.  
T. 68. E

See also on this subject, *Grose v. Grose*, (1898), 78 L.T. 89; *Nicolas v. Nicolas*,  
(1899), 68 L.J.P. 66; 80 L.T. 422; *Tollemache v. Tollemache*, 28 L.J.  
Mat. 2; *Sutton v. Sutton* and P. 32 L.J. Mat. 156. F

12. Upon any such petition for the dissolution of a marriage,

Court to be satis-  
fied of absence of  
collusion.

the court shall satisfy itself, so far as it reasonably  
can, not only as to the facts alleged, but also  
whether or not the petitioner has been in any  
manner accessory to, <sup>1</sup> or conniving at, <sup>2</sup> the going

through of the said form of marriage, or the adultery, or has con-  
doned the same, <sup>3</sup> and shall also inquire into any counter-charge  
which may be made against the petitioner <sup>4</sup>.

(Notes.)

General.

Corresponding English Law.

The Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), S. 29 provides as  
follows —

“Upon any such petition for the dissolution of a marriage, it shall be the duty  
of the Court to satisfy itself, so far as it reasonably can, not only as to  
the facts alleged, but also whether or no the petitioner has been in any  
manner accessory to or conniving at the adultery, or has condoned the  
same, and shall also inquire into any counter-charge which may be  
made against the petitioner.” G

1.—“*Accessory to.*”

(1) “*Accessory to*”—Meaning.

The words—mean aiding to produce or contribute to the bringing about of the  
offence complained against *Gipps v. Gipps and Hume*, 83 L.J.P. &  
M. 161. H

(2) *Accessory contemplated by the section.*

The—should be an accessory before the fact. See *Marris v. Marris* and  
*Burke*, 2 Sw. and Tr. 530. I

(3) *Connivance, how differs from being “ accessory to.”*

“Connivance is not so strong as “ being necessary to.” The bar of connivance  
proceeds on the principle *volenti non fit injuria*. A husband willfully  
abstaining from taking any steps to prevent an adulterous intercourse,  
which, from what passes before his eyes, he cannot but believe, or

1.—“Accessory to ”—(Concluded).

reasonably suspect, is likely to occur, is guilty of connivance.” *Gipps v. Gipps and Hume*, Cor. Dom. Proc. per L.C. (Lord Wensleydale dissenting) 33 L.J.P. & M., 161; *Macrae on Divorce*, p. 83. J

(4) Duty of Judge to satisfy himself that petitioner is not accessory.

It is the duty of the Judge to satisfy himself not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to the adultery, and if he finds he has been accessory to the adultery, he shall dismiss the petition. 22 M. 328 (331). K

2.—“Conniving at.”

(1) Connivance—Meaning of.

(a) “The word ‘conniving’ is not to be limited to the literal meaning of wilfully refusing or affecting not to see or become acquainted with that which you know or believe is happening, or about to happen. It must include the case of a husband acquiescing in, by wilfully abstaining from taking any steps to prevent that adulterous intercourse, which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur.” *Gipps v. Gipps and Hume*, on app. 33 L.J. Mat. 161, see also, in 1863, 3 Sw. and Tr. 116. L

(b) “It is a figurative expression, meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, and is inapplicable to anything past or future. If a husband, ignorant at the time of his wife’s infidelity, afterwards discovers it, and leaves it unnoticed and unpunished, whatever may be the motive of his silence, even if it be the base and sordid one of making a profit out of his own dishonour, he cannot be said to connive even at the past adultery, much less at any future intercourse of the guilty parties.” *Gipps v. Gipps and Hume*, on app. 33 L.J. Mat. 161. M

(2) What constitutes connivance.

(a) “Connivance has its source and its limits in this principle, *volenti non fit injuria* a willing mind. This is all that is necessary. There must be intention and consent, though there is not active conspiracy. Without intentional concurrence or corrupt connivance there is no bar” *Boulting v. Boulting*, Sw. and Tr. 335. *Phillips v. Phillips*, on app. 4 N.C. 529; and see *Turton v. Turton*, 3 Hagg. E.R. 838; *Dennis v. Dennis*, *ibid.*, 348 n.; *Hoar v. Hoar*, *ibid.*, 137; *Moorsom v. Moorsom*, 3 Hagg. E.R. 103 and 106; *Rogers v. Rogers*, 3 Hagg. E.R. 60. N

(b) Facts to constitute connivance must have a direct and necessary tendency to cause adultery to be committed or continued. *Stone v. Stone*, 3 N.C. 278, p. 304. O

(c) In order to amount to connivance there must be something more than mere negligence, inattention, dulness of apprehension, or indifference. *Rogers v. Rogers*, 3 Hagg. E.R. 57 (1830); *Riz v. Riz*, 3 Hagg. E.R. 74 (1777). P

(3) Connivance implies corrupt conduct.

(a) It was held that connivance, to constitute a bar to a divorce by reason of adultery, must be corrupt. *Phillips v. Phillips*, 1 Robert 145 (1846).

(b) In every case where connivance is set up the honesty of the husband’s intentions, not the wisdom of his conduct, is to be considered. *Hoare v. Hoare*, 3 Hagg. 137 (1900). Q

2.—“*Conniving at*”—(Continued).

(c) Facts to constitute connivance must have had a tendency to cause adultery to be committed. *Stone v. Stone*, 1 Robert 101 (1844). R

(d) Hence the following have been held not to constitute connivance:—

(I) Coarse, nor even brutal behaviour.

(II) Obscene or disgusting language.

(III) Even entire disregard of appearances. *Stone v. Stone*, 1 Robertson, 101 (1844). S

(4) **Passive connivance.**

Passive connivance is as much a bar as active conspiracy, but it is necessary to show an intention that guilt should ensue. *Moorsom v. Moorsom*, 3 Hagg. E.R. 107 (1793), *Harris v. Harris*, 2 Hagg. E.R. 376 (1829). T

(5) **Extreme negligence may amount to connivance**

Such extreme negligence as to the conduct of the wife, and such encouragement of acquaintance and familiar intimacy, as were likely to lead to an adulterous intercourse, were held to be sufficient to constitute connivance. *Gilpin v. Gilpin*, 3 Hagg 150. See also, *Michelson v. Michelson*, (1804), 3 Hagg E.R. 147. U

(6) **Want of prudence—Error of judgment**

“Mere imprudence and error of judgment were not held to constitute connivance”. See Browne and Powell on Divorce, Seventh Edition, 1905, p. 31. V

(7) **Party conniving need not be accessory before the fact**

(a) Tho....., so as to have taken any active measures to bring about the result of adultery. *Glennie v. Glennie and Boules*, 32 L.J. Mat. 17, and see *Marris v. Marris and Buhe*, 2 Sw. & Tr 530. W

(b) It would suffice if he is cognizant that such a result would follow from certain transactions that he approved of and consented to. *Glennie v. Glennie and Boules*, 32 L.J. Mat. 17, and see *Marris v. Marris and Buhe*, 2 Sw. & Tr. 530. X

(c) It is one thing to say to a man, “You will watch this woman, so as to be able to give evidence that she has committed an act of adultery” (provided she had actually committed that act, but you must not manufacture evidence of adultery), and another thing to say, “You will betray her into committing an act of adultery”. *Sugg v. Sugg and Moore*, 31 L.J. Mat. 41. Y

(8) **Connivance and condonation distinguished**

(a) Connivance must always precede the event. *Laws of England*, Vol. XVI, p. 487. Z

(b) Connivance is clearly distinguishable from condonation, which always comes after the event. (*Ibid.*) A

(c) Condonation means the forgiving of the offences known and intended to be condoned. It does not operate as a forgiveness of other unknown or subsequent adulteries. But connivance on the other hand, operates as a complete bar to a suit not only in respect of the particular adultery connived at but also in respect of any other similar offence. Thus connivance of adultery with A bars relief in respect of subsequent adultery with B. *Bernstein v. Bernstein*, 1893, p. 292. B

2. - "Conniving at"—(Continued).

(9) **Connivance is criminal—Condonation is often noble.**

- (a) Connivance necessarily involves criminality on the part of the conniver, while condonation may be meritorious, especially in the case of a wife. *Angle v. Angle*, (1848), 6 Notes of Cases, 192 **C**
- (b) Condonation was often held to be meritorious, especially in a wife, but connivance was always considered to involve criminality. *Turton v. Turton*, 3 Hagg. 351 (1830). **D**

(10) **Connivance and being "accessory to" distinguished.**

See Macrae on Divorce, p. 33 cited, *supra*. **E**

(11) **Connivance not to be presumed easily**

- (a) The presumption of law, is against the existence of connivance. *Rix v. Rix*, (1777), 3 Hagg. Ecc. 71; *Moorson v. Moorson*, (1792), 3 Hagg. Ecc. 87, 107. **F**
- (b) Where the connivance was doubtful, the presumption was always in favour of an absence of intention *Phillips v. Phillips*, 1 Robert 145 (1846) **G**
- (c) But if, for instance, a husband invited the adulterer and then decamped and gave him the opportunity for, or otherwise actively promoted the adultery, that would give rise to a presumption of connivance in the husband. *Reeves v. Reeves*, 3 Sw. and Tr. 139, 32 L J P. & M 178. *Timmings v. Timmings*, (1792), 3 Hagg. Ecc. 76. **H**

(12) **Connivance of adultery with A bars relief in respect of adultery with B.**

- (a) Connivance at adultery with one person precludes relief in respect of adultery with another. *Gipps v. Gibbs*, 33 L. J. P. & M. 161. **I**
- (b) But if the subsequent adultery be committed long after the adultery connived at, it may be that the petitioner's right to relief is not lost *Hodges v. Hodges*, 3 Hagg. 118, *Rogers v. Rogers*, 3 Hagg. 57, But see, also, Rattigan on Divorce, 1897, p. 78 **J**
- (c) Connivance to bar the petitioner's right to relief need not necessarily be connivance at adultery with the particular person charged. *Stone v. Stone*, 3 No. of Cases, 278 (1814) **K**

(13) **Deed of separation—Presumption of connivance.**

If a deed of separation were so worded as to found a presumption that it might be intended to sanction adultery by the wife, that presumption must be rebutted by evidence. *Barber v. Barber*, 2 Add. 285 (1824). **L**

(14) **Proof of connivance**

- (a) "Connivance may be proved by express language or by inference deduced from facts and conduct". *Boulting v. Boulting*, 3 S. & T. 329, 33 L.J P. 33; 9 L.T. 779. **M**
- (b) Where such a state of things exists as would in the apprehension of reasonable men result in the wife's adultery, and he does not interfere when he might do so, he is guilty of connivance. *Gipps v. Gipps*, 11 H L. Cas 1, 38 L.J P. 735. **N**
- (c) But, where a deed of separation contained the following clause "Major S. to allow Mrs. S. to reside where she pleases, and not to compel her to live with him again, or to go near her or molest her in any way and Mrs. S. promises that if she does not fulfil her part of the agreement, Major S. shall have the full power of a husband over her, whatever his way of living may be." The Court held, that the concluding

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2.—“*Conniving at*”—(Continued).

words should not be construed as giving the husband licence to commit adultery, *Studdy v. Studdy*, 1 S. and T. 321; 28 L.J.P. 44  
See also 28 L.J.P. 105. O

## (15) Consent given in consideration of an allowance constitutes connivance.

“If a wife, though unwilling to consent that her husband should live in adultery, ultimately gives her consent for the sake of obtaining an allowance from him, she is guilty of connivance.” *Ross v. Ross*, 1 L.R., P. and D. 734; 38 L.J.P. 49; 20 L.T. 853. P

## EXAMPLES OF CONNIVANCE.

## A.—CONDUCT OF HUSBAND HELD TO CONSTITUTE CONNIVANCE.

## (1) Wilful desertion—Constituting connivance

Wilful desertion has been construed as connivance. *Michelson v. Michelson*, 3 Hagg. E.R. 147. Q

## (2) Connivance of adultery with one person bars relief in respect of adultery with another.

Connivance at adultery with A. is a defence to a charge of adultery with B. *Lovering v. Lovering*, 3 Hagg. E.C. 85, and see *Gipps v. Gipps and Hume*, 3 Sw. Tr. 116. R

## (3) Husband abandoning his rights in consideration of money received from adulterer.

(a) “A husband who, having the right to divorce his wife for adultery, abandons it in consideration of a sum of money received from the adulterer, can never afterwards succeed on a petition for divorce on the ground of her adultery with the same person” *Gipps v. Gipps and Hume*, 33 L.J. Mat. 161. S

(b) Nor, with any other person. *Stone v. Stone*, 3 N.C. 278 S-1

(c) His conduct is almost equivalent to selling his assent to such intercourse. 3 Hagg. E.C. 87. T

(d) “Can a man consenting to adultery with A., but not consenting to adultery with B. take advantage of that adultery, and say *Non omnibus dormio*? This is language not to be endured. If he cannot say *Non omnibus dormio*, can he say *Non semper dormio*?” *Per Lord Stowell* in 3 Sw. & Tr. 116. U

## (4) Passive sufferance of adultery, for a length of time.

..... by the husband, bars him from his remedy. *Crewe v. Crewe*, 3 Hagg. E.C. 123. Y

## (5) Conduct amounting to connivance—Husband—Totally indifferent to his wife.

If a husband is totally indifferent to his wife, and permits her to be absent from him for a long time without inquiry, and, though capable of doing so, makes no provision for her, and adultery ensues as a consequence, his conduct amounts to connivance. *Michelson v. Michelson*, 3 Hagg. E.R. 147. W

## (6) Husband insensible of his own honour—Delay.

“A, ....., and who from a conformity to the corrupt manners of the world, may have no wish to pursue a legal remedy, or may not think it worth pursuing, refrains, from doing so; if he at length, after a long continuance of toleration, awakes of his own accord, or

2.—“*Conniving at*”—(Continued).

EXAMPLES OF CONNIVANCE—(Continued).

A.—CONDUCT OF HUSBAND HELD TO CONSTITUTE CONNIVANCE—(Ctd.).

is compelled by the clamour and outcry of the world to awake to a sense of his wrong, he awakes too late.” *Crewe v. Crewe*, 3 Hagg. E.R. 188. X

(7) Husband virtually assigning wife to co-respondent by means of deed.

Where a husband has by a deed virtually assigned his wife to the co-respondent, he would be barred from asserting any right to a divorce on the ground of her adultery with the co-respondent. *Walton v. Walton and Hobbell*, 28 L. J. P. & M. 97. Y

(8) A husband employing a man to get evidence of adultery.

(a) “If ..... upon which to obtain a divorce, and the man so employed sets about to procure the defilement of the wife, and by the intervention of that man the wife is purposely induced to commit adultery, the petitioner has no right to a remedy for such adultery.” *Gower v. Gower*, Pearson, L.R., 2 P. & D. 428. Z

(b) The husband would lose his right in the above case even if it were proved that he had not given any distinct orders for the purpose. *Gower v. Gower*, Pearson, L.R., 2 P. & D. 428. A

(c) Where the agents of the petitioner employed by him to watch the respondent after his separation from her, by giving false information to her of the co-respondent's wishes and by carrying letters, brought about the meeting at which the adultery complained of took place held that the petition ought to be dismissed, 45 P.R. 1871. B

(9) Adultery of the wife, procured by design during the husband's absence.

The....., and entirely without his agency, or knowledge even, has been held to disentitle him to relief. *Picken v. Picken and Simmonds*, 34 L. J. Mat. 22. C

(10) Introducing wife to a woman of loose character.

A husband—may be held guilty of connivance, if such introduction has any connection with the resulting adultery. But if the adultery of the wife did not appear to have been occasioned by it that would not bar the husband of his right of relief. *Harris v. Harris*, 2 Hagg. E.R. 416 (1829). D

(11) Other cases where husband's conduct was held to amount to connivance.

(i) Where the husband's absence was coupled with such conduct on his part as indicated a consent in his wife's irregular habits. *Michelson v. Michelson*, (1804), 3 Hagg. Ecc. 147. E

(ii) Where the husband tolerated his wife's adultery with another to whom he owed money. *Denniss v. Denniss*, (1808) 3 Hagg. Ecc. 348 N. F

(iii) Wilfully abstaining, even without corrupt intention, from preventing adulterous intercourse, which might reasonably be expected to occur from the party's conduct. *Gipps v. Gipps*, (1864), 11 H.L. Cas. 1. G

(iv) Where the adultery of the wife was, as it were, manufactured by an agent of the husband or his relatives. *Picken v. Picken and Simmonds*, (1864) 34 L.J. (P. M. and A.) 22. But see also *Sugy v. Sugy and Moore*, (1861), 31 L.J. (P. M. and A.) 41. H

2.—“*Conniving at*”—(Continued).

## EXAMPLES OF CONNIVANCE—(Continued).

## A.—CONDUCT OF HUSBAND HELD TO CONSTITUTE CONNIVANCE—(Ctd.).

(v) Where the adultery of the wife was committed in consequence of the inducement of the agent of the husband, though without his authority.  
*Gower v. Gower*, (1872), L.R. 2 P. & D. 423. I

N.B.—For another recent case in which detectives figure largely, see *Pollard v. Pollard*, (1904), Times 17th—31st March, 21st & 22nd April. J

(vi) Encouraging such intimacy as might lead to adultery. *Gilpin v. Gilpin*, 3 Hagg. Ecc. 150. J-1

## (12) Delay, effect of.

“The first thing which the Court looks to when a charge of adultery is preferred is the date of the charge relatively to the date of the criminal fact and knowledge of it by the party, because, if the interval be very long between the date and knowledge of the fact and the exhibition of them to this Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation in order to take it out of the reach of such interpretations.” *Per Lord Penzance, Boulting v. Boulting*, 33 L.J. P. & M. 93. K

## B.—CONDUCT OF HUSBAND HELD NOT TO CONSTITUTE CONNIVANCE

## (1) Husband introducing his wife to a woman of loose character.

Where a . . . . ., her subsequent adultery, not connected with the introduction, was held not to constitute connivance *Harris v. Harris*, 2 Hagg. Ecc. 376. L

## (2) Husband countenancing wife's indelicate conduct.

Where the husband countenanced his wife's indelicate conduct, four years after which she committed adultery, he held the husband was entitled to relief. *Hodges v. Hodges*, 3 Hagg. Ecc. 118. M

## (3) Conduct injudicious but intentions honest.

Where the conduct of the party charged with connivance was injudicious, but the intentions were honest that would not constitute connivance. *Hoar v. Hoar*, (1801), 3 Hagg. Ecc. 137. N

## (4) Lack of foresight.

Mere ——— does not constitute connivance. *Allen v. Allen and D'Arcy*, 30 L. J. P. & M. 2. O

## (5) Dullness of apprehension.

Nor does mere ——— constitute connivance. (*Ibid.*) P

## (6) Leaving wife of whose guilt the husband is morally convinced.

Where a husband left his wife being morally convinced of her adultery, but waited for proof of it, the husband also being not able to support her, such conduct is not connivance. *Reeves v. Reeves*, (1813), 2 Phillim. 125. Q

## (7) Negligence not amounting to acquiescence

Negligence not amounting to acquiescence in the acts of the other party with the expectation that such acts would lead to his or her adultery is not connivance. *Rogers v. Rogers*, (1880), 3 Hagg. Ecc. 57. R

2.—“*Conniving at*”—(Continued).

## EXAMPLES OF CONNIVANCE—(Continued).

## B.—CONDUCT OF HUSBAND HELD NOT TO CONSTITUTE CONNIVANCE—(Concluded).

(8) **Husband's tolerating conduct from which adultery would result.**

(a) The—cannot be construed as connivance. *Glennie v. Glennie and Bowles*, (1862), 32 L J. (P.M. & A.) 17. S

(b) The following will not each by itself, constitute connivance :—

(i) Coarse and even brutal behaviour. *Stone v Stone*, 3 N. C. 278, p. 304. T

(ii) Obscene and disgusting language. (*Ibid*) U

(iii) Entire disregard of decorum. (*Ibid*.) Y

(iv) Over confidence. (*Ibid*.) *Rogers v. Rogers*, (1830), 3 Hag. Ecc 57. W

(v) Cruelty and desertion, though they tend to induce a wife to disregard her own duties, and also tempt her to commit adultery, are held not to be connivance. *Stone v. Stone*, 3 N. C. 278, p. 304. X

## C.—CONDUCT OF WIFE HELD TO CONSTITUTE CONNIVANCE.

(1) **If a wife once consents to allow her husband to commit adultery.**

———, she has no right afterwards to claim a decree on account of that adultery. *Thomas v. Thomas*, 2 Sw & Tr 113 Y

(2) **Consent of wife given in consideration of an allowance made to her.**

Her willing consent to her husband's misconduct as the condition of an allowance to her is connivance. *Ross v. Ross*, L R 1 P. & D. 734. Z

(3) **Deed showing wife's willingness to continuance of husband's misconduct.**

A deed showing wife's willingness that the offence of the husband should continue would bar the wife's right to relief. *Boulting v. Boulting*, (1864), 3 Sw & Tr. 329. A

(4) **Wife not complaining of her husband's remarriage.**

Where a wife who had obtained a decree of dissolution of marriage in the United States was not heard to complain of her husband's remarriage, it was held that her conduct constituted connivance. *Palmer v. Palmer*, (1859), 1 Sw. and Tr. 551. B

(5) **Husband's misconduct brought about by clerk of wife's solicitor.**

Where the husband's adultery was brought about by a clerk of the wife's solicitor, though without her knowledge it was held that the wife could have no relief. *Bell v. Bell*, (1889), 58 L J. (P) 54. C

## D.—CONDUCT OF WIFE HELD NOT TO CONSTITUTE CONNIVANCE.

(1) **Expectation of deed of separation.**

Mere expectation of a deed of separation by a wife does not imply a license to her husband to commit adultery. See *Ross v. Ross*, (1869), L.R. 1 P. and D. 734. D

(2) **Acts done to spare disgrace to her family—Confiding in husband's promises—Effect.**

Where the husband had, to his wife's knowledge, committed adultery with her sister, and yet the wife allowed that sister to accompany her and her husband to India, held that though the wife's conduct had been injudicious, it did not, under the circumstances, amount to connivance at the adultery which was subsequently committed between her sister



2.—“*Conniving at*”—(Concluded).

## EXAMPLES OF CONNIVANCE—(Concluded).

## D.—CONDUCT OF WIFE HELD NOT TO CONSTITUTE CONNIVANCE—(Old.).

and husband, as it was to spare the disgrace to her family of an exposure, and only on the husband's sworn promise that he would have no further intercourse with the sister, that the wife allowed her to accompany them to India." *Turton v. Turton*, 3 Hagg. 398; *Macrae on Divorce*, pp. 84, 85. E

3.—“*Has condoned the same.*”(1) *Condonation, what constitutes*

- (a) Condonation of adultery is a blotting out of the offence imputed, so as to restore the offending party to the position which he or she occupied before the offence was committed. *Keats v. Keats and Montezuma*, 28 L.J. Mat. 57, upheld on appeal. F
- (b) It is a conditional forgiveness on a full knowledge of all antecedent guilt, the condition being that the offence shall not be repeated. *Bramwell v. Bramwell*, 3 Hagg. E.R. 629, *Blandford v. Blandford*, 8 P.D. 20. G
- (c) “Condonation of matrimonial offences means the complete forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore as between the spouses the *status quo ante*” *Ellis v. Ellis and Smith*, (1885), 4 Sw. & Tr. 154, *Hall v. Hall and Kay*, (1891), 64 L.T. 837, *Alexandre v. Alexandre*, (1870), L.R. 2 P. & D. 164, *Dempster v. Dempster*, (1861), 2 Sw. & Tr. 488, *Keats v. Keats and Montezuma*, (1859), 1 Sw. & Tr. 334. H
- (d) The above rule is however subject to the express or implied condition that no further matrimonial offence shall occur *Durant v. Durant*, (1925), 1 Hagg. Ecc. 733, *Dent v. Dent*, (1865), 4 Sw. & Tr. 105, *Bunney v. Bunney*, (1893), 69 L.T. 498, *Blandford v. Blandford*, (1883), 8 P.D. 19, *Cooke v. Cooke*, (1863), 3 Sw. & Tr. 126, 216. I
- (e) If, however, such a subsequent offence should arise, the forgiveness is cancelled, and the old cause of complaint is revived, even if the offence is not *ejusdem generis* with the original offence. *Palmer v. Palmer*, (1860), 2 Sw. & Tr. 61, *Wilton v. Wilton and Chamberlain*, (1859), 1 Sw. & Tr. 563; *Worsley v. Worsley*, (1730), 2 Lee 572. J
- (f) Condonation is a “blotting out of the offence so as to restore the offending party to the same position he or she held before the offence was committed.” *Browne and Powell on Divorce*, Seventh Edition, 1905, p. 33. K
- (g) Forgiveness is the essence of condonation, *Ellis v. Ellis and Smith*, 34 L.J. P. & M. 118; 4 Sw. & Tr. 154. L
- (h) Mere forgiveness is not condonation; to be condonation “it must completely restore the offending party, and must be followed by cohabitation.” *Keats v. Keats*, 1 S. & T. 334; 28 L.J.P. 57, 32 L.T. 321. M
- (i) Condonation must be a complete obliteration of the condoned offence. *Browne and Powell on Divorce*, Seventh Edition, 1905, p. 33. N
- (j) “It is a conclusion of fact, not of law, and, in my judgment, means the complete forgiveness and blotting out of a conjugal offence, followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The husband, in my

### 3.—“Has condoned the same”—(Continued).

opinion, need not be aware of all the acts of adultery committed by the wife when he forgives her any particular act of adultery. Condonation means a full and absolute forgiveness, with knowledge of all that is forgiven. It does not operate as a forgiveness of other unknown adulteries." *Per Lopes, L.J. in Bernsteln v. Bernsteln*, 1893, p. 300; and see *Alexandre v. Alexandre*, L.R., 2 P. & D. 164, *Dempster v. Dempster*, 81 L.J. Mat. 21.

- (k) Sir Cresswell Cresswell thus defines condonation:—"it must amount to such a blotting out of her offence as will restore her to her former position". *Keats v. Keats*, 1 S. & T. 334; 28 L.J.P. 57; 32 L.T., O.S. 321.

**N.B.**—See S. 14, last para, as to what under this Act would be condonation of adultery.

### (2) Condonation implies knowledge of the offence condoned.

- (a) In order to found condonation, there must be a complete knowledge of all the adulterous connexion, and a condonation subsequent to it. *Turton v. Turton*, 3 Hagg. E.R. 351.

- (b) In other words, it is "forgiveness of a conjugal offence with a full knowledge of all the circumstances," i.e., those relating to the guilt of the erring party. *Peacock v. Peacock*, 27 L.J. Mat. 71, *Campbell v. Campbell*, Dea. and Sw. 235.

### (3) Mere desire to condone is not condonation.

A mere willingness to condone is not sufficient to constitute condonation. See *Macrae on Divorce*, p. 37.

### (4) Principle of the doctrine of condonation.

"Condonation is a doctrine not limited to the Ecclesiastical Courts, or their successor, the Probate, Divorce and Admiralty Division of the High Court of Justice, nor is it the creation of statute, but a broad general principle of law." *Williams v. Williams*, (1904), p. 145; 73 L.J.P. 31; 90 L.T. 174.

### (5) Motive for condonation.

"Where the fear of being deprived of her children, and their being left to the charge of a harsh father, is the motive which induced the wife to resume cohabitation, her so returning to cohabitation is not necessarily a condonation of the marital offence for which she had left her husband." *Courtis v. Courtis*, 27 L.J. P. & M. 73; 1 Sw. & Tr. 192. *Macrae on Divorce*, p. 36.

### (6) Condonation by wife, and condonation by husband—Difference.

- (a) "In considering the question of condonation it is necessary to divide it into two parts; first, when pleaded by the wife; second, when pleaded by the husband, since the Courts have often held condonation praiseworthy in a wife and, under exactly similar circumstances, culpable in a husband." *D'Aguiar v. D'Aguiar*, 1 Hagg. E.R. 786, (1794); *Angle v. Angle*, 1 Robert, 641, (1843).

- (b) "It is therefore a far more available defence for a wife than for a husband." *Browne and Powell, on Divorce*, Seventh Edition, 1905, p. 34.

- (c) The forgiveness which must follow a knowledge of a wife's guilt to establish the plea of condonation might be express or implied. *Beeby v. Beeby*, 1 Hagg. E.R. 793 (1799).

### 3.—“Has condoned the same”—(Continued).

- (d) “Forgiveness on the wife’s part, especially with a large family, in the hope of reclaiming her husband, is meritorious, while a similar forgiveness on the part of the husband would be degrading and dishonourable.”  
*Durant v. Durant*, 1 Hagg. E.R. 752 (1825). Y

**N.B.**—“The proviso in S. 14 that no adultery shall be deemed to have been condoned unless conjugal cohabitation has been resumed or continued does away with many of the nice distinctions taken by the Ecclesiastical Court between condonation in the case of a wife and condonation in that of a husband.

These are still applicable to condonation of other conjugal offences than adultery.” See *Macrae on Divorce*, p. 36. Z

#### (7) Condonation is question of fact.

Condonation is “forgiveness of a conjugal offence with the full knowledge of all the circumstances, and is a question of fact, not of law”. *Peacock v. Peacock*, 1 S. and T. 183, 27 L.J.P. 71. A

#### (8) Evidence of condonation.

- (a) The best evidence of condonation is the continuance or resumption of sexual intercourse. *Winlham v. Windham and Gruglins*, (1863), 32 L.J. (P.M. & A.) 89. B

- (b) It is the case especially in the case of a wife. *D’Aguilar v. D’Aguilar*, (1794), 1 Hagg. Eco. 773. C

- (c) It is a question of fact, which may be decided by a jury, for knowledge and forgiveness of an offence are not presumed. *Peacock v. Peacock*, (1852), 1 Sw. & Tr. 183, *Durant v. Durant*, *supra*. D

#### (9) Condonation need not be specially pleaded.

Condonation, though not pleaded, will be noticed by the court, if the evidence in the case discloses such fact. *Curtis v. Curtis*, 4 Sw. & Tr. 231. E

#### (10) Condonation of wife’s adultery—Effect on husband’s claim for damages against co-respondent.

- (a) Condonation of the wife’s adultery was held to be no answer to the husband’s claim for damages against the co-respondent *Pomero v. Pomero*, 10 P.D. 174, 54 L.J.P. 93. F

- (b) But this decision was afterwards overruled by the Court of Appeal. *Bernstein v. Bernstein*, (1892), p. 375, 62 L.J.P. 16, 67 L.T. 52, on appeal, (1893), p. 292, 63 L.J.P. 3, 69 L.T. 513. G

### A.—CONDONATION PRESUMED TO BE CONDITIONAL

#### (1) Condonation—Always assumed to be conditional.

- (a) Condonation is always assumed to be conditional, and the condition extends, not only as against the repetition of the old offence, but also to any other marital offence. *Palmer v. Palmer*, 29 L.J. Mat. 124. H

- (b) “Condonation is forgiveness, with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness, therefore on breach of the condition the right to a remedy for the former injury revives.” *Durant v. Durant*, 1 Hagg. E. R. 752 (1825). I

3.—“*Has condoned the same*”—(Continued).

## A.—CONDONATION PRESUMED TO BE CONDITIONAL—(Concluded).

## (2) Condonation may be expressly made conditional.

(a) “There may be also conditional condonation, *i.e.*, condonation with not only the implied subsequent condition, but with an express condition precedent, which, until it has been satisfied, prevents the condonation operating” *Cooke v. Cooke*, 3 S. & T. 26; 32 B.J.P. 154, 8 L.T. 644; on appeal, 3 S. & T. 246, *Newsome v. Newsome*, L.R., 2 P. & D. 306; 40 L.J.P. 71, 25 L.T. 204. J

(b) “A wife leaves her husband’s house on account of his cruelty to her, she returns and promises to resume cohabitation, if her husband reinstate her in all respects in the position a wife should occupy. The husband does not place her in such position, but continues to show slights and insult, and offer bad treatment to his wife. She again leaves his house. Her conduct in returning does not amount to condonation” *Cooke v. Cooke*, 3 Sw. & Tr. 126, (affirmed on appeal) *ib.*, 246, S.C., 32 L.J.P. & M. 81, *ib.*, 151, *Macrae on Divorce*, p. 38. K

## (3) Condition precedent to an offer of condonation.

“It is, of course, in the power of the party to annex a condition precedent to an offer of condonation. If this condition is not complied with, there is no condonation of the offence, and it cannot afterwards be pleaded in a suit in which the offence is charged.” *Cook v. Cook*, 3 Sw. & Tr. 136. L

## B.—REVIVAL OF CONDONED OFFENCE BY SUBSEQUENT OFFENCE.

## (1)\* Slight offence revives condoned offence.

(a) To revive an offence which has been condoned, an offence less than would be required to found a petition may be sufficient. *Durant v. Durant*, 1 Hagg. E.R. 761, *Bostock v. Bostock*, (1858), 1 Sw. & Tr. 221; see, also, 5 M. 118. M

(b) But this doctrine does not go the length of making mere familiarities revive adultery, which carries a change of status as its result. *Ridgway v. Ridgway*, (1881), 23 W.R. 612. N

## (2) Revival of condoned adultery.

(a) Adultery condoned is, revived by subsequent adultery. *Newsome v. Newsome*, L.R., 2 P. & D. 306, *Dent v. Dent*, 34 L.J. Mat. 118, *Durant v. Durant*, 1 Hagg. E.R. 761. O

(b) When a husband, having received reasonably probable information of his wife’s adultery, has, by continuing co-habitation, condoned the offence, subsequent misconduct of the wife tending to, though falling short of, adultery, revives the condoned adultery. 5 M. 118. P

(c) Less cruelty was necessary to revive condoned adultery than to found an original suit. *Bramwell v. Bramwell*, 3 Hagg. E.R. 635 (1831) Q

(d) Condoned adultery may be revived by undue familiarity short of adultery. *Winscom v. Winscom and Plowden*, 33 L.J.P. & M. 45; 3 Sw. & Tr. 380. R

(e) Desertion revives condoned adultery, whether petitioner be husband or wife. *Houghten v. Houghten*, 1903, p. 150, 89 L.T. 76; *Copsey v. Copsey*, 1905, p. 94, 91 L.T. 363. S

3.—“*Has condoned the same*”—(Continued).

## B.—REVIVAL OF CONDONED OFFENCE BY SUBSEQUENT OFFENCE—(Old.).

(f) Where a petition for judicial separation on the ground of adultery had been dropped and a deed entered into, the wife was granted a dissolution of marriage on fresh adultery with the same woman. (*Binney v. Binney*, (1893), 69 L.T. 493) T

(g) On condonation of adultery, subsequent adultery revives both it and every other matrimonial offence which has been committed. *Blandford v. Blandford*, 8 P.D. 20; and see *Worsley v. Worsley*, 1 Hagg. E.R. Supp. 734. U

## (3) Incestuous adultery condoned, revival of.

Incestuous adultery condoned is revived by adultery though not incestuous. *Newsome v. Newsome*, L.R., 2 P & D 306, *Dent v. Dent*, 34 L.J. Mat. 118; *Durrant v. Durrant*, 1 Hagg. E.R. 761. Y

## (4) Cruelty condoned, revival of.

Subsequent adultery revives former cruelty which had been condoned. *Palmer v. Palmer*, 1 S.L.T. 61 cited in 14 Bom. L.R. 173 (174). N

## (5) Cruelty and adultery—Revival of one by the other.

Cruelty and adultery will each revive the other. See *Durant v. Durant*, 1 Hagg. E.R. 763; *D'Aguilar v. D'Aguilar*, 1 Hagg. E.R. 773; *Popkims v. Popkims*, *ibid*, 765. X

## (6) Condoned desertion, revival of.

Desertion condoned is revived by subsequent adultery. *Blandford v. Blandford*, 8 P.D. 19. Y

## (7) Condoned bigamy, revival of.

Whether condoned bigamy can be revived by subsequent misconduct. *Furness v. Furness*, 29 L.J. P. & M. 133. Z

## (8) Disobedience of order for restitution of conjugal rights.

The effect of disobedience to an order for restitution of conjugal rights can be revived, after subsequent co-habitation, by a further matrimonial offence. *Paine v. Paine*, (1903), p. 263. A

## C. EXAMPLES.

## I.—WHAT AMOUNTS TO CONDONATION.

## (1) Wife remaining in husband's house after misconduct—Both dining together.

Where the petitioner suffered his wife to remain in his house for about three weeks after he had been apprised of her misconduct, and they dined together for three days after the disclosure, the husband's petition was rejected. *Mr. Miller's Case*, Macq. H. of L. 628, Sess. 1821. B

## (2) Wife sleeping at husband's house after adultery—Presumption.

Where wife slept at her husband's house the night after the last act of adultery charged (of which act he was cognizant), it was held that the *onus* of showing that they did not sleep together on that night lay on the husband. *Timnings v. Timnings*, 1 Hagg. E.R. 84 (1792). C

## (3) Sleeping together in same bed after knowledge of misconduct.

(a) The fact that a husband sleeps in the same bed with his wife after knowledge of her adultery affords a strong presumption of condonation;

## 3.—“Has condoned the same”—(Continued).

## C.—EXAMPLES—(Continued).

## I.—WHAT AMOUNTS TO CONDONATION—(Concluded).

but it is capable of being rebutted by evidence. *Hall v. Hall*, 60 L.J.P. 73 (C A), affirming 67 L.T. 837. See also *Pitt v. Pitt*, 33 L.T. 136. D

- (b) In order to establish condonation, it is not sufficient to prove that a husband returned to co-habitation with his wife, after he had evidence of her adultery: it is necessary also to prove that he believed her to be guilty and intended to forgive her. *Ellis v. Ellis*, 4 S.&T. 154; 34 L.J.P. 100, 13 L.T. 211. E

(4) **Condonation by conduct—Co-habitation.**

A husband, when told of his wife's guilt, and placing reliance on the information, ought to cease co-habitation with her *Dillon v. Dillon*, 3 Curt. 90, *Elwes v. Elwes*, 1 Hagg. C.R. 292, *Beeby v. Beeby*, 1 Hagg. E. R. 793. F

(5) **Compromise by deed.**

- A compromise by deed reaches farther than condonation which is conditional. *Rowley v. Rowley*, (1861), 3 Sw & Tr 338, affirmed (1866), L.R. 1 Sc. & Div. 63. G

(6) **Condonation by deed—Condition not to plead any offence committed before date of deed—No revival.**

“Where a husband had been guilty of cruelty, and he and his wife separated under the provisions of a deed by which it was agreed that no proceedings should be taken by either party against the other in respect of any cause of complaint which had arisen before the date of the deed, and that every offence, if any, committed by either party against the other should be considered as condoned, and that in any proceeding by either against the other in respect of any cause of complaint which might subsequently arise, no offence committed by either party before the deed should be pleaded or be admissible in evidence, the Court of Appeal held that subsequent adultery by the husband did not revive the wife's right to complain of the cruelty committed before the deed.” *Rose v. Rose*, 8 P.D. 93, 52 L.J.P. 25, 48 L.T. 378. See also, *Gooch v. Gooch*, (1893), Prob. 99, 62 L.J.P. 73, 68 L.T. 462. H

## II.—WHAT DOES NOT AMOUNT TO CONDONATION.

(1) **Residence without conjugal co-habitation.**

Mere residence in the same house without actual conjugal co-habitation was not held to amount to condonation. See *Lord Cloncurry's Case*, Macq. H. of L. 607, Sess. 1811; *Campbell v. Campbell*, 1 Dea. & Sw. Ecc. 289 (1857). I

(2) **Condonation of cruelty—Presumption from continuance of co-habitation.**

The wife's condonation of cruelty will not lightly be presumed from a continuance of co-habitation, after one or even several acts of cruelty. *Curtis v. Curtis*, 1 S. & T. 192. J

(3) **Co-habitation after cruelty by wife—Effect.**

• “Co-habitation after the last act of cruelty, is not necessarily and universally such condonation as would be a bar to the wife's suit, even though it may be in one sense a voluntary co-habitation, or may not be forced or fraudulently brought about by the husband.” *Snow v. Snow*, 2 No. of Ca. Supp. 13 (1842). See also *D'Aguiar v. D'Aguiar*, 1 Hagg. E.R. 786 (1794). K

3.—“*Has condoned the same*”—(Concluded).

## C.—EXAMPLES—(Concluded).

## II.—WHAT DOES NOT AMOUNT TO CONDONATION—(Concluded).

(4) **Conjugal co-habitation if necessary for condonation.**

There can be no condonation which is not followed by conjugal co-habitation. *Keats v. Keats and Montezuma*, 28 L.J. Mat. 57, and see *Brannigan v. Brannigan*, The Times, Feb. 8th, 1890, see also as to condonation of adultery, S. 14, *infra*. L

(5) **Effect of co-habitation by injured wife and injured husband—Difference.**

(a) “The effect of cohabitation is less stringent on the wife, she is more *sub potestate*, more *inops consilii*, she may entertain more hopes of the recovery and reform of her husband”. *Beeby v. Beeby*, 1 Hagg. E.R. 793 (1799). See also *Turton v. Turton*, 3 Hagg. 338 (1830). M

(b) “A woman has not the same control over her husband, has not the same guard over his honour, has not the same means to enforce the observance of the matrimonial vow, his guilt is not of the same consequence to her, therefore the rule of condonation is held more laxly against her.” *D’Aguilar v. D’Aguilar*, 1 Hagg. E.R. 786 (1794). N

(c) “Forbearance in bringing the suit” (by a wife) “may not only be excusable but meritorious, in hopes of reconciliation.” *Ferrers v. Ferrers*, 1 Hagg. Con. C. 133. O

(d) “It is not necessary for the wife to withdraw from cohabitation on the first or second instance of misconduct, it is legal and meritorious in her to be as patient as possible, forbearance does not weaken her title to relief.” *Pophins v. Pophins*, 1 Hagg. 768 (notes) (1794). P

(6) **Evidence of condonation—Words spoken**

(a) Words, however strong, can, at the highest, only be regarded as imperfect forgiveness. *Keats v. Keats and Montezuma*, 28 L.J. Mat. 57, and see *Brannigan v. Brannigan*, The Times, Feb. 8th, 1890. Q

(b) Unless followed up by something which amounts to a reconciliation, and to a reinstatement of the wife in the condition she was in before she transgressed, it must remain incomplete (*Ibid.*) R

(c) Words alone, however strong, cannot amount to condonation. There must be a return to conjugal cohabitation, and such a blotting out of the offence as restores the guilty party to his or her former position. 70 P.R. 1873. S

(d) Where a husband is in possession of evidence of his wife’s adultery, it is not sufficient in order to establish condonation merely to show that there was a return to cohabitation; it must also be shown that the husband gave credit to that evidence, and took his wife back believing her to be guilty and intending to forgive her. (*Ibid.*) T

(7) **Suit for restitution of conjugal rights.**

The commencement of a suit for restitution by the wife, and her returning again under it to cohabitation, was held to be a complete condonation. *Evans v. Evans*, 2 No. of Cas. 473 (1843). See also *Neeld v. Neeld*, 4 Hagg. E.R. 268 (1831). U

**4.—“Counter charge....against the petitioner.”**

**(1) Pleading counter charges.**

(a) The counter charges must be duly made by a party to the proceedings, in accordance with the rules of procedure and practice applicable to such party. 62 P.R. 1887. **Y**

(b) Thus, in a suit for dissolution of marriage which was undefended, it appeared that, after service of the summons, a letter purporting to be from the respondent was received by the Judge by post. The letter imputed gross misconduct to the petitioner, such as, if the respondent had appeared and put in a formal answer would have amounted to counter charges within the meaning of this section (12). The letter also announced that the writer was unable to appear to defend for want of means. *Held* that the Court was not bound to take action on the letter and inquire into the imputations made. 62 P.R. 1887. **W**

**(2) Counter charges—Duty of Court before pronouncing decree nisi.**

“In a suit for dissolution of marriage, where the Court recorded the statement of the petitioner and respondent and caused the documentary evidence produced by both to be filed, and thereupon proceeded at once to pronounce judgment granting a decree nisi without fixing issues upon the statements of the parties, nor causing any further enquiry to be made, although the respondent alleged acts of cruelty and adultery against the petitioner subsequent to her marriage which allegations the petitioner denied *held*, that the decree nisi should not be confirmed, as the investigation was defective to a substantial extent, with reference to Ss. 12 and 14 of the Act.” 130 P.R. 1879. **X**

**13.** In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed,

or finds that the petitioner has, during the marriage, been accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion <sup>1</sup> with either of the respondents,

then and in any of the said cases the Court shall dismiss the petition. **•**

When a petition is dismissed by a District Court under this section, the petitioner may, nevertheless, present a similar petition to the High Court <sup>2</sup>.

**(Notes).**

**General.**

**Corresponding English Law.**

The Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), Sec. 30, provides as follows —



## General—(Concluded).

"In case the Court, on the evidence in relation to any such petition, shall not be satisfied that the alleged adultery has been committed, or shall find that the petitioner has during the marriage been accessory to, or conniving at, the adultery of the other party to the marriage, or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then and in any of the said cases the Court shall dismiss the said petition." X-I

## I.—"Collusion."

## (1) What is collusion in Divorce Courts.

- (a) "Collusion is said to exist, where parties put forward false facts to form the basis of the judgment, and where they put forward facts which are true, but which have been corruptly and fraudulently preconcocted to form that basis." McQueen on Div., 2nd Ed., p. 67. Y
- (b) "Collusion exists, where the initiation of a suit for dissolution of marriage is procured, or its conduct provided for by agreement or bargain between the spouses or their agents, as, for instance, an agreement not to defend, even where the agreement is disclosed to the Court, and where no one is able to indicate any fact which is being falsely dealt with or withheld, because the Court will not be hampered in ascertaining, for itself, whether there is danger of a husband or wife obtaining a divorce contrary to the justice of the case." Matrimonial Causes Act, 1860 (23 and 24 Vic., c. 144), S. 7; see Laws of England, Vol XVI, p. 489 Z
- (c) To support the plea of collusion there must be an agreement between the husband and wife either to put forward a false case or to stifle a defence, or an agreement that the respondent shall assist the petitioner by furnishing evidence 70 P.R. 1873. A

## (2) Principle on which collusion is discouraged.

- (a) Acting in concert is collusion, the inference then being that all the truth is not presented to the Court. *Chism's case*, Mcq. H. of L.Pr. 585; *Lloyd v. Lloyd and C.*, 30 L.J. Mat. 97. B
- (b) "In such a case the Court is forced to believe that it is being misled, or, at any rate, it can feel no assurance that it is not, as where the parties agree that there shall be no defence". *Edward's case*, Mcq. H. of L.Pr. 588; *Churchward v. Churchward and H.*, 1895, p. 28. C
- (c) Where the parties concur in getting up the evidence of the case, though the case may be a true one, as where one party, contrary to his or her apparent interest, is found acting in concert with the other in matters material to the suit. *Midgley v. Wood*, 30 L.J. Mat. 57. D

## (3) Object of this provision as to collusion.

"The object of this special provision with regard to collusion is to compel the parties to come into the Court of Divorce with clean hands. It is to oblige them to bring all material and pertinent facts to the notice of the Court; to prevent their blinding the eyes of the Court in any respect; to oblige them so to act as to enable the Court to be in a position to do justice between the parties." *Fer Lopes*, L.J., in *Butler v. Butler*, 15 P.D. 66; *Rattigan on Divorce*, 1897, p. 86. E

1.—“*Collusion*”—(Continued).

## (4) Collusion in one suit does not bar relief in another suit.

Collusion, although an absolute bar to dissolution of marriage or judicial separation, does not prevent a fresh suit free from collusion being afterwards brought. Matrimonial Causes Act, (1857), 20 and 21 Vic., c. 85, S. 30. *Butler v. Butler and Burnham*, (1890), 63 L.T. 256. F

## (5) Collusion in presentation of petition for dissolution—English and Indian Law.

S. 13 of the Indian Divorce Act (IV of 1869) provides, that in suits for dissolution, “if the Court finds that the petition is presented or prosecuted in collusion with either of the respondents, it shall dismiss the petition.” 11 C. 651 (654). G

N.B. —This is a similar provision to that which is contained in S. 30 of the English Divorce Act (20 and 21 Vict., c. 85), 11 C. 651 (654).

## (6) English Law.

(a) It has been held in the English Courts that the word *collusion* in this section has a far wider meaning than *connivance*, and extends to cases where the original ground of the petition has not been connived at, but where the parties have subsequently agreed to use it as a means of divorce—so that collusion in this sense may exist, without any connivance at all. 11 C. 651 (654); see *Lloyd v. Lloyd*, 1 S. & T. 567; *Crewe v. Crewe*, 3 Hag. 130. Cited in 11 C. 651 (654). H

(b) Where it appeared upon the proceedings that after the petition had been filed the petitioner and respondent each presented a petition, in which they agreed that, from that date, the marriage between them should be dissolved; that neither of them should have any claims against the other, that each should marry again at pleasure; that the wife should have no claims against the husband for maintenance or otherwise; and that they prayed for a dissolution upon those terms, each party paying his and her own costs, it was held that that was clearly a case of collusion. 11 C. 651 (654). I

## (7) No collusion between respondents.

Collusion may be committed by the petitioner with either of the respondents, but there cannot be collusion between the respondents. McQueen on Div., 2nd Ed., p. 67. J

## (8) Collusion contemplated by the section.

The collusion need not be of the offence, it is sufficient that it be of the prosecution of the suit. See *Lloyd v. Lloyd and Chichester*, 30 L.J. P. & M. 97. K

## (9) Parties concurring to get up evidence of the case.

(a) If the parties concur in getting up evidence of the case, it is collusion though the case be a true one.—Per the Judge Ordinarily in *Midgley (falsely called Wood) v. Wood*, 30 L.J. P. & M., 57. L

(b) But the parties to the suit will not be held responsible for the acts of their respective solicitors in colluding to put evidence before the Court, if the solicitors have thus acted without the knowledge or concurrence of the parties. *Cox v. Cox*, 30 L.J. P. & M., 255. M

1.—“*Collusion*”—(Continued).

## EXAMPLES.

## A.—WHAT AMOUNTS TO COLLUSION.

## (1) Agreement to withhold relevant evidence from the Court.

(a) An agreement between the parties to a divorce suit to withhold any relevant evidence from the Court amounts to collusion. *Bacon v. Bacon*, 25 W.R. 560; *Hunt v. Hunt*, 47 L.J.P. 22; 39 L.T. 45. N

(b) Collusion is not limited to imposing of other than genuine evidence on the Court. It extends to any agreement to withhold any material evidence. See *Churchward v. Churchward*, (1894), p. 161. See *Encyclopaedia Britannica*, Times Suppt., Vol. XXVII, p. 475. O

## (2) Keeping back evidence of what would be an answer to the petition.

(a) Collusion may consist on the keeping back evidence of what would be a good answer to the petition. *Jessop v. Jessop*, 2 S. & T. 302, *Bacon v. Bacon and Ashby*, 25 W.R. 560 (1894). P

(b) So, where both parties, being equally guilty, agree to put forward the guilt of one party alone, it amounts to collusion. *Gray v. Gray*, 2 S. & T. 559. Q

(c) It has, indeed, been held that, if the petitioner is otherwise entitled to a decree, the suppression of material facts which might have been adduced is not necessarily a ground for refusing a decree. *Alexander v. Alexander*, L.R., 2 P. 164 39 L.J.P. & M. 84. R

## (3) Suppressed facts not sufficient to establish counter charge—Effect.

It is equally collusion if the parties agree *inter se* to keep back pertinent and material facts, even though the suppressed facts might not have been sufficient to establish the counter-charge. *Hunt v. Hunt and Wright* 47 L.J.P. & M. 22. S

## (4) Adultery committed by agreement of parties with a view to obtain divorce.

Where a husband committed adultery by agreement with his wife, and supplied the evidence against himself, in order that she might get a divorce, the Court dismissed the wife's petition on the ground of collusion. *Todd v. Todd*, L.R., 1 P. & D. 121; 35 L.J.P. 34; 13 L.T. 759. T

## (5) Petitions for divorce have also been rejected on the ground of collusion in the following cases:—

I. Where the adultery was proved, but a bond was subsequently produced by the husband to the wife conditioned that she should not unduly oppose the divorce. *Captain Edward's case*, (1779), Macq. H. of L. Pr. 583. U

II. Where the solicitor refused to give evidence that he was not employed by the adulterer. *Mr. Down's case*, Ib. 584. V

III. Where the wife's adultery was proved, but evidence of the husband's misconduct had been collusively suppressed. *Mr. Cope's case*, Ib. 593, Sess. 1801. W

IV. Where the wife was present at Doctors Commons when the husband's proctor brought the witnesses thereto identify her, the Court held that explanation was necessary to repel the suspicion of collusion. *Mr. Vere's case*, 74 H. of L. Journ. 118 and 121, Sess. 1842. X, Y

I.—“*Collusion*”—(Continued).

## EXAMPLES—(Continued).

## A.—WHAT AMOUNTS TO COLLUSION—(Concluded).

v. To establish a charge of collusion against the petitioner and the respondent, it is necessary to prove that there exists some understanding or agreement between them. *Gethin v. Gethin*, 31 L.J.P. 43. Z

vi. An agreement between the parties for one to commit, or appear to commit, adultery, in order that the other may obtain a remedy as for a real injury, is collusive. *Crewe v. Crewe*, 3 Hag. E.R. 129. A

## (6) Suit begun and conducted by agreement between petitioner and respondent.

“It is clearly collusion if a suit is begun and conducted by agreement between petitioner and respondent, more especially if the latter abstains from defending, though no false facts are put forward, because the Court has no guarantee that all the material facts are before it.” *Churchward v. Churchward and H.*, 1895, p. 23. B

## (7) Agreement to withhold evidence from court.

An agreement between them to withhold decisive or even relevant, material facts from the Court is collusion, *Hunt v. Hunt*, 47 L.J. Mat. 22; *Bacon v. Bacon and A.*, 25 W.R. 560, *Butler v. Butler*, 15 P.D. 66; *Rogers v. Rogers*, p. 161. C

## (8) Agreement not to disclose anything prejudicial to petitioner's case.

is collusion if the petitioner and respondent agree for money that the petitioner may take proceedings, and that the latter shall not disclose anything prejudicial to the petitioner's case. *Shaw v. Could*, L. R., 3 H. L. 55. D

## (9) Respondent not defending.

The fact that a respondent does not appear to defend, even though aware of facts which would constitute a good defence, if amounts to collusion, if done without any understanding or arrangement with the petitioner. See *Gethin v. Gethin and the Queen's Proctor*. 31 L. J. P. & M. 43, *Macrae on Divorce*, p. 40. E

## (10) Conversation between husband and wife.

Where a witness deposed that he had heard the husband and wife speaking together about the divorce, when the husband told her not to take any notice, that he could get the divorce for £40 if she would not oppose, that it would be better for both, the cheaper it could be done, and that he could be a friend to her hereafter,—held that the husband had been guilty of collusion, and was disentitled to a divorce. *Barnes v. Barnes and Grimwade*, 37 L.J. P. & M. 4; 1 L.R., P. & D. 505; *Macrae on Divorce*, p. 40. F

## B.—WHAT DOES NOT AMOUNT TO COLLUSION.

## (1) Mutual desire that the petition may succeed.

“A mere mutual desire on the part of the petitioner and respondent that the petition may succeed, and the fact of either party, independently of the other, putting his or her case before the Court with a view to this end, is not collusion.” See *Gethin v. Gethin and the Queen's Proctor*. 31 L.J. P. & M. 43. *Macrae on Divorce*, p. 39. G

1.—“*Collusion*”—(Concluded).

## EXAMPLES—(Concluded).

## B.—WHAT DOES NOT AMOUNT TO COLLUSION—(Concluded).

## (2) Absence of any secret agreement between the parties.

“The fact that both spouses desire a *divorce a Vinculo* does not make them guilty of collusion provided they have not entered into any agreement obnoxious to the Court.” *Gethin v. Gethin*, (1861), 31 L.J. (P.M. & A.) 44; *Harris v. Harris & Lambert*, (1862), 31 L.J. (P.M. & A.) 160. H

## (3) Collusion between solicitors of parties not collusion in the parties.

“Where the solicitors for the petitioner and respondent conducted the proceedings in a suit for dissolution of marriage, in such a way as to give rise to a reasonable suspicion of collusion, but it appeared that neither of the parties to the suit had been implicated in the irregularities of their solicitors, the Court held that collusion had not been established.” *Cox v. Cox*, 2 S. & T. 306; 30 L.J.P. 97; 70 L.T. 450. I

## (4) Husband giving his wife money.

(a) The mere fact of the husband having given his wife money, before and after the suit began, does not prove collusion. *Barnes v. Barnes and G.*, L.R., 1 P. & D. 505. J

(b) There is no impropriety in the husband making his wife a reasonable allowance while a suit is pending to save the expense of alimony proceedings. *Barnes v. Barnes and G.*, L. R., 1 P. & D. 505. K

## (5) Husband making his wife an allowance in lieu of alimony.

“The mere fact of the husband making his wife an allowance in lieu of alimony while the suit is pending is not *per se* proof of collusion.” *Rattigan on Divorce*, 1897, p. 87. L

2.—“*Present a similar petition to the High Court.*”“*Similar petition*” to the Chief Court after appeal from District Court.

The petitioner filed a suit for divorce in the District Court on the ground of his wife's adultery, the suit was dismissed, and the petitioner appealed to the Chief Court, his appeal being dismissed for default of prosecution. *Held*, that the petitioner could bring a similar suit in the Chief Court, but that there could not be a fresh case compounded of new acts of adultery and of acts previously in litigation.” 45 P.E. 1871 M

Power to Court to pronounce decree for dissolving marriage.

14. In case the Court is satisfied on the evidence<sup>1</sup> that the case of the petitioner has been proved,

and does not find that the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery of the other party to the marriage, or has condoned the adultery complained of,

or that the petition is presented or prosecuted in collusion with either of the respondents,

the Court shall pronounce a decree<sup>2</sup> declaring such marriage to be dissolved in the manner and subject to all the provisions and limitations in sections sixteen and seventeen made and declared :

Provided that the Court shall not be bound to pronounce such decree if it finds <sup>8</sup> that the petitioner has, during the marriage, been guilty of adultery <sup>4</sup>,

or if the petitioner has, in the opinion of the Court, been guilty of unreasonable delay <sup>5</sup> in presenting or prosecuting such petition, or of cruelty <sup>6</sup> towards the other party to the marriage,

or of having deserted or wilfully separated himself or herself <sup>7</sup> from the other party before the adultery complained of, and without reasonable excuse,

or of such wilful neglect <sup>8</sup> or misconduct of or towards the other party as has conduced to the adultery <sup>9</sup>.

**Condonation.** No adultery shall be deemed to have been condoned within the meaning of this Act unless where conjugal co-habitation has been resumed or continued.

(Notes).

General.

#### Corresponding English Law.

The Matrimonial Causes Act, 1857 (20 & 21 Vict., c 85), sect. 31, provides as follows:—

“ In case the Court shall be satisfied on the evidence that the case of the petitioner has been proved, and shall not find that the petitioner has been in any manner accessory to or conniving at the adultery of the other party to the marriage or has condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, then the Court shall pronounce a decree declaring such marriage to be dissolved. Provided always, that the Court shall not be bound to pronounce such decree if it shall find that the petitioner has during the marriage been guilty of adultery, or if the petitioner shall, in the opinion of the Court have been guilty of unreasonable delay in presenting or prosecuting such petition, or of cruelty towards the other party to the marriage, or of having deserted or of wilfully separated himself or herself from the other party before the adultery complained of, and without reasonable excuse, or of such wilful neglect or misconduct as has conduced to the adultery.” M-1

*1.—“In case the Court is satisfied on the evidence, etc.”*

#### (1) Evidence of marriage.

(a) The bare assertion of a petitioner is not sufficient proof of marriage to satisfy the requirements of the Act, 16 M. 455. N

(b) In cases under the Act, the proper, though not absolutely essential, mode of proving the marriage is by producing a certified copy of the marriage certificate and obtaining a statement from the petitioner that he was married as therein specified. F.J. 1896, p. 206. O

#### (2) Decree for dissolution not to be made on mere admissions.

A decree for dissolution of marriage cannot be made merely on admissions and without recording any evidence. 17 B. 624; P J, 1892, p. 231. P

1.—"In case the Court is satisfied on the evidence, etc."—(Concluded).

(3) Evidence—Uncorroborated testimony of wife.

The Court would not accept the uncorroborated testimony of the wife, that her husband had committed or attempted to commit an unnatural offence on her person. 161 P.L.R. 1905=77 P.R. 1905. Q

(4) Collusion—Effect.

When it was found that the parties were in collusion in wishing to be divorced, the High Court, in the exercise of its discretionary power, refused to confirm the decree for dissolution of marriage, on the ground that the petitioner herself had been guilty of adultery. A.W.N. (1905), 141=2 A.L.J. 420 (F.B.). R

2.—"The court shall pronounce a decree."

(1) Scope of the provision.

This provision that the Court shall pronounce a decree in certain cases does not bind the Court to pass a decree against the consent of the petitioner. See *Mycock v. Mycock*, 39 L.J.P. & M. 56, Macrae on Divorce, p. 42; But see, also, *Haswell v. Haswell and Sanderson*, 1 Sw. & Tr. 502, 29 L.J.P. & M. 21. S

(2) Amendment of petition for dissolution into one for judicial separation

(a) So, where a wife had proved a case entitling her to a decree under this section, she would be allowed, if she so desires, to amend her petition to a prayer for judicial separation. *Mycock v. Mycock*, 39 L.J.P. & M., 56 See *Dent v. Dent*, 4 Sw. and Tr. 105, 34 L.J.P. & M. 118. T

(b) But, if any of the facts stated in the section as being discretionary bars to relief are made out against the petitioner, the Court will not allow the petition to be amended to one for judicial separation *Borchem v. Borchem*, 1 L.R., P. & D., 77. U

(3) Opportunity to be given to petitioner to amend petition in certain cases.

In one case, the wife obtained a decree nisi for dissolution on the ground of her husband's adultery and cruelty. But, afterwards, the Queen's Proctor intervened and showed that the husband's adultery was brought about by the clerk of the wife's solicitor, though without her knowledge. Under such circumstances the court rescinded the decree nisi, but refused to dismiss the wife's petition in order to give her an opportunity to apply for judicial separation. *Bell v. Bell*, 58 L. J. P. & M., 54. Y

(4) Power to grant judicial separation where dissolution of marriage is prayed for.

The Court has — and this irrespective of the consent of the respondent, if the facts proved in the case entitle the petitioner only to judicial separation and not to a decree for dissolution. See *Smith v. Smith*, 1 Sw. & Tr. 359; *Grossi v. Grossi*, L.R. 3. p. 111. W

(5) Court may attach conditions to making of a decree for dissolution.

Husband, a butler, supported his wife during his long absence, till she took to drinking, and had an illegitimate child. The Jury in this case found conduct on the part of the petitioner (husband) conducing to the wife's misconduct. Nevertheless, the Court made a decree in favour of the petitioner on condition of an allowance *dum sola et casta*. *Parry v. Parry*, (1896), p. 37. Cf. *Cox v Cox*, (1893), 70 L T. 200 C.A. where the Court allowed the wife to plead her husband's flirtations. X

## 2.—“The Court shall pronounce a decree”—(Concluded).

N.B.—For another case where a decree was passed subject to an allowance being made to the wife, see *Lander v. Lander*, Temple, Fox and Fox, (1890), 63 L.T. 257. Y

## (6) Form of decree.

A decree under the Section should declare the marriage to be dissolved subject to the provisions and limitations in S. 17 made and declared. *Mannuel, Thomas v. Dea Thomas*, P.J. 1896, p. 206. Z

## 3.—“Provided that the Court shall not be bound to pronounce such decree if it finds, etc.”

## (1) Scope of the provision.

This clause leaves to the Court a discretion to make the decree or not, if it finds that the petitioner is guilty of one or other of the offences mentioned in the section. See *Brown and Powell on Divorce*, 7th Ed., p. 29. A

## (2) Discretion of Court under the section, how to be exercised.

(a) “The Court is not bound by any rigid rules as to the exercise of its discretion” *Per Evans, J.*, in *Bullock v. Bullock*, (1910), 103 L. T. 847, at p. 848. B

(b) “The discretion must be a regulated discretion, and not a free option subordinated to no rules” *Per Lord Penzance* in *Morgan v. Morgan and Porter*, 38 L.J. P. & M. 41. C

(c) In the year 1903, the President (Sir F. H. Jenue) laid down the following two propositions, regarding the exercise of discretion in case of discretionary bars —

(i) “There is now no specific limitation to the discretion of the Court, and the category of cases for its exercise is not a fixed one. Whilst the discretion is judicial and not arbitrary, the class of cases for its exercise may be from time to time extended. The discretion cannot on principles of justice be exercised in favour of a petitioner whose guilt has in any serious degree contributed to the misconduct of the respondent; nor is a respondent to be allowed to evade the consequences of misconduct, by alleging the misconduct of the petitioner for which such respondent has been in any serious degree responsible.”

(ii) “A wife who leaves her husband because she has transferred her affections to another man, and whose husband correctly assumes this to be so, is in a serious degree responsible for the subsequent misconduct of the husband.” *Constantinidis v. Constantinidis*, 72 L.J.P. 82; 89 L.T. 340; *Symons v. Symons*, (1897), p. 167, followed. *Brown and Powell on Divorce*, 7th Ed., p. 49. D

(d) “Although the discretion conferred by the section is a judicial and not an arbitrary discretion, the causes for and the circumstances under which the Court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force; and the list of such causes is not a closed book, but may be extended as occasion arises.” *Constantinidis v. Constantinidis*, (1903), p. 246; followed in *Coombs v. Coombs*, (1904), 73 L.J.P. 23. E

(e) “But in order that the Court should exercise its discretion, it is not enough that the misconduct of the petitioner was more or less pardonable or



**3.—“Provided that the Court shall not be bound to pronounce such decree if it finds, etc.”—(Continued).**

capable of excuse, but the Court must find as a fact that the petitioner's misconduct was caused directly by the matrimonial offence, or offences, of the respondent.” *Wyke v. Wyke*, (1904), p. 149. 73 L.J.P. 88; 90 L.T. 172. F

- (f) “The Court will be guided by the circumstances of each case in deciding what order it will make.” *Pryor v. Pryor*, (1900), p. 157; 69 L.J.P. 99. See also *Lloyd v. Lloyd*, 84 L.T. 728. G

**(8) Discretion not exercised so as to injure public morality.**

The discretion of the Court is never exercised in a petitioner's favour to the injury of society and public morality. *Evans v. Evans and E.*, 1906, p. 125, 94 L.T. 616. H

**(4) Discretion to be exercised on principles recognized by English Courts.**

- (a) The Courts in India will adopt, as a guide in the exercise of the judicial discretion in granting or refusing a decree of dissolution of marriage given by this section, the principles laid down in the English decisions with regard to the corresponding section in the English Act. (20 and 21 Vict., c. 85, S. 31). 8 B.H.C. 48. I

- (b) The discretion to be exercised under this section must be a regulated discretion. 8 B.H.C. 48. J

- (c) The Court cannot grant or withhold a divorce on the mere footing that the petitioner's adultery is more or less pardonable, or that it has been more or less frequent. There must be special circumstances attending the commission of such adultery, or special features placing it in some category capable of distinct statement and recognition, in order that the discretion may be fitly exercised in favour of a petitioner. 8 B.H.C. 48. K

**(5) Duty of Court exercising jurisdiction under the Divorce Act.**

In India there is no public officer corresponding to the Queen's Proctor. So, a judge exercising jurisdiction under this Act, ought to make a large use of his power to look into any matters which may come under his notice, affecting the proper exercise of the discretionary power of the Court to grant or withhold a divorce under specified circumstances, even though such matters are not brought to his notice by a party to the proceedings, or an intervenor. 6 P.R. 1888. L

**(6) Court refusing relief on ground of petition in adultery—Such refusal no bar to Courts granting relief on subsequent proceeding.**

- (a) The fact that, in a former suit for dissolution of marriage, the Court decided to exercise its discretionary power of withholding relief from the petitioner on the ground of his adultery, is no bar to the Court exercising that discretion in his favour in a subsequent proceeding notwithstanding his adultery be found proved. 6 P.R. 1888. M

- (b) Such discretion would be properly exercised in favour of the petitioner, where it appears, that the adultery has been condoned, that such adultery had no connection whatever with the separation of the wife from her husband, with the decision of the former suit, nor with her subsequent life of profligacy and prostitution. 6 P.R. 1888. N

**3.—“Provided that the Court shall not be bound to pronounce such decree if it finds, etc.”—(Continued).**

**(7) Reference to previous records in proof of petitioner's adultery.**

In a second suit for dissolution of marriage, the Court is at liberty to look to the record in a former suit. The Court may upon reference to it, and without further evidence, find that the petitioner had been guilty of adultery. 6 P.R. 1838. O

**(8) Matters of discretionary bar being condoned—Effect.**

- (a) The adultery of one party, if condoned, is not a bar to a suit for divorce on account of adultery afterwards committed by the other. *Seller v. Seller*, 29 L.J. P. & M. 99. (*Per Sir Cresswell v. Cresswell*). P

**N.B.:**—“This does not, however, appear to be the law in cases for dissolution of marriage, where the Court is not bound by the decisions of the Ecclesiastical Court, and where the words of the Act clearly seem to exclude the supposition that the legislature intended to withdraw from the consideration of the Court any of the matrimonial offences specified as affording discretionary bars to a decree, if such offences should happen to have been condoned.” See *Macrae on Divorce*, p. 43. Q

- (b) “A counter-charge against a petitioner is not, as a matter of law, barred by condonation, but is to be taken into consideration with all the other circumstances of the case” *Per Sir Cresswell v. Cresswell in Goode v. Goode and Hanson*, 2 Sw. & Tr. 253, *Lautour v. Her Majesty's Proctor*, 33 L.J. P. & M. 89; *Allen v. Allen and D'Arcy*, 28 L.J. P. & M. 81; 3 B.L.R. (O.C.J.) 140 See also on this subject, *Pretty v. Pretty*, (1911), p. 83. R

**N.B.**—See also cases noted under ‘Adultery of petitioner condoned—Effect.’

EXAMPLES.

**A.—Decrees were granted in the following cases.**

**(1) Wife's supposed death.**

The ——— was held to be a good excuse for the husband's misconduct. *Joseph v. Joseph and Wentzell*, (1865), 34 L.J. (P.M. & A.) 96. S

**(2) Belief that decree  *nisi* was final.**

Re-marriage contracted on the honest —, was held excusable. *Noble v. Noble*, (1869), L.R., 1 P. & D. 691, *Snook v. Snook*, (1892) 67 L.T. 389. T

**(3) Husband believed wife dead—Separated from second wife on discovery.**

Where a husband married on the belief that his wife was dead, but as soon as he discovered the mistake, he separated himself from the second wife, held such conduct would not bar his right of relief. *Meegard v. Meegard*, (1883), 8 P.D. 186. U

**(4) Adultery of petitioner not conducing to adultery of respondent.**

“In a husband's suit for dissolution of marriage, upon findings of fact, that the petitioner and respondent had both committed adultery, the Court, finding as a further fact that the adultery of the petitioner had not conduced to the adultery of the respondent, exercised in favour of the petitioner the discretion conferred by the Matrimonial Causes Act, 1857, S. 31, and pronounced a decree  *nisi* dissolving the marriage.” *Constantinidis v. Constantinidis*, (1903), p. 246. Y

3.—“*Provided that the Court shall not be bound to pronounce such decree if it finds, etc.*”—(Concluded).

**A—Decrees were granted in the following cases—(Concluded).**

**(5) Mutual leave to re-marry.**

Mutual leave to re-marry believed in and acted on—On discovery co-habitation renewed—Wife's adultery—Husband's right to relief not barred. *Whitworth v. Whitworth*, (1893), p. 85. **W**

**B.—Decrees were refused in the following cases.**

**(1) Want of reasonable grounds to believe that wife was dead.**

Where a man had no reasonable ground for believing his wife was dead, and continued in his misconduct after her re-appearance, held he was not entitled to relief. *Pegg v. Pegg and Gowing*, (1904), 20 T.L.R. 353. **X**

**(2) Continuing after discovery of wife in evil course.** <sup>a</sup>

——commenced before discovery would be good ground to refuse relief to the husband. *Hynes v. Hynes and Luke*, (1904), 20 T.L.R. 781. **Y**

**4.—“That the petitioner has been guilty of adultery.”**

**(1) Petitioner's adultery—Effect**

Except under special circumstances the Court will not grant a divorce where the petitioner has been guilty of adultery. *Mc Cord v. Mc Cord et al.*, L. R. 3 P. & D., 237. **Z**

**(2) Discretion in case of petitioner's adultery.**

(a) “In the case of the petitioner being found to have committed adultery, the discretion is most narrowly limited.” *Drummond v. Drummond*, 30 L.J. P. & M. 177, *Macrae on Divorce*, p. 43, **A**

(b) “I am not aware of any case in which a wife who has been guilty of adultery has been considered to be entitled to relief” *Per Sir Cresswell Cresswell in Drummond v. Drummond*, 30 L.J. P. & M. 177. **B**

(c) “I think that a wife guilty of adultery cannot be a petitioner in this Court on the ground of any matrimonial offence of the husband.” 1b, 2 Sw. & Tr. 266, 1 Sw. & Tr. 106. **C**

(d) “I cannot say, sitting in this seat, that a man is licensed to live in adultery with another woman, because his wife has deserted him.” *Per Sir C. Cresswell in 31 L.J. P. & M. 66.* **D**

**(3) Cases where the discretion has been exercised in favour of the petitioner.**

“There are three classes of cases in which the discretion has been exercised in favour of the petitioner (1) when the petitioner has been induced to believe and honestly believes, that his wife is dead, (2) when the petitioner was driven to prostitution by the threats and violence of her husband, the respondent, (3) when an act of adultery by the petitioner has been long since condoned by the respondent” See *Joseph v. Joseph and Wentzell*, 34 L.J. P. & M. 96, see *Coleman v. Coleman*, 35 L.J. P. & M. 37, 1 L.R., P. & D. 8, *Lautour v. Her Majesty's Proctor*, 10 H.L. Cas. 685, *Macrae on Divorce*, p. 44. See, however, *Goode v. Goode*. **E**

4.—“ *That the petitioner has been guilty of adultery* ”—(Continued). ,

(4) Counter charge against petitioner, if barred by condonation.

“ A counter-charge against a petitioner is not, as a matter of law, barred by condonation, but is to be taken into consideration with all the other circumstances of the case.” *Per Cresswell Cresswell in Goode v. Goode*, 2 Sw. & Tr. 253, *Lautour v Her Majesty's Proctor*, 33 L.J. P. & M. 89, *Allen v. Allen and D'Arcy*, 28 L.J. P. & M. 81, 3 B.L.R. (O.C.J.) 140. F

(5) Evidence of adultery

This was a suit for dissolution of a marriage on the ground of the adultery of the respondent with the co-respondent. There was the respondent's evidence that she had committed adultery with the co-respondent in 1883 and in 1886. As to the adultery in 1886 she, in course of her examination, produced certain letters which she swore she had received from the co-respondent. Some of these letters showed that he had importuned her to visit him in 1886 and the letters raised a violent presumption that adultery was committed on the occasion of that visit. The petitioner, in his evidence, proved that co-respondent was in Court at the time of the trial. The co-respondent was not called to contradict any of the evidence given by the respondent at the trial. *Held* that the petitioner was entitled to have the decree made absolute in respect of the adultery in 1886. 7 A.W.N. 272. G

(6) *Compensatio criminum*, doctrine of—Canon Law

Under the Canon Law where both the parties had been guilty of adultery, it was treated as *compensatio criminum*, as a consequence of which both were restored to the position of innocent parties. See Decretals of Gregory, ix. lib. 5, tit. 16, Decret. 6 and 7. H

(7) Above doctrine not applicable under the section.

(a) “ It appears quite clear that the words of the legislature in this section exclude its application.” See Macrae on Divorce, p. 45. I

(b) Also “ apart from any conduct of the respondent, the Court, in a suit for dissolution of marriage, has to satisfy itself that the petitioner comes before it stainless and with clean hands.” (*Ibid.*) I-1

(c) The Divorce Court, in refusing a petitioner, who has been guilty of adultery a decree of dissolution or even of judicial separation, acts on the principle that the party who prays for relief must come into the Court with clean hands. In the words of Cotton, L.J., “ A wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts or which might now be taken in the Court of Divorce, and therefore, on that ground, she is not in a position to come to that Court to give her any relief as to any matrimonial offence which the husband may have committed, or to put it on the ground of compensation for a crime of the same nature.” *Otway v. Otway*, 13 P. D. 141, 57 L.J. P. & M. 81, *Rattigan on Divorce*, 1897, p. 95. J

4.—“*That the petitioner has been guilty of adultery*”—(Continued).

### A.—CASES WHERE PETITIONER'S ADULTERY WAS EXCUSED AND DECREE MADE IN PETITIONER'S FAVOUR.

**N B.**—In the following four cases the discretion of the Court may be fitly exercised in favour of a petitioner who has been guilty of adultery. *Browne and Powell on Divorce*, Seventh Edition, 1905, pp. 45—47. **K**

#### 1.—Where the adultery is committed in ignorance of fact.

##### EXAMPLES.

##### (a) Honest belief that wife is dead.

Where a husband, believing that his wife (who had eloped from him and was living in adultery) was dead, married another woman, *held*, the husband was entitled to relief notwithstanding. *Joseph v. Joseph*, 34 L. J.P. 96. See, also, *Freegard v. Freegard*, 8 P.D. 186, 52 L.J.P. 100. **L**

##### (b) Honest belief that husband is dead.

Where the wife, deserted by her husband, marries again under the erroneous belief that he is dead, such second marriage will not disentitle her to relief. *Potter v. Potter*, 67 L.T. 721. **M**

#### 2.—Where the adultery is committed in ignorance of law.

##### EXAMPLES.

##### (i) Marriage by husband after decree *nisi*.

“Where a husband in ignorance of law married a fortnight after he had obtained a decree *nisi* for the dissolution of his first marriage, the Court exercised its discretion in his favour.” *Noble v. Noble and Goodman*, 38 L.J.P. & M. 52. See, also, *Styles v. Styles*, 62 L.T. 618; *Snook v. Snook*, 67 L.T. 399. **N**

##### (ii) Marriage by wife after decree *nisi*.

A wife re-married after a decree *nisi* under an honest misapprehension that the prior marriage was dissolved. She co-habited with her second husband until his death. Then discovering her true position, she returned to her husband for a year, whom she was again forced to leave on account of his cruelty. *Held*, that, as she acted on the *bona fide* belief that the marriage was dissolved the decree should be made absolute. *Moore v. Moore*, (1893), p. 352; 62 L.J.P. 10; 67 L.T., 530. **O**

##### (iii) Mutual agreement for separation acted upon.

“A husband and wife signed a paper to the effect that they agreed to separate, and that each was to be at liberty to marry again. The husband, an ignorant man, went through the form of marriage with another person, believing this document to be legal; but as soon as he discovered his mistake separated at once from the woman with whom he was co-habiting. The Court granted him a divorce.” *Whitworth v. Whitworth*, (1893), p. 85, 62 L.J.P. 71; 68 L.T. 467; *Browne and Powell on Divorce*, 7th Ed., 1905, p. 46. **P, Q**

4.—“*That the petitioner has been guilty of adultery*”—(Continued).

A—CASES WHERE PETITIONER'S ADULTERY WAS  
EXCUSED AND DECREE MADE IN PETITIONER'S  
FAVOUR—(Continued).

III.—Where the adultery is committed in consequence of the violence and  
threats of the husband.

EXAMPLES.

(1) Husband coercing wife to prostitution.

(a) “Where a husband had been guilty of adultery and cruelty, and also had, by threats and by personal violence, coerced his wife into leading a life of prostitution, and had lived upon the money she obtained, the Court being satisfied that the wife had been coerced into this life, granted her a decree nisi.” *Coleman v. Coleman*, L.R., 1 P. & D. 81; 35 L.J.P. 37; 18 L.T. 684

R

(b) This was a suit instituted in a District Court by a husband for the dissolution of his marriage on the ground of his wife's adultery. The District Judge found that it was the harsh and cruel treatment of the plaintiff's mother-in-law, to which the plaintiff was a party, that drove her from her home and that it was only at the last when she had returned two or three times to her husband, and had again been turned out, that in despair, and to ward off absolute want and starvation, she took up with the defendant. He also found that at the time of the institution of the suit plaintiff was living in adultery with another woman. *Held*, that under the circumstances plaintiff was debarred from obtaining the relief claimed. 3 A.W.N. 78.

S

IV.—When the adultery is committed by petitioner to the knowledge of  
respondent, and by him or her long since pardoned and condoned.

[*Anchini v. Anchini*, 2 Curt. 210 (1839), followed in *Seller v. Seller*, 1 S. & T. 482; 28 L.J.P. 99]

T

N.B.—The above was not a suit for dissolution, but a suit for judicial separation brought by the wife.

Adultery of petitioner condoned—Effect.

(a) “The Court might refuse a decree where the petitioner had been guilty of adultery, although such adultery had been condoned; and this rule was acted on, even where the petitioner had been proved guilty of a single act of adultery only. *Goode v. Goode*, 2 S. & T. 253; *McCord* or *McLard v. McCord* or *McLard*, L.R., 3 P. & D. 237; 44 L.J.P. 38; 33 L.T. 264; followed in *Boucher v. Boucher*, 67 L.T. 790.

U

(b) In some previous cases it was held that it must be considered an open point whether adultery by a husband, condoned by his wife, was necessarily a bar to his obtaining a divorce on account of her adultery. *Rose v. Rose*, 8 P.D. 98 (99); 52 L.J.P. 25; 48 L.T. 378.

Y

(c) In one case the Court refused to grant a decree where the petitioner had been guilty of adultery with his wife's sister, but which had been condoned by his wife. *Stoker v. Stoker*, 14 P.D. 60; 58 L.J.P. 40; 60 L.T. 400.

W

4.—“*That the petitioner has been guilty of adultery*”—(Continued).

A—CASES WHERE PETITIONER'S ADULTERY WAS  
EXCUSED AND DECREE MADE IN PETITIONER'S  
FAVOUR—(Concluded).

IV.—When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since *pardoned* and *condoned*—(Contd.)

EXAMPLES—(Concluded).

(d) “The petitioner had committed adultery with a domestic servant five years before he petitioned for a dissolution of his marriage. This adultery had been condoned by his wife, who lived with him up to the date of the petition. The Court dismissed his petition.” *Storey v. Storey*, 12 P.D. 196; 57 L.J.P. 15, 57 L.T. 536, See also *Barnes v. Barnes*, L.R., 1 P. & D. 572, 88 L.J.P. 10, 19 L.T. 526. X

(e) In one case, a husband obtained a decree *nisi* on the ground of his wife's adultery. This was however rescinded on the ground of his cruelty and adultery. The parties lived together again as husband and wife. Subsequently the wife presented a petition for dissolution of marriage on the ground of her husband's subsequent cruelty and rape. *Held* she was entitled to a decree. *Collins v. Collins*, 9 P.D. 231; 58 L.J.P. 116. See also *Browne and Powell on Divorce*, 7th Ed., 1905, pp 45–47. Y

B.—DECREES WERE GRANTED TO THE HUSBAND  
IN THE FOLLOWING CASES.

- (1) Evidence of petitioner's single act of adultery which had been, not satisfactorily proved in a former suit by witnesses since deceased.

In this case a decree was made in favour of the petitioner notwithstanding—.

*Conradi v. Conradi*, (1868), L.R. 1. P.D. 514. Z

- (2) Where the husband alleged that his only misconduct was brought about by his wife's treatment of him.

———, and the Court found such allegation to be true, the discretion would be exercised in his favour. *Rosenz v. Rosenz and Josten*, (1909), 25 T.L.R. 473. NB In this case the Decree *nisi* was rescinded on motion by King's Proctor. A

C.—DECREES WERE REFUSED TO THE HUSBAND  
IN THE FOLLOWING CASES

- (1) Adultery of husband when excused.

It is not sufficient that the petitioner's adultery was pardonable. It must have been due to his wife's misconduct. *Wyke, W* (K.P.). P. 1904, 149 L.T. 90. 172. B

- (2) Husband going to a brothel.

(a) A married man going to a brothel for the purpose of dressing himself for a calico ball, he being aware of the nature of the house, furnishes a violent presumption of his adultery, which must be rebutted by the very best evidence. 84 P.R. 1875. C

(b) “The respondent, who was an apothecary, left his wife at Lahore upwards of two years before suit, having obtained from her Rs. 2,000 to set up a dispensary at Mooltan. He did not set up the dispensary, or communicate with her, and she did not hear of him again until he

4.—“That the petitioner has been guilty of adultery”—(Continued).

C.—DECREES WERE REFUSED TO THE HUSBAND IN THE FOLLOWING CASES—(Concluded).

IV. When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned—(Concl'd.).

EXAMPLES—(Continued).

was met in Calcutta by a friend from Lahore, whom he took to a house which turned out to be a brothel, for the purpose, as the respondent said, of “tiding himself up a bit” for a calico ball. He also told his friend that he was the medical attendant of the inmates of the house. In a suit for divorce instituted by the wife on the grounds of the respondent's adultery and desertion, and in which he did not appear to answer to the charges, held, that the desertion for two years and upwards, was established, and (Campbell, J. dissenting as to this, that the presumption of adultery had not under the circumstances) been repelled.” 81 P.R. 1875. D

(3) Drink.

Drink is no excuse for the other party frequenting a brothel and contracting a venereal disease. *Hutchinson v. Hutchinson and Barker*, (1866) 14 L.T. 338. E

(4) Venereal disease.

— is a bar. *Wilkey v. Wilkey and Ryder*, (1878) 26 W.R. 239. F

(5) Single act condoned.

— was held to be a bar to relief. *McCord v. McCord*, (1875), L.P. 3 P. & D. 237. G

(6) Single act when drunk condoned

— was also held to be a bar to relief. *Grosvenor v. Grosvenor*, (1835), 34 W.R. 140. H

(7) Repeated acts of misconduct.

— were held to be a bar. *Fovell v. Fovell, Terrass and Burlergh*, 33 L.T. 578. I

(8) Incest condoned

— would bar any right of relief. *Stoker v. Stoker*, (1889) 14 P.D. 60. J

(9) Single Act, if wilfully committed.

— will also be a bar to relief. *Craven v. Craven and Robinson*, (1909) 26 T.L.R. 4. K

(10) Wife's leaving husband.

(a) — does not justify his committing adultery afterwards. *Todd v. Todd*, (1906) 23 T.L.R. 9 *aff'd*. (1907) 24 T.L.R. 28 C.A. L

(b) After the wife leaving her husband for the co-respondent, the husband committed adultery with a prostitute. Held the husband was entitled to a decree. *Constantinidis v. Constantinidis*, (1905), p. 253, C.A. M

(11) Petitioner voluntarily confessing to court that, after his wife's incest, he had committed one act of adultery.

— would disentitle him to relief. *Clarke v. Clarke and Clarke*, (1865), 34 L.J. (P. M. & A.) 94. N

(12) Adultery with maid servant.

— would be good ground for the court exercising its discretion against such adulterer. *Story v. Story and O'Connor*, (1887), 12 P.D. 196. O



4.—“*That the petitioner has been guilty of adultery*”—(Concluded).

D.—DECREES WERE GRANTED TO THE WIFE IN THE FOLLOWING CASES.

Where wife's adultery was condoned to by cruelty of husband.

The Court granted a divorce to a wife guilty of adultery, her adultery having been condoned to by the cruelty, threats, and general misconduct of her husband. *Burdon v. Burdon*, (1900), 69 L.J.P. 118, Brown and Powell on Divorce, Seventh Edition, 1905, p. 49. P

E.—DECREES WERE REFUSED TO WIVES IN THE FOLLOWING CASES.

Where the husband's conduct though very bad, was not the direct cause of the adultery of the wife.

In a case decree was refused to the wife. See *Wyke v. Wyke*, (1904), p. 147, *Shaw v. Shaw*, (1904), 20 T L R. 795, *Tulk v. Tulk*, (1906), 23 T.L.R. 120. Q

5.—“*If the petitioner . . . has been guilty of unreasonable delay.*”

(1) Delay, effect of.

- (a) Delay of petitioner in asking for relief under the Act would be ground for depriving the petitioner of the relief to which he would, otherwise, be entitled. 7 M.H.C. 284. R
- (b) Unless satisfactory explanation is given for the long delay in presenting and prosecuting a petition, a Court is obliged to refuse a decree for dissolution of marriage, under this section. 12 C.W.N. 1009. S
- (c) “Delay is not of itself a bar to the suit; but it is a most material matter, which, unexplained, would lead the Court to conclusions fatal to the petitioner's relief”. *Boulting v. Boulting*, 3 S. & T. 329; 33 L.J.P. 33; 9 L.T. 779. T
- (d) If there has been apparently unreasonable delay in taking proceedings, some sufficient reason for it must be given. *Nicholson v. Nicholson*, L.R., 3 P. & D. 53; 29 L.T. 108. U
- (e) But the Court will not dismiss a petition where a sufficient explanation of the delay is given. *Wilson v. Wilson*, L.R., 2 P. & D. 435. Y

(2) Delay as bar to relief—Reason of the rule.

- (a) “The first thing which the Court looks to when a charge of adultery is preferred, is the date of the charge relatively to the date of the criminal fact and knowledge of it by the party, because if the interval be very long between the date and knowledge of the fact, and the exhibition of them to this Court, it will be indisposed to relieve a party who appears to have slumbered in sufficient comfort over them, and it will be inclined to infer either an insincerity in the complaint, or an acquiescence in the injury, whether real or supposed, or a condonation of it. It therefore demands a full and satisfactory explanation in order to take it out of the reach of such interpretations.” *Per Sir J.P. Wilde (Lord Pensance, in Boulting v. Boulting)*, 33 L.J.P. & M. 33. See, also, *Mortimer v. Mortimer*, 4 Hagg. Cons. 813. W

**5.—“If the petitioner... has been guilty of unreasonable delay”—(Contd.)<sup>a</sup>**

- (b) “Thus, though delay of itself goes for little, the conclusions to which it may give rise may go the full length of barring the remedy. All depends on the other facts of the case.” *Per Sir J. P. Wilde (Lord Penance)* in *Boulting v. Boulting*, 33 L.J.P. & M. 39, citing *Lord Stowell*, 1 *Mortimer v. Mortimer*, 4 Hagg. Cons. 313. **X**
- (c) “The Court will be indisposed to relieve a party who appears to have slumbered in sufficient comfort,.....and it will be inclined to infer either an ingincerity in the complaint, or an acquiescence in the injury, whether real or suppressed, or a condonation of it.” *Mortimer v. Mortimer*, 4 Hagg. Con. C. 313. **Y**
- (d) The reason of the rule is that delay raises a presumption of connivance or condonation. See 7 M.H.C. 284; see, also, 3 C. 688. **Z**
- (e) Whilst on the one hand there is no absolute limitation in the case of a petition for dissolution of marriage, yet the first thing which the Court looks to when the charge of adultery is preferred, is whether there has been such delay as to lead to the conclusion that the petitioner had either connived at the adultery, or was wholly indifferent to it. 3 C. 688. **A**
- (f) But any presumption arising from apparent delay may always be rebutted by an explanation of the circumstances. 3 C. 688. **B**

**(3) Nature of the delay contemplated by the section.**

- (a) The delay meant here must be that sort of delay which would show the petitioner to have been insensible to the loss of his wife. *Pellow v. Pellow and Berkeley*, 1 Sw. & Tr. 553; 29 L.J. P. & M. 44. **C**
- (b) But it is not in every case that the delay ought to be construed into an insensibility to the injury sustained. 7 M.H.C. 284. **D**
- (c) In order to entitle the petitioner to relief there must be circumstances in the case that rebut the presumption of indifference approaching to connivance. *Per Halloway, J.*, in 7 M.H.C. 284, see, also, *Bellew v. Bellew and Tollemache v. Tollemache*, 1 Sw. & Tr., 553, cited in 7 M.H.C. 284. **E**
- (d) It must be understood to be culpable delay, somewhat in the nature of connivance. *Tollemache v. Tollemache*, 1 Sw. & Tr. 557. *Macrae on Divorce*, p. 46. **F**
- (e) Though there is no absolute limitation in the case of a petition for dissolution of marriage, yet the Court will always look whether there has been such delay in preferring the charge of adultery as to lead to the conclusion that the petitioner had either connived at the adultery or was wholly indifferent to it. 3 C. 688. **G**

**(4) Delay must be after knowledge of offence.**

- (a) The Court will inquire when a husband first knew, and when he first took action. *Brougham v. Brougham*, (1895), p. 289. **H**
- (b) A man, who, believing his wife dead, has remarried, must immediately take proper steps on discovering that she is alive. *Pegg v. Pegg and Gowing*, (1904), 20 T.L.R. 353. **I**

**(5) Delay bars relief only when it is unreasonable.**

- (a) The delay contemplated by the section must be unreasonable delay. It must be such as makes the petitioner appear insensible to the loss of his wife. See scot. 31, M. C. A. 1857, *Pellow v. Pellow and Berkeley*, 29 L.J. Mat. 44, 1 Sw. & Tr. 555, *Tollemache v. Tollemache*, 1 Sw. & Tr. 561. See, also, 7 M.H.C. 284. **J**

'5.—“If the petitioner....has been guilty of unreasonable delay”—(Contd.).

- (b) Thus lack of means to proceed earlier, though a long time may have elapsed since the commission of the acts complained of, will be a satisfactory explanation of the delay.

Thus, also, A desire to avoid the public exposure of a scandal, at a mother's wish, and omitting to sue for twenty years, have been considered not sufficient ground for barring a decree.

A husband thought his wife's elopement to America, and residence there, rendered a divorce unnecessary. This fact, and mental prostration due to his wife's misconduct, were held to have sufficiently explained his delay in suing. *Harrison v. Harrison*, 33 L.J. Mat. 44, *Dr. Lardner's case* and *Mr. Warr's case*, Meq. H.L. Practice, pp. 664, 666, see Martin's Div. Bill, 1847, 79 H.L. Journal, 72.; *Newman v. Newman*, L.R., 2 P. & D., 58, *Heaviside's Divorce*, 12 Cl. & F. 334. K

- (c) Poverty is almost always a sufficient excuse, but it must be convincingly established. *Short v. Short*, (1874), L R. 3P. and D. 193. *Harrison v. Harrison*, (1864), 3 Sw. & Tr. 362. L

(6) Void marriage—Effect of delay in case of—Suits for nullity.

- (a) In cases of void marriages neither delay nor insincerity constitute a bar. Laws of England, Vol. XVI, p 491. M

- (b) “But in suits for nullity of voidable marriages by reason of impotence, although delay is not in itself a bar, it is not permissible for the competent party to approbate a marriage in spite of the other's defect, and, having thereby obtained advantages, afterwards to repudiate it” See the judgment of Lord Selborne, L C, in *G v. M*, (1885), 10 App. Crs. 171, 186, Laws of England, Vol. XVI, pp. 469, 470, 491. N

CASES WHERE DELAY WAS HELD TO BE REASONABLE.

(1) Want of means.

- (a) Want of means was always considered a sufficient excuse for delay. See *Harrison v. Harrison*, 3 S. & T 362; 33 L.J.P 44; 10 L.T. 138, *Mason v. Mason*, 8 P.D. 21; 52 L.J.P. 27; 48 L.T. 290, *Short v. Short*, L.R., 3 P. & D. 193. But see, also, 12 C.W.N. 1009 (1010). O

- (b) Where it was proved that the petitioner had been without means of instituting a suit, and had brought her petition as soon as she became possessed of funds, the Court granted a decree, although nineteen years had elapsed from the last act of misconduct complained of to the date of filing the petition. *Harrison v. Harrison*, 33 L.J. P. & M. 44. P

- (c) “It is, however, said that she is suing in *forma pauperis* and that she had no money to bring the suit earlier. That is not a good excuse as she could have filed her suit in *forma pauperis* long ago.” *Per Curiam* 12 C.W.N. 1009 (1010). Q

(2) Insanity.

- “Where a husband charged adultery committed many years before, the fact that the wife was insane, and had been in a lunatic asylum for many years, and that the husband had been expecting release from her death, was held a sufficient answer to a plea of unreasonable delay.” *Johnson v Johnson*, (1901), p 193, 70 L.J.P. 44, 84 L.T. 725, *Brown and Powell on Divorce*, 7th Ed., 1905, p. 53. R

## 5.—“If the petitioner.... has been guilty of unreasonable delay”—(Old). •

CASES WHERE DELAY WAS HELD TO BE  
REASONABLE—(Concluded).

## (3) Delay to avoid public scandal.

“Where a petitioner took no proceedings against her husband for incestuous adultery with her own sister, on account of her mother's anxiety to avoid a public scandal, until after the death of the latter, the Court held that a delay of eighteen years was not unreasonable.” *Newman v. Newman*, L.R., 2 P. & D. 57; 39 L.J.P., 36, 22 L.T. 552. S

## (4) Delay in expectation of respondent's death.

Delay, in the expectation of the respondent's death, her adultery having been followed by insanity, is not necessarily unreasonable delay. *Johnson v. Johnson*, 1901, p. 193. T

## (5) The following excuses have also been accepted as cases where there was reason for delay, and decrees have been pronounced in such cases in spite of the delay.

- (i) Exigencies of domestic service. *Davies v. Davies and Hughes*, (1863), 3 Sw. & Tr. 221 (sod quære). U
- (ii) A wife waiting till her son was grown up *Beauclerk v. Beauclerk*, *supra*, but see *Beauclerk v. Beauclerk*, (1891), p. 189, C. A. Y
- (iii) Insanity of respondent wife. *Johnson v. Johnson*, (1901), p. 193. W
- (iv) Ignorance of law. *Tollemarche v. Tollemarche*, (1859), 1 Sw. & Tr. 557. X
- (v) Consideration by a wife for her mother's feelings in a case of incest. *Newman v. Newman*, (1870), L.R., 2 P. & D. 57. Y
- (vi) Patient endurance of cruelty by a wife. *Green v. Green*, (1873), L.R., 3 P. & D. 121. Z

N.B.—But delay for two years, after knowledge of misconduct, might in the absence of explanation, be fatal to a decree. *Nicholson v. Nicholson*, (1873) L.R., 3 P. & D. 53. A

## 6.—“Cruelty.”

N.B.—On this point, see notes under ss. 3 and 10.

## (1) Cruelty contemplated by this section.

- (a) The cruelty contemplated by this section should be such cruelty as has led to the adultery alleged in the petition. *Pearman v. Pearman and Burgess*, 29 L.J. P. & M. 54; Macrae on Divorce, p. 47. B
- (b) Cruelty, by the petitioner, is a discretionary bar. It must either have led to the respondent's adultery, or be wanton and unprovoked. The Court considers the interests of the children and the parties. Its discretion is not arbitrary, but judicial. *Pryor v. Pryor*, (1900), p. 157. C

## (2) Cruelty condoned—Effect.

- (a) The Court has a discretion, under this section to refuse a decree for divorce if the petitioner has been guilty of cruelty, although the cruelty may have been condoned. 3 B.L.R. (O.C.J.), 136. D
- (b) A suit was brought by the husband for the divorce of his wife on the ground of her adultery. The wife admitted the adultery, but proved that her husband has been guilty of cruelty towards her which disentitled him to have an unconditional divorce. She claimed a right to a judicial

6.—“ *Cruelty* ”—(Concluded).

separation with alimony, she was at the time of the suit being with the co-respondent. *Held* the respondent was entitled to the decree for judicial separation with alimony. 3 B.L.R. (O.C.J.) 196. **E**

(3) *Cruelty, what amounts to.*

(a) A false charge by a husband against his wife of adultery does not amount at law to cruelty so as to entitle the wife to a judicial separation. 4 A. 374. **F**

(b) It does not matter in such a case whether such charge was made wilfully, maliciously and without reasonable or probable cause. 4 A. 374. **G**

(4) *Cruelty—Pleading.*

(a) The cruelty must be specifically pleaded. 3 B.L.R. App. 6. **H**

(b) And if it is not so pleaded, the Court will not allow the issue to be raised or evidence given of it. 3 B.L.R. App. 6. **I**

(5) *Wife's drunken habits being the cause of husband's cruelty.*

Where the wife's drunken habits were the probable cause of the husband's cruelty to her, the Court exercised its discretion in his favour, and granted him a divorce. 1 Sw. & Tr. 601; see, also, *Whittall v. Whittall and Hunt*, 13 L.J. P. & M. 108, notes. **J**

7.—“ *Of having deserted or wilfully separated himself or herself.* ”(1) *Unreasonable desertion, a bar to relief.*

(a) Desertion, or wilful separation from the other party before the adultery complained of, and without reasonable excuse is a discretionary bar to relief. *Yeatman v. Yeatman and Rummell*, L.R., 2 P. & D. 187. **K**

(b) If the husband has left her *without* a reasonable excuse, he cannot resist an answer setting up desertion. *Jeffreys v. Jeffreys and Smith*, 3 Sw. & Tr. 493. **L**

(2) *Separation being common to both parties.*

The mere fact of a separation being an act common to both parties may not in all cases be enough to constitute “reasonable excuse,” though it may go a long way towards it. *Proctor v. Proctor, Smith, et al.*, 34 L.J. Mat. 99. **M**

(3) *Desertion mixed question of law and fact.*

The charge of desertion, which, if proved, would, coupled with adultery, entitle a wife to a dissolution of marriage, is a mixed question of law and fact. 4 C. 260=3 C.L.R. 484. **N**

(4) *Evidence of desertion.*

Adultery, after years of separation by mutual consent, is not evidence of desertion. *Synge v. Synge*, 1901, p. 317. **O**

(5) *Reason of the rule as to desertion being a discretionary bar to relief.*

(a) “If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of the husband's society, the security of his house and name, and the just protection of his presence so far as his position and avocation will admit. Whoever falls short in this regard, if not the author of his own misfortune, is not wholly blameless in the issue; and though he may not have justified the wife, he has so far compromised himself as to forfeit his claim for a divorce.” *Per Lord Penzance, J. in Jeffreys v. Jeffreys*, 33 L.J. P.M. 81, cited in 5 A. 71 (75). **P**

## 7.—“Of having deserted or wilfully separated himself or herself”—(Contd.).

(b) “It must not be supposed that a husband can neglect and throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on account of infidelity. The Legislature never intended that such a man should be entitled to a divorce. *Per Lord Pensance*, in *Jeffreys v. Jeffreys*, 33 L.J. P.M. 84 cited in 5 A. 71 (75). Q

(c) The power given to the Courts to dissolve the marriage bond was not granted in the interest of husbands who, having grown tired of their wives, deliberately separate from them, careless as to what becomes of them and virtually encouraging them to go astray. 5 A. 71 (75). R

## (6) Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion—Drunkenness of wife.

Evidence adduced at the hearing of a petition by a husband for the dissolution of marriage with his wife showed that the petitioner had left his wife voluntarily on account of her drunkenness; that he had not maintained her or contributed to her support since so leaving her, that he had no reason for believing that his wife had committed adultery during the time he had lived with her, and that she had (if the evidence were believed) been leading an immoral life since the petitioner had so left her. *Held*, that the petitioner having deserted his wife without just or reasonable cause, and without making any provision for her, had condoned to the adultery (if any had been committed), and that the petition had been rightly dismissed. 22 M. 328. S

## (7) Separation by husband because of wife running him to debt.

A husband separated himself from his wife, who up to the time of his doing so was a virtuous woman, merely because she had run him into debt. He did not write to her, or go to see her, or make her allowance proportionate to his income, after he had done so. *Held*, upon a petition by the husband for dissolution of his marriage on the ground of his wife's adultery, such adultery having been committed during such separation, that his conduct towards his wife disqualified him from obtaining the relief sought for. 5 A. 71. T

## (8) Plea of desertion in defence.

“Desertion, when pleaded in bar, need not be desertion for two years, or for any specific period. *Brown and Powell on Divorce*, 7th Edition, 1905, p. 53. U

## A.—CASES WHERE DESERTION WAS HELD TO BE REASONABLE.

## (1) Separation on mutual agreement.

A separation which is the result of mutual agreement cannot constitute desertion. See *Cock v. Cock*, 3 Sw. & Tr. 514; 33 L.J. P. & M. 157; *Macrae on Divorce*, p. 49. Y

## (2) Separation under a deed.

Where a separation-deed had never been acted upon, the fact that such separation-deed has been executed was held not to deprive the husband's conduct in subsequently leaving his wife against her will of the character of desertion. *Cook v. Cock*, 3 Sw. & Tr. 514, 33 L.J. P. & M. 157. W

“7.—“Of having deserted or wilfully separated himself or herself” —(Contd.).

A.—CASES WHERE DESERTION WAS HELD TO BE REASONABLE—(Concluded).

(3) Separation under deed and in consideration of an allowance.

A married a prostitute, but had no means to support her. There was a separation immediately after the marriage, *acquiesced in by the wife*, and evidenced and sanctioned by a deed of separation, under which the husband's father paid her an allowance. She committed adultery. Her husband sued for dissolution, and the Court, holding that the separation was not without reasonable excuse, pronounced a decree in the petitioner's favour. *Procter v Procter, Smith, et al*, 34 L. J. Mat. 99 X

(4) Gross improprieties.

.....by the wife constituted a reasonable excuse for separating from her. *Haswell v Haswell and Sanderson*, 29 L.J. Mat. 21, 1 Sw. & Tr. 502

(5) Suspicion of unchastity.

But a suspicion only of her chastity is no excuse to her husband deserting the wife. *Jeffreys v. Jeffreys and Smith*, 33 L.J. Mat. 84. Z

(6) Husband's desertion due to wife's taking indecent liberties with stranger.

In one case the husband having deserted his wife in consequence of having seen a man taking indecent liberties with her, it was held that his desertion was not without a reasonable excuse, so as to induce the Court to exercise the discretion conferred on it by refusing a dissolution of the marriage, the wife's adultery having been proved. *Haswell v. Haswell and Sanderson*, 29 L.J. P & M. 21, followed in *Yeatman v. Yeatman*, 37 L.J., P. & M. 37. A

(7) Leaving wife to obtain employment.

A husband, who absents himself, not wilfully but of necessity, for the purpose of obtaining employment, does not desert his wife. *Thompson v. Thompson*, 27 L.J. Mat 65. B

(8) Desertion under compulsion.

Desertion under compulsion is a reasonable excuse. *Beavan v. Beavan*, 2 Sw. & Tr. 652. C

(9) Desertion after being trapped into marriage.

Desertion by the petitioner, after being trapped into marriage, has been held reasonable. *Du Terreaux v. Du Terreaux*, 24 L. J. Mat. 95. D

B.—CASES WHERE DESERTION WAS HELD TO BE NOT REASONABLE.

(1) Frailty of temper and displeasing habits, not good excuse for desertion.

Mere frailty of temper and displeasing habits, which might be cured by judicious conduct of the husband, do not constitute reasonable excuse for his desertion. *Yeatman v. Yeatman*, 37 L.J. P & M. 87 (40). E

(2) Habitual intemperance not good excuse.

It has been held in England that even gross and habitual intemperance combined with violence of temper are not sufficient reasons to justify a husband in going away from his wife, leaving her to support herself and not troubling himself as to how she is living. *Heyes v. Heyes*, L.R., 13 P.D. 11, cited in 22 M. 328 (331). F

7.—“Of having deserted or wilfully separated himself or herself”—(Old).\*

B.—CASES WHERE DESERTION WAS HELD TO BE  
NOT REASONABLE—(Continued).

(3) Separation by husband because of his wife running him to debt.

— is not a reasonable excuse for desertion. 5 A. 71.

G

(4) Separation by husband on account of wife's drunkenness.\*

— is not a reasonable excuse. See 22 M. 328.

H

(5) Conduct falling short of matrimonial offence.

Conduct falling short of a matrimonial offence sufficient to found a decree for judicial separation, is still sufficient cause to bar all remedy to a wife deserted by her husband, but the cause must be grave and weighty. *Haswell v. Haswell* and S., ante; *Yeatman v. Yeatman*, L.R., 1 P. & D. 494.

I

N.B.—For other cases on this point see notes under S. 10, *supra*.

J

8.—“Wilful neglect.”

(1) Reason of the rule as to neglect or misconduct.

(a) The intention of the legislature is that a wife should not, first, be the object of neglect and ill-treatment, and then the victim of the husband's own wrong. *Proctor v. Proctor*, Smith, et al., 34 L.J. Mat. 99.

K

(b) “If chastity be the duty of the wife, protection is no less that of the husband. The wife has a right to the comfort and support of her husband's society, the security of his home and name, and his protection as far as circumstances permit. If he fall short of this, he is not wholly blameless if she fall, and, though not justifying her fall, he has so far compromised himself as to forfeit his claim for a divorce.” *Per Lord Penzance in Jeffreys v. Jeffreys and Smith*, 3 Sw. & Tr. 493.

(c) “It must not be supposed that a husband can neglect or throw aside his wife, and afterwards, if she is unfaithful to him, obtain a divorce on account of her infidelity.” *Jeffreys v. Jeffreys*, 3 S. & T 493; 33 L.J.P. 84, 10 L.T. 309.

M

(2) Neglect or misconduct conducing to the adultery must be misconduct after the marriage.

(a) . . . . ., and it must have conduced to the adultery *Allen v. Allen and D'Acy*, 28 L.J. P. & M. 81, *Badcock v. Badcock and Chamberlain*, 81 L.T. 268.

N

(b) It is not mere carelessness. *Dering v. Dering*, L.R., 1 P. & D. 531; 37 L.J.P. 52, 19 L.T. 48.

O

(c) It must be wilful neglect or misconduct, which has directly conduced to the respondent's fall from virtue. *St. Paul v. St. Paul*, L.R., 1 P. and D. 739; 21 L.T. 108; but see *Millard v. Millard*, 78 L.T. 471.

P

(d) The neglect must be such as conduces to the woman's fall, and not to any particular act of adultery after it. *St. Paul v. St. Paul and Farquhar* (Q.P.), L. R., 1 P. & D. 739; see also *Dagg v. Dagg and Speake*, 51 L. J. Mat. 19; and *Millard v. Millard* and B. L. T. 471; *Hodgson v. Hodgson and T.* 1905, p. 233, 93 L.T. 466.

Q

(3) Mere Carelessness is not neglect or misconduct.

Carelessness is not sufficient to constitute such neglect or misconduct as is contemplated by this section. See *Dering v. Dering and Blakely*, 37 L.J. P. & M. 53; *Macrae on Divorce*, p. 52.

R



## 9.—“Misconduct...as has conduced to the adultery.”

## (1) Wilful neglect or misconduct, effect of.

- (a) In a petition for dissolution of marriage the Court is not bound to pronounce a decree, if it finds that the petitioner has been guilty of such wilful neglect, or misconduct, as has conduced to the adultery charged. *Coulthart v. Coulthart and Gouthwaite*, (1859), 38 L.J. (P. & M.) 21. S
- (b) “But though it may do so in its discretion, it will refuse relief if a husband, although he intended no wrong, saw danger and recklessly allowed his wife to remain exposed to it.” *Beavan (an infant) v. Beavan*, (1869), 2 Sw. & Tr. 652, Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), S. 31. *Dering v. Dering*, (1868), L.R. 1 P. & D. 531. T

## (2) Misconduct contemplated by the section.

- (a) The misconduct here referred to is misconduct after the marriage—*Allen v. Allen and D'Arcy*, 28 L.J. P. & M. 51. U
- (b) The wilful neglect or misconduct intended by the section must be such as conduced to the fall of the wife, and not such as may have led to any particular act of adultery after the wife's first fall from virtue. *St. Paul v. St. Paul and Farquhar*, 38 L.J. P. & M. 57; *Macrae on Divorce*, p. 50. Y
- (c) The neglect or misconduct must be neglect or misconduct by the party in his or her marital capacity, a breach of some marital duty. *Cunnington v. Cunningham and Noble*, 1 Sw. & Tr. 475, S.C. 28 L.J. P. & M. 101. W

## (3) Principle underlying this provision.

It is for the public interest that such a safeguard should be provided, and that a husband who has himself thrown his wife into temptation, and exposed her to the address of other men, should not be allowed to cast her aside after she has yielded to temptation. *Barnes v. Barnes Grimwade*, et al., 37 L.J. Mat. 4. X

## (4) Misconduct must be such as to conduce to adultery charged.

A petitioner who has been guilty of cruelty or desertion is not debarred from obtaining a decree of judicial separation, on the ground of adultery, unless, it seems, such conduct on his part has conduced to adultery. *Hodgson v. Hodgson*, (1905), p. 293. Y

## (5) Mere carelessness is not sufficient to constitute misconduct.

“....., but there must be a knowledge of an intimacy of a distinctly dangerous character. It must appear that the husband knew so much of it as to perceive the danger, and purposely or recklessly disregarded it, and forebore to interfere.” *Dering v. Dering and Blakely* (Q.P.) L.R. 1 P. & D. 531. Z

## (6) Taking a wife to a dancing-hall with another man, allowing her to dance with him constantly.

....., and then leaving her there in his care night after night, is conduct conducing to adultery. *Barnes v. Barnes Grimwade*, et al., 37 L.J. Mat. 4. A

## (7) Wife may allege introduction by her husband to an improper acquaintance.

The....., especially when she charges him with adultery with that person. A husband cannot lead his wife to follow his bad example, and then take advantage of her wrong. *Graves v. Graves*, 3 Curt. 235. B

9.—“*Misconduct...as has conducted to the adultery*”—(Continued).

(8) Cohabitation before marriage.

She may also allege cohabitation before marriage, for if that were so, greater care would be necessary afterwards. *Graves v. Graves*, 3 Curt. 235. C

(9) Exposure to temptation of a wife.

(a) Exposure to temptation of a wife is wilful neglect. *Groves v. Groves and Thompson*, 28 L. J. Mat. 108. D

(b) A husband offered his wife an annuity if she would give up her adulterous connection. Subsequently the adultery was proved, but the conduct of the husband was considered deficient in the necessary caution and circumspection, and his bill for divorce was rejected. *Perry's case*, *Mcq. H.L. Practice*, 663. E

(10) Compulsory separation as by imprisonment.

(a) Compulsory separation, as by imprisonment, is not neglect as contemplated by the section. *Cunnington v. Cunningham*, *Noble, et al.*, 28 L. J. Mat. 100. See also *Townsend v. Townsend*, L.R., 3 P. & D. 129. F

(b) Felony committed by a husband, resulting in a long term of imprisonment, during which time his wife commits adultery, is not wilful misconduct within the meaning of the Act *Cunnington v. Cunningham*, 1 S. & T. 475; 28 L. J.P. 101. G

(11) Respondent's conviction does not justify the petitioner's withdrawal from cohabitation.

The....., but, taken with other facts, it may do so. *Williamson v. Williamson and Bates*, 51 L.J. Mat. 54. H

(12) Husband leaving home to improve his position.

It is not such wilful misconduct where a husband leaves his home with the bona fide intention of improving his position, although his absence may be the immediate cause of his wife committing adultery. *Davies v. Davies*, 3 S. & T. 221, 32 L. J.P. 111; 8 L. T. 703. I

(13) Respondent—Subject to insane delusions.

(a) If a respondent, who is subject to insane delusions and is charged with a matrimonial offence, knows the nature of it and its probable consequences when committing it, insanity is no defence to the petition. *Yarrow v. Yarrow*, 1892, p. 92. J

(b) Lunacy of the respondent is, at any rate as a rule, no answer to a petition for dissolution of marriage. *Motdant v. Moncreffs*, L.R., 2 H.L. (Sc.) 374; 43 L.J.P. 49; 30 L.T. 649. See also *Yarrow v. Yarrow*, (1892), p. 92; 61 L.J.P. 69; 66 L.T. 383, *Hanbury v. Hanbury*, (1892), p. 242; 61 L.J.P. 115. K

(14) Marriage how far condonation of ante-nuptial incontinence.

Though marriage is condonation of ante-nuptial incontinence, the latter has been pleaded in reply to a defensive charge by the wife of neglect or connivance. *Graves v. Graves* 3 Curt. 235. L

(15) Wife's refusal of intercourse

(a)——is not, though reprehensible, by itself, conduct conducing to her husband's adultery. *Synge v. Synge*, (1900), p. 180, but see also *Dixon v. Dixon*, *infra*. M

**9.--“Misconduct....as has conduced to the adultery”---(Continued).**

- (b) Where a wife refused to submit to marital intercourse, it was held that her conduct had conduced to the adultery of her husband. *Dixon v. Dixon*, 67 L.T. 894; But see also *Synge v. Synge*, *supra*. **N**

**(16) Rape.**

Rape, which necessarily implies adultery, is, on the same footing *qua* defence as adultery. See Laws of England, Vol. XVI, pp. 480, 496. **O**

**(17) Unnatural offence.**

- (a) There does not seem to be any authority for dealing with an unnatural offence committed by the petitioner as a defence to a suit for dissolution. See Laws of England, Vol. XVI, pp. 477, 497. **P**
- (b) “But it is submitted that such an offence might be considered as conduct conducing, or that the Court might grant a wife a decree of dissolution on a cross prayer in spite of adultery committed.” *Geils v. Geils*, (1848), 6 Notes of cases. See Laws of England, Vol. XVI, pp. 477, 493, 407, 515. **Q**

**EXAMPLES.**

**A—What is misconduct in the husband.**

In the following cases, petitions were dismissed on the ground that the petitioner has been guilty of such wilful misconduct as had conduced to the adultery of the other party.

- (i) Where petitioner who knowingly married a prostitute left her without means.

——, it was held that such conduct on his part conduced to adultery of the wife. *Coulthart v. Coulthart*, (1859), 28 L.J. (P. & M.) 21. **R**

- (ii) Where a husband (a butler) only occasionally visited wife.

——for ten years, and then ceased without good cause, and continued to support her for some time only, it was held that such conduct on the part of the husband was an excuse for the wife's misbehaviour. *Jeffreys v. Jeffreys and Smith*, (1864), 3 Sw. & Tr. 493. **S**

- (iii) Husband's communicating venereal disease to wife.

——would justify the dismissal of a petition by him. *Wildcy v. Wildcy and Reyder*, (1876), 26 W.R. 239 (Eng). **T**

- (iv) Leaving wife because she got into debt.

A husband——would not be entitled to complain of her misconduct afterwards. *Starbuck v. Starbuck and Oliver*, (1889), 59 L.J.P. 20. **U**

- (v) Other circumstances excusing misconduct on the part of the respondent, are :—

(a) Marriage to mistress.

(b) Quarrels for money. **V**

(c) Husband making wife live alone in chambers. *Baylis v. Baylis*, (1867), L.R., 1 P. & D. 395. **Y**

- (vi) The following have been held to be conduct on the part of the husband conducing to the wife's adultery.

(a) Where a husband allowed the co-respondent to visit frequently at his house during his absence. *Browne and Powell on Divorce*, Seventh Edition, 1905, p. 54. **W**

9.—“*Misconduct...as has conducted to the adultery*”—(Continued).

A.—What is misconduct in the husband—(Concluded).

- (b) Where the husband allowed the co-respondent to send provisions into his house. *Browne and Powles on Divorce*, Seventh Edition, 1905, p. 54. **X**
- (c) Where the co-respondent was allowed to make his wife an allowance of 1l. a week. *Browne and Powles on Divorce*, Seventh Edition, 1905, p. 54. **Y**
- (d) Where the husband had sent his wife to borrow money of the co-respondent, and allowed him to escort her to London. *Brown v. Brown*, 21 L.T. 181. **Z**
- (e) Where a husband had been in the habit of going with his wife and the co-respondent to places of amusement, and of allowing her to dance frequently with the co-respondent there, and then leaving her in the care of the co-respondent. *Barnes v. Barnes*, L.R. 1 P. & D. 505; 37 L.J.P. 4, 17 L.T. 286. **A**
- (f) Where a husband, having married a woman of loose character, in a short time separated himself from her without reasonable cause, and induced her to reside away from her friends in a place where she was especially liable to temptation. *Baylis v. Baylis*, L.R. 1 P. & D. 395, 36 L.J.P. 89, 6 L.T. 613. See, also, *Groves v. Groves*, 28 L.J.P. 108. **B**

B—What is misconduct in the wife.

(i) WIFE'S CRUELTY AND WILFUL DESERTION.

— has been held to be conduct on her part conducing to her husband's adultery. *Boreham v. Boreham*, (1866), L.R. 1 P. & D. 77. **C**

(ii) WIFE COMMITTING ADULTERY AFTER SHE HAD OBTAINED A JUDICIAL SEPARATION FOR DESERTION.

— would disentitle her to any relief on the ground of her husband's misconduct. *Yeatman v. Yeatman*, (1870), L.R. 2 P. & D. 187. **D**

(iii) WIFE QUARRELLING WITH HER MOTHER-IN-LAW AND GOING INTO LODGINGS WITH A SMALL ALLOWANCE.

— would be an excuse to her husband's misconduct. *Groves v. Groves*, (1859), 28 L.J. (P. & M.), 108. **E**

(iv) WIFE'S INSOLENT CONDUCT AND NEGLECT.

A husband however accused of adultery may plead that, in addition to deserting him, his wife treated him with insolence and neglect, and absented herself without informing him of her whereabouts. *Hughes v. Hughes*, (1866), L.R. 1 P. & D. 219. **F**

C.—What is not misconduct in the husband.

The Court made decrees in the following cases.

**N.B.**—In these cases the Court exercised its discretion in favour of the petitioner, notwithstanding his misconduct.

(i) PROSTITUTE MARRIED TO A WARD OF SIXTEEN—WARD SENT ABROAD—AND SHE WAS NOT MAINTAINED.

Where a prostitute was married to a ward of sixteen and he being sent abroad she was not maintained, held, the non-maintenance by the ward was not conduct conducing to the adultery of the wife. See *Beaven v. Beaven*, (1862), 2 Sw. & Tr. 652. **G**

9.—“*Misconduct... as has conduced to the adultery*”—(Concluded).

## C—What is not misconduct in the husband—(Concluded).

- (ii) AN UNDERGRADUATE MARRIED A PROSTITUTE—HIS FATHER ARRANGED DEED OF SEPARATION AND ALLOWED HER 1*l.* PER WEEK.

An undergraduate married a prostitute. His father arranged a deed of separation and allowed one pound a week which she accepted. She cannot afterwards plead her husband's separation under the deed as an excuse for her misconduct. *Proctor v. Proctor, Smith and Pitman*, (1865), 34 L. J. (P. M. & A.) 99. H

## D.—What is not misconduct in the wife.

- (i) WIFE'S REFUSAL OF INTERCOURSE.

A wife's refusal of intercourse, although reprehensible, is not, it seems, conduct conducing. *Synge v. Synge*, (1900), p. 180; but see *contra*, *Dixon v Dixon*, (1892), 67 L. T. 394. I

- (ii) WIFE'S REFUSAL TO ACCOMPANY HUSBAND TO NEW ZEALAND.

— is not conduct conducive to her husband's misconduct. *Stevens v. Stevens and Field*, (1890), 61 L. T. 844. J

- (iii) WIFE'S CONVICTION.

The conviction of a wife for an offence against the criminal law is no justification for refusing further cohabitation with her, and, if such refusal conduce to her adultery, the Court will not grant her husband a dissolution of his marriage. *Williamson v. Williamson*, 7 P. D. 76, 51 L. J. P. 54; 46 L. T. 920. K

## 15. In any suit instituted for dissolution of marriage, if the respondent opposes the relief sought on the

Relief in case of  
opposition on cer-  
tain grounds.<sup>1</sup>

ground, in case of such a suit instituted by a husband, of his adultery, cruelty or desertion without reasonable excuse, or, in case of such a suit instituted by a wife, on the ground of her adultery and cruelty<sup>2</sup>, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had presented<sup>3</sup> a petition seeking such relief, and the respondent shall<sup>4</sup> be competent to give evidence of or relating to such cruelty or desertion.

## (Notes).

1.—“*Relief in case of opposition on certain grounds.*”

## (1) Corresponding English Law.

The Matrimonial Causes Act, 1866 (29 and 30 Vict. C. 3), S. 2, provides as follows:—

“In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or

**1.—“Relief in case of opposition on certain grounds ”—(Continued).**

her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief ” L

**(2) Object of section—Necessity of avoiding cross-suits—English Law.**

The object of the section is to do away with the necessity of cross-suits which were found necessary under the old Acts See *Osborne v. Osborne*, 3 Sw & Tr. 327. M

**(3) Procedure under the old English Law.**

The practice in England under the old law was to stay the one suit until the determination of the other. (*Ibid.*) Macrae on Divorce, 1871, p. 53 N

**(4) Procedure under present law**

The practice in England, under the present law, is, where there are cross-petitions, to consolidate the two petitions and hear them together. Thus a double hearing would be saved See Browne and Powles on Divorce, 5th Ed, p. 322; Rattigan on Divorce, 1897, p. 108 O

**(5) Cross-suits—Conduct of suit to whom given**

In case of cross-suits being consolidated together, the conduct of the suit is generally given to the first petitioner. (*Ibid.*) P

**(6) Section only applies to suits for dissolution**

S. 15 can only apply to suits for dissolution of marriage See *Williams v. Williams*, 6 Jur. N.S. 151, 29 L J P. & M. 62 Q

**(7) Section has no application to suits for nullity of marriage.**

It is not permissible, therefore, to a respondent in a suit for nullity of marriage to plead the adultery, cruelty, or desertion on the part of the petitioner and to pray for relief in respect thereof *Williams v. Williams*, 6 Jur. N.S. 151; 29 L J P. and M. 62, *Toverner f.c. Ditchford v. Ditchford*, 33 L J 11 and M. 105 R

**(8) Suits for nullity—Prayer for restitution—English practice**

But in a suit for nullity of marriage, the respondent can, in the answer to such suit, pray for restitution of conjugal rights. 12 C. 706. S

**(9) Two modes in which respondent may obtain affirmative relief.**

If a husband or wife, who has been served with a petition, desires (in addition to resisting, by an answer, the prayer of such petition) to obtain affirmative relief, there are at least two ways in which this may be asked for.—(1) by filing a separate petition, and (2) by a prayer for relief in such answer. See *Besant v. Wood*, (1879), 12 Ch. D. 605. T

**(10) Cases where affirmative relief was allowed on cross-prayer.**

**(i) SUIT BY HUSBAND TO ENFORCE DEED OF SEPARATION—COUNTERCLAIM BY WIFE FOR JUDICIAL SEPARATION**

Where husband brings a suit to enforce a deed of separation, the wife can counterclaim for a judicial separation. Per *Jessel*, M.R. in *Besant v. Wood*, (1879), 12 Ch. D. 605. U

**(ii) SUIT FOR DISSOLUTION — COUNTERCLAIM OF ADULTERY, CRUELTY AND DESERTION—RESTITUTION OF CONJUGAL RIGHTS**

(a) In suits for dissolution of marriage which are opposed on the ground of adultery, cruelty, (or, where the wife is petitioner, desertion), the res-

**1.—“Relief in case of opposition on certain grounds”—(Concluded).**

pondent may obtain, on his or her application, the same relief as might have been obtained by the filing of a petition. Matrimonial Causes Act, 1866 (29 & 30 Vict. C. 32), S. 2. Y

- (b) In this connection, restitution of conjugal rights is not the proper relief for desertion, and cannot therefore be prayed for in the answer to a petition for dissolution of marriage. *Drysdale v. Drysdale*, (1867), L.R. 1 P. & D. 365. W

**(iii) CROSS-PRAYER FOR JUDICIAL SEPARATION.**

- (a) In a petition for dissolution of marriage, a cross-prayer for judicial separation was allowed. *Schira v. Schira*, (1868), L.R. 1 P. & D. 466. X
- (b) In a petition for restitution of conjugal rights, a cross-prayer for judicial separation was allowed. *Blackhorne v. Blackhorne*, (1868), L.R. 1 P. & D. 563. Y

**(11) Cases where affirmative relief was not afforded on cross prayer.**

**(i) RESTITUTION OF CONJUGAL RIGHTS NOT ALLOWED IN COUNTER-CLAIM.**

In suits other than for dissolution of marriage, although the practice of the Ecclesiastical Courts is followed as far as possible, restitution of conjugal rights is not granted except on an original petition. Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), S. 22; *Wingfield v. Wingfield*, (1898), 78 L.T. 568; but compare *Clowes v. Clowes*, (1842), 3 Curt. 185. See, also, *Drysdale v. Drysdale*, (1867), L.R. 1 P. & D. 365. Z

**(ii) CHARGE OF ADULTERY—COUNTER-CHARGE OF IMPOTENCE.**

Where charges are made of adultery on the one side and of impotence on the other, these should be the subjects of separate petitions. *Anon* (1857), Dea & Sw. 295; *Ousey v. Ousey*, (1874), L.R. 3 P. & D. 223; *K. v. D.*, (1885), 10 P.D. 175; *S. v. S.*, (1907), p. 224. A

**2.—“Adultery and cruelty.”**

**“Adultery and cruelty”—Here “and” is to be read as “or.”**

Although the word “and,” is used it cannot be intended by the Legislature that the husband-respondent should have to prove both adultery and cruelty on the part of the wife. The corresponding section of the English Act reads “adultery or cruelty,” and there can be no doubt, the word “and” in this section must be construed disjunctively as meaning “or.” “If the intention was that the wife’s cruelty alone was to be no bar to her suit, the words “and cruelty” might have been omitted altogether.” *Rattigan on Divorce*, 1907, p. 109. B

**PRACTICE AND PROCEDURE.**

**(1) Adulterer to be served with citation—English practice.**

If relief be claimed in an answer, the adulterer must be served with a citation and sealed copy of the answer, and the respondent with a sealed copy of the answer but not with a fresh citation. *Laws of England*, Vol. XVI, p. 515, Note C

**(2) Counter-claim of adultery—Alleged adulterer may intervene.**

Where the counter-claim charges the petitioner with adultery, the alleged adulterer may intervene. *Curling v. Curling*, 14 P.D. 18; 58 L.J.P. & M. 20; *Wheeler v. Wheeler*, 14 P.D. 154. D

2.—“ *Adultery and cruelty* ”—(Concluded).

PRACTICE AND PROCEDURE—(Concluded).

- (3) Cross-prayer for affirmative relief—Petitioner not allowed to withdraw petition.

Where the respondent in a suit for dissolution applies for affirmative relief on the ground of the petitioner's misconduct, it is not open to the petitioner to terminate the suit by withdrawing the petition and having the suit dismissed, unless the respondent also agrees to such termination. *Schura v. Schura*, L.R. 1 p. 466. E

- (4) Notice of withdrawal of petition no bar to affirmative relief being prayed for by respondent.

If a petitioner gives notice before trial that the petition will not be proceeded with, this does not preclude the respondent from obtaining the relief sought in a cross prayer *Hall v. Hall and Richardson*, (1879), 48 L. J. p. 57. F

- (5) Amendment of answer by adding a cross-prayer

Nor does it prevent such respondent from obtaining leave to amend the answer by adding a cross-prayer *Firminger v. Firminger and Ollard*, (1869), 17 W.R. 935, (Eng.). G

N.B.—The above-mentioned rule that that notice of withdrawal of petition is no bar to cross prayer by respondent is in the case of a wife respondent, rather to the advantage of her husband, for otherwise she might bring a second suit at his expense. *Schura v. Schura*, (1868), L. R. 1 P. & D. 466. H

16. Every decree for a dissolution of marriage made by a High Court not being a confirmation of a decree of a District Court <sup>1</sup>, shall, in the first instance, be a decree *nisi*, not to be made absolute<sup>2</sup> till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs.

Decrees for dissolution to be *nisi*.

During that period any person shall be at liberty<sup>3</sup>, in such manner as the High Court by general or special order from time to time directs, to show cause why the said decree should not be made absolute<sup>4</sup> by reason of the same having been obtained by collusion<sup>5</sup> or by reason of material facts not being brought before the Court<sup>6</sup>.

Collusion.

On cause being so shown, the Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further enquiry, or otherwise as justice may demand.

The High Court may order the costs<sup>7</sup> of Counsel and witnesses and otherwise arising from such cause being shown, to be paid by the parties or such one or more of them as it thinks fit, including a wife if she have separate property.



Whenever a decree *nisi* has been made, and the petitioner fails, within a reasonable time, to move to have such decree made absolute, the High Court may dismiss the suit.

(Notes).

1.—“*District Court.*”

N.B.—As to District Courts under this Act in the Punjab, see S. 23 of the Punjab Courts Act, XVIII of 1884 I

2.—“*Every decree . . . be a decree nisi not to be made absolute, etc.*”

A.—GENERAL.

(1) Corresponding English Law.

(a) The Matrimonial Causes Act, 1860 (23 & 24 Vict., C. 144), S. 7, runs as follows.—

“Every decree for divorce shall in the first instance be a decree *nisi*, not to be made absolute till after the expiration of such time, not less than three months from the pronouncing thereof, as the Court shall by general or special order from time to time direct, and during that period any person shall be at liberty, in such manner as the Court shall by general or special order in that behalf from time to time direct, to show cause why the said decree should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, that Court shall deal with the case by making the decree absolute, or by reversing the decree *nisi*, or by requiring further inquiry, or otherwise as justice may require, and at any time during the progress of the cause or before the decree is made absolute any person may give information to Her Majesty's proctor of any matter material to the due decision of the case, who may thereupon take such steps as the Attorney-General may deem necessary or expedient, and if from any such information or otherwise, the said proctor shall suspect that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce contrary to the justice of the case, he may, under the direction of the Attorney-General, and by leave of the Court, intervene in the suit, alleging such case of collusion, and retain counsel and subpoena witnesses to prove it; and it shall be lawful for the Court to order the costs of such counsel and witnesses, and otherwise arising from such intervention, to be paid by the parties or such of them as it shall see fit, including a wife if she have separate property, and in case the said proctor shall not thereby be fully satisfied his reasonable costs, he shall be entitled to charge and be reimbursed the difference as part of the expense of his office.” J

(b) S. 2 of the Matrimonial Causes Act, 1878 (41 Vict. c. 19), further states as follows.—

“Where the Queen's Proctor or any other person shall intervene or show cause against a decree *nisi* in any suit or proceeding for nullity of marriage, the Court may make such order as to the costs of the Queen's Proctor, or of any other person who shall intervene or show cause as aforesaid, or of all and every party or parties thereto occasioned by such intervention or showing cause as aforesaid as may seem just; and the Queen's Proctor, any other person as aforesaid, and such

2 —“Every decree... be a decree nisi not to be made absolute, etc” 4

—(Continued).

A.—GENERAL—(Continued).

party or parties shall be entitled to recover such costs in like manner as in other cases. Provided that the Treasury may if it shall think fit order any costs which the Queen's Proctor shall, by any order of the Court made under this section, pay to the said party or parties to be deemed to be part of the expenses of his office.” K

(2) Decree nisi, effect of on suit.

A decree nisi for dissolution does not terminate the suit; and, in contemplation of law, the suit is still pending even after the decree nisi. *Ellis v. Ellis*, 8 P. D. 188; 52 L.J.P. & M. 39. L

(3) Decree nisi—Its effect on the marriage.

(a) A decree nisi does not affect the status of the married woman. *Norman v. Villars*, 2 Ex. D. 359. M

(b) And, until the decree is made absolute she is subject to many of the disabilities of, and is also entitled to many of the rights of, a married woman. (*Ibid.*) N

(c) “The decree nisi does not dissolve the marriage. It was endeavoured to show that after the decree nisi the status of the parties was a peculiar one—that they were in a sort of suspended condition, neither husband and wife nor divorced, and it is said there was authority for saying that if under such circumstances the man cohabited with the woman he would be committing adultery. But the authority has not been produced, and the idea appears to me full of absurdities.” *Per Bowen, L.J.*, in *Stanhope v. Stanhope*, 11 P. D. 103; 55 L. J. P. & M. 36 cited in *Rattigan on Divorce*, 1897, p. 112. O

(4) Continuance of marriage between decree nisi and decree absolute.

(a) The rule is that the marriage of the parties continues undissolved between the decree nisi and the decree absolute. *Hulse v. Hulse*, L.R. 2 P. & D. 259; 40 L. J. P. 51. P

(b) Hence sexual connection by either of the parties during that period with a third person would constitute adultery. (*Ibid.*) Q

(c) The Court will take notice of such misconduct committed by either party in that period. (*Ibid.*) R

(5) Decree nisi does not confer liberty to remarry.

Liberty to marry again arises on decree absolute. *Dering v. D. and others*, L. R. 1 P. & D. 531. S

(6) Decree nisi not a decree as defined in Civ. Pro. Code.

A decree nisi is not a decree within the meaning of the term as defined in the Civ. Pro. Code, as such decree does not “decide the suit.” See 6 B. 416 (443). T

(7) Decree nisi, effect of, on husband and wife.

When a decree nisi is pronounced, neither of the parties to the marriage whose marriage is to be dissolved can take any active step in the suit except to have the decree nisi made absolute. But, it is open to them to so conduct themselves as to prevent the decree being made absolute. *Stanhope v. Stanhope*, 11 P. D. 103; 55 L. J. P. & M. 36. U

(8) Appeal from decree nisi, provisions as to

See S. 55, *infra*.

U-1

2.—“ Every decree . . . be a decree nisi not to be made absolute, etc ”

—(continued).

A.—GENERAL—(Continued).

(9) Effect of decree nisi being rescinded.

(a) The—is to rescind it for all purposes. *Hyman v. Hyman*, (1904), p. 403 ; 73 L.J.P. 106 ; 91 L.T. 861. Y

(b) Thus, any damages which may have been given against the co-respondent by the decree nisi would fall to the ground along with the rescinding of the decree nisi. (*Ibid.*) W

(10) Death of petitioner after decree nisi and before decree absolute.

(a) The—will abate the suit. *Stanhope v. Stanhope*, 11 P. D. 103 ; 55 L. J. P. 86 ; 54 L. T. 906. X

(b) In such a case, his legal personal representative could not revive the suit for the purpose of applying to make the decree absolute. (*Ibid.*) Y

(11) Death of respondent and co-respondent.

In one case the Court made a decree absolute notwithstanding a suggestion, supported by affidavits, that the respondent and co-respondent were dead. *Dering v. Dering*, L.R. 1 P. & D. 531 ; 19 L.T. 48. Z

(12) Petitioner not applying to make decree absolute—Effect.

In one case, a wife had allowed more than a year to elapse without moving to have the decree for dissolution made absolute. Held, on an application by the respondent, that the petition must be dismissed for want of prosecution, unless the petitioner applied for decree absolute within a week. *Lewis v. Lewis*, (1892), p. 212, 61 L.J.P. 95 ; 67 L.T. 358. A

(13) Order for new trial—Effect.

An—rescinds a decree nisi. *Worsley v. Worsley*, 20 T.L.R. 171 (1904). B

(14) Effect of decree absolute on the status of wife.

(a) “ A woman divorced is no longer a wife ; she has not the rights, nor has she the duties, of a married woman.\* She is at liberty to marry again. The equitable doctrines of separate use and restraint against anticipation have no application to her until she does marry again. Whatever property she may have or acquire is her own, her former husband has no interest in it. He, on the other hand, is not bound to support her ; she has no implied authority to pledge his credit, even for necessities. She is free from him and he from her.” *Per Lindley L.J., Watkins v. Watkins*, (1896), p. 222. C

(b) After a decree of divorce has been made absolute, the whole of the wife's property, including such *choses in action* as have not been previously reduced into possession, belongs to her absolutely. *Wells v. Malban*, 31 L.J., Ch. 344 ; 31 Beav. 48 ; *Wilkinson v. Gibson*, L.R., 4 Eq. 162 ; 36 L.J., Ch. 646. D

(15) Decree absolute, effect of.—It operates as decree *in rem*.

Section 41 of the Evidence Act says :—

(a) “ A final judgment, order, or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person, but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing is relevant.

2.—“Every decree . . . be a decree nisi not to be made absolute, etc.”—(Ctd.)

A.—GENERAL—(Continued).

“Such judgment, order, or decree is conclusive proof—

“that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation ,

“that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order, or decree declares it to have accrued to that person ;

“that any legal character which it takes away from any such person ceased at the time when such judgment, order, or decree declared that it had ceased or should cease ;

“and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order, or decree declares that it had been or should be his property.” See S 41, Indian Evidence Act, 1872 **E**

(b) “The record of a decree in a suit for divorce, or of any other decree, is evidence that such a decree was pronounced, and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife, but it is not conclusive, not even *prima facie* evidence against strangers that the cause for which the decree was pronounced existed. For instance, if a divorce between A and B were granted, upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *prima facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit.” *Per Sir Barnes Peacock.* 7 W R. 338 (344). **F**

(c) If a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity, as, for instance, in the case of a Mahomedan, that the marriage was with the sister of another wife then living, the decree would be conclusive that the marriage had been set aside, and that the relationship, of husband and wife had ceased, if it ever existed, but it would be no evidence as against third parties, for example, in question of inheritance, that the two ladies were sisters. 7 W. R. 333 (344). **G**

(d) A decree of divorce not only dissolves the marriage but makes the wife of a *feme sole*. Phippon on Evidence, 4th Ed., p 378 **H**

(16) Reason of the rule that such decrees bind also third parties.

(a) “A judgment of a matrimonial Court decreeing nullity of marriage or divorce is binding as to the status of the parties concerned.” Cunningham's Evidence Act, 11th Ed., p. 114. **I**

(b) This is not on the principle that every one is presumed to have had notice of the suit, as *Holloway, J.*, appears to have thought in 2 M H.C.R. 276, 7 W.R. 338 (344). **J**

(c) For, if they had notice, they could not intervene or interfere in the suit, but upon the principle that, when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons. (*Ibid.*) **K**

2.—“Every decree . . . be a decree nisi not to be made absolute, etc.”—(Otd.).

A.—GENERAL—(Continued).

(d) A valid marriage causes the relationship of husband and wife to exist, not only as between the parties to it, but also as respects all the world, a valid dissolution of a marriage, whether it be by the act of husband, as in the case of a repudiation by a *Mahomedan*, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world. 7 W R 338 (344). L

(17) Conclusive proof of such decrees how avoided

The effect of such conclusive proof can only be avoided by showing that the High Court was not “a competent Court,” within the meaning S 41 of the Evidence Act, or was “A Court not competent to deliver,” the decree within the meaning of S 41 of the Evidence Act. Unless that can be shown, the decree is conclusive, till fraud or collusion is suggested 22 A 270 (279) (F B). See, also, *Cun Ev*, 11th Ed., p 114 M

(18) Affirmation by High Court of nullity decree before limitation period, whether valid.

A decree by a High Court, confirming a decree of nullity of marriage passed by the Court of the Judicial Commissioner of Oudh even though it ought not to have confirmed the Judicial Commissioner's decree, was held to be a final decree of the kind specified in S 41 of the Evidence Act, made in the exercise of matrimonial jurisdiction, declaring a certain woman not to be the wife of another, if it was the decree of a competent Court, then, however, erroneous, or irregular it may have been, it is under S 41 of the Evidence Act conclusive proof that the woman's previous marriage was a nullity. 22 A 270 (279) (F.B.) N

(19) Time from which decree absolute takes effect.

(a) When the decree nisi is made absolute, it takes effect for the above purpose from the date of the decree nisi. *Pole v. Soady*, L.R. 3 Ch. 220, 37 L J, Ch. 246 O

(b) Decrees of judicial separation, restitution of conjugal rights and jactitation of marriage, are final decrees, and take effect immediately from the day on which they are dated *Browne and Powles on Divorce*, Seventh Ed, 1905, p. 456 P

(20) Effect of decree nisi being rescinded.

When a decree nisi is rescinded, that part of it condemning the co-respondent in costs falls with it. *Hyman v. Hyman*, (1904), p. 403, 73 L J.P. 106, 91 L.T. 361, see, also, *Hechler v Hechler*, (1889), 59 L.J.P. 27.Q

(21) Order for new trial.

An—rescinds decree nisi. *Worsley v. Worsley*, 20 T.L.R. 171 (1904). R

(22) Divorced wife may retain the name of her first husband.

(a) A wife who is divorced and who marries a second husband, may, generally speaking, retain the name and title of her first husband. *Cowley v. Cowley*, P. 1900, 305. P

(b) A Peeress, divorcing her husband, and then marrying a commoner, may retain her first husband's title, in the absence of malice. (*Ibid*). T

- 2.—“Every decree ... be a decree nisi not to be made absolute, etc.”  
 • —(Continued).

A.—GENERAL—(Concluded).

- (c) Divorced wives keep their married names if they wish. But such a course is at times disadvantageous. *Fendall v. Fendall and G*, 2 P. D. 263. U
- (d) Marriage confers a name upon a woman. The name so conferred becomes an actual name and continues to be so even after a decree of divorce until she has acquired by repute some other name, which, so to speak, obliterates it. *Fendall v. Fendall and Goldsmid*, 2 P. D. 263, 46 L.J. P. and M. 70. Y

B.—WHO CAN APPLY FOR DECREE ABSOLUTE.

- (1) Only the petitioner can apply for decree absolute.

The decree Absolute can only be obtained by the petitioner. *Ousey v. Ousey and A*, 1 P. D. 56, *Hulse v. Hulse and T.*, 2 P. and D. 259; *Halpen v. Boddington*, 6 P. D. 13. W

- (2) Only innocent party can apply for decree absolute.

(a) It is only the innocent party who can apply to the Court to make the decree nisi absolute. See *Ousey v. Ousey and Atkinson*, 1 P. D. 56, 45 L. J. P. and M. 56. X

(b) But if such innocent party fails, within a reasonable time, to apply to have the decree made absolute, the other party is entitled to call on the innocent party either to apply for decree absolute or to show cause why the decree nisi should not be revoked and the petition dismissed for want of prosecution (*Ibid*). Y

- (3) Respondent cannot apply for decree absolute

The Court will not make a decree absolute for dissolution of marriage on the application of the respondent. *Ousey v. Ousey*, 1 P. D. 56, 45 L. J. P. 56, 33 L. T. 789. Z

- (4) Nor can the respondent show cause against decree nisi being made absolute.

The respondent has no right to show cause against the decree nisi being made absolute. He or she should apply for a new trial. *Per Sir Crosswell Crosswell in Stoute v. Stoute*, 2 S. & T. 384, cited in 6 B. 416 (432). A

- (5) Legal representative of the petitioner.

(a) The—cannot, after the petitioner's death, apply to have the decree made absolute. See *Stanhope v. Stanhope*, 11 P. D. 103, 55 L. J. P. & M. 36, *Rattigan on Divorce*, 1897, p. 113. B

(b) “A man can no more be divorced after his death than he can be married or condemned to death. Marriage is a union for two lives, it can be dissolved either by death or by process of law. After it has been dissolved in one of those ways it cannot be dissolved again—a knot which has already been untied cannot be untied again.” *Per Bowen, J. J., in Stanhope v. Stanhope*, 11 P. D. 103; 55 L. J. P. and M. 36. C

C.—TIME FOR MAKING DECREE ABSOLUTE.

- (1) Petitioner should apply for decree absolute within a reasonable time after expiry of period fixed.

It is incumbent on the petitioner to apply for a decree absolute within a reasonable time after the expiry of the time fixed by the Court. See *Rattigan on Divorce*, 1897, p. 115. D

2.—“Every decree ... be a decree nisi not to be made absolute, etc.”  
—(Continued).

C.—TIME FOR MAKING DECREE ABSOLUTE—(Continued).

(2) What is reasonable time—Pendency of petition for permanent maintenance.

- (a) What is reasonable time must depend on the particular circumstances of each case. *Southern v. Southern*, 62 L.T. 689. **E**
- (b) Thus, in one case, a wife who had obtained a decree nisi, petitioned for permanent maintenance. She delayed to apply for decree absolute on the ground that her petition for maintenance was still pending. Held that her delay was reasonable. *Southern v. Southern*, 62 L.T. 688. **F**

(3) Remedy of respondent if petitioner does not apply within reasonable time.

- (a) The— is to call on him to show cause why the decree nisi should not be revoked and the petition dismissed. *Ousey v. Ousey and Atkinson*, 1 P. D. 56. **G**
- (b) In such a case the Court may either order the petitioner to forthwith apply for decree absolute or to forfeit the benefit of the decree nisi. *Lewis v. Lewis*, 1892, p. 213. **H**

(4) Decree absolute, when made—English Law and Practice—General rule—Six months after decree nisi.

The decree absolute is usually made after six months from decree nisi. This is what is provided for by the Statute and the Rules made thereunder. See Rules of the Divorce Court, 80 and 194. **I**

(5) Period can be postponed in certain cases.

But the period may be postponed on the intervention of the King's Proctor. *Pattenden v. P. and H.*, 19 L.T.N.S. 612, *Longworthy v. L.*, 1 P.D. 88, *Dering v. Dering and B.*, L.R. 1 P.D. 539. **J**

(6) Period may be curtailed in Court's discretion.

The Court has also powers to curtail the above period of six months if, under the circumstances, it so deems fit. *Walton v. Walton and others*, 35 L.J. Mat. 95, *Fitzgerald v. Fitzgerald*, L.R.P. & D. 136. See, also, *Dixon on Divorce*, 4th Ed., 1908, p. 205. **K**

(7) Limit to Court's discretion.

But even where the Court fixes a shorter time, it cannot be less than three months. See *Walton v. Walton*, (1866), L.R. 1 P. & D. 227. **L**

(8) The following have been held to be good grounds for curtailing the period.

The — are the following —

(i) LONG LITIGATION.

After a long litigation the period was fixed at three months. See *Fitzgerald v. Fitzgerald*, (1874), L.R. 3 P. & D. 136. **M**

(ii) SECOND TRIAL.

In another case, after a second trial, and the recital of both decrees nisi, the period for making decree absolute was curtailed. *Sheffield v. Sheffield and Pauce*, (1881), 29 W.R. 523 (Eng.). **N**

(iii) SECOND DECREE NISI.

Where the first decree nisi was rescinded on the ground of collusion, the second decree nisi was made absolute after three months after such second decree nisi. *Rogers v. Rogers*, (1894), 6 R. 589. **O**

- 2.—“Every decree... be a decree nisi not to be made absolute, etc.”<sup>6</sup>  
—(Continued).

C.—TIME FOR MAKING DECREE ABSOLUTE—(Continued).

- (iv) ENABLING HUSBAND TO MARRY A WOMAN WHO IS ABOUT TO BE CONFINED.

— may be a good cause to make a decree absolute in less than six months after the passing of the decree nisi. *Edwards v. Edwards and Wilson*, (1899), Times 17th and 20th June. See, also, an unreported case in July (1909), Laws of England Vol. XVI, p. 592 (Note). **P**

**N.B.**—In the above case the period was curtailed after the petitioner's application in chambers, the King's Proctor attending and not objecting. (*Ibid*) **Q**

- (9) The following have been held *not* to be good grounds for curtailing the period.

- (i) CONVENIENCE.

Mere — is no ground to shorten the period of six months provided by law. *Rippinggall v. Rippinggall and Lockhart*, (1882), 48 L.T. 126 **R**

- (ii) BAD HEALTH AND ANXIETY.

— is no good ground either. See *Shenton v. Shenton and Campbell*, (1869), 38 L.J. (1. and M.) 34, See, also, *M. v. B*, (1874), L.R. 3 P. and D. 200. **S**

- (10) The following have been held to be good grounds for postponing making of the decree absolute.

- (i) APPLICATION FOR NEW TRIAL.

On a trial by jury which arose from an intervention, a verdict was returned in favour of the petitioner. Nevertheless, the Court postponed the making of the decree absolute until the expiry of the time for an application for a new trial. *Dering v. Dering*, L.R. 1 P. & D. 531, 19 L.T. 48. **T**

- (ii) APPLICATION BY QUEEN'S PROCTOR.

(a) An — for postponement would be a good ground for postponing the making of the decree absolute. *Hamilton v. Hamilton*, 33 L.T. 462; *Palmer v. Palmer*, 4 Sw. & Tr. 143, 34 L.J. P. 110. **U**

(b) Thus, in one case, the Queen's Proctor applied for a postponement on the ground that he intended to intervene, but had not yet been able to take the Attorney-General's directions in the matter. Under such circumstances it was held that the making of the decree absolute must be postponed although the six months had expired. (*Ibid.*) **V**

- (iii) ARREARS OF ALIMONY *PENDENTE LITE* NOT BEING PAID IS A BAR TO DECREE ABSOLUTE.

Decree nisi is not to be made absolute until all the arrears of alimony *pendente lite* are paid. *Latham v. Latham*, 2 Sw. & Tr. 299. See, also, 4 A. 295. **W**

- (11) The following have been held *not* to be good grounds for postponing making of the decree absolute.

- (i) PETITIONER NOT PAYING HIS PROCTOR'S TAXED COSTS.

• A decree absolute will not be suspended merely on the ground that the petitioner has not paid his proctor's costs. *Patterson v. Patterson and Graham*, L.R. 2 P. & D. 192 **X**

- (ii) PETITIONER NOT PAYING HIS SOLICITOR'S TAXED COSTS.

The fact of the — is not sufficient ground to justify the postponement of the making of the decree absolute. *Patterson v. Patterson*, L.R. 2 P. & D. 192; 40 L.J.P. 4; 23 L.T. 631. **Y**



2.—“Every decree....be a decree nisi not to be made absolute, etc.”

—(Continued).

C.—TIME FOR MAKING DECREE ABSOLUTE—(Concluded).

(12) Time for decree absolute when commences to run.

- (a) The Court may allow the time for decree absolute to run from the date of the hearing. See *Houghton v. Houghton*, (1903), p. 150, 72 L.J. P. 31; 89 L.T. 76; Browne and Powles on Divorce, 7th Ed., p. 178. **Z**
- (b) When judgment has been reserved, the decree nisi when pronounced, will be dated on the day of its actually being pronounced. It will not be anti-dated. (*Ibid.*) **A**

(13) Computation of the period.

In computing the period of six months mentioned in the section, the day on which the decree nisi is pronounced is excluded from computation. See *Macrae on Divorce*, 1871, p. 57. **B**

D.—PRACTICE IN APPLYING FOR DECREE ABSOLUTE.

(1) Necessity for a motion in Court to make decree nisi absolute.

Courts would not make a decree nisi absolute without a motion being made for that purpose. See 6 A.L.J. 793=6 M.L.T. 96, 10 A. 559, noted under S 17, *infra* **C**

(2) Only petitioner can apply for decree absolute—Procedure if he or she fails to apply.

- (a) Only the petitioner can apply for decree absolute. *Ousey v. Ousey and Atkinson*, P.D. 56; *Halpen v. Boddington*, 6 P.D. 13 **D**
- (b) The respondent's course, if he does not proceed, is to call upon him to show cause why the decree nisi should not be revoked and the petition dismissed. *Ousey v. Ousey and A.*, 1 P.D. 56. **E**

(3) Second marriage of petitioner not necessarily a bar to an application for decree absolute.

If a petitioner honestly believed, when going through the form of a second marriage, that the decree nisi in the first marriage entitled her to do so, she will not be debarred, by her second marriage, from obtaining her decree absolute in the first, if the case admits of it. *Nobb v. Nobb and G.*, L.R. 1 P. & D. 691, *Moore v. Moore*, (Q.P.), P. 1892, 382. **F**

(4) Delay of petitioner—Effect.

Where a petitioner intentionally delays to apply for a decree absolute, the Court may order her to do so at once, or to forfeit it. *Lewis v. Lewis*, P. 1892, 213. **G**

(5) Practice in moving to have the decree nisi made absolute—English Law.

The following procedure is to be observed in English Courts in moving to have the decree nisi made absolute.—

- (i) The application should be made on affidavits.
- (ii) The affidavits must show that there has been a recent search for an appearance by any person and that there has been no appearance; or, if there has been an appearance, that no affidavits have been filed in opposition to the decree.

**N.B.**—The search must be recent. Else the Courts will not entertain the application. See *Stone v. Stone*, 32 L.J. P. & M. 7; 3 Sw. & Tr. 113. **H**

2.—“Every decree....be a decree nisi not to be made absolute, etc.”

—(Continued).

D.—PRACTICE IN APPLYING FOR DECREE ABSOLUTE—(Continued).

(iii) Generally notice of the motion should be served on the respondent and co-respondent. See Macrae on Divorce, 1871, p. 59, *Boddy v. Boddy and Grover*, 30 L.J. P. & M. 95. I

(iv) The affidavits must further show that the search was recent *Stone v. Stone and Brownrigg*, 2 S. & T. 113, 32 L.J. P. & M. 7. J

(6) Copy of decree nisi to be filed with application.

A copy of the decree nisi must also be filed with the application. *Fowler v. Fowler*, 31 L.J. P. & M. 31. K

(7) Notice of motion to be served on respondent and co-respondent—English Law.

As a rule, according to the practice of English Courts, notice of the motion should be served on the respondent and co-respondent *Boddy v. Boddy and Grover*, 30 L.J. P. & M. 95, But see 8 C. 756, 4 B.L.R. O C 52, 18 C. 413. L

(8) Indian Law on the above point differs.

But the want of such service would not vitiate a decree absolute, if, in other respects it is valid, 4 B.L.R. O C 52, 8 C. 756. M

(9) Practice in England—Reason of the English Rule.

The practice in England of requiring such service is based on the principle that the Queen's Proctor should have notice in order to intervene, if necessary, 8 C. 756 (757).. N

N B—As the Indian Law makes no provision for the Queen's proctor the above reason would not apply.

(10) Decree nisi for dissolution of marriage—Service on respondent—Indian Law

(a) A decree nisi for dissolution of marriage need not be served upon the respondent, in order to be made absolute, 8 C. 756; 9 B.L.R. App. 39, 4 B.L.R. O C. 52. See, also, 18 C. 413 O

(b) On a motion under this section to make a decree nisi obtained in an *ex parte* case absolute the question arose as to the sufficiency of the notice of the application to the respondent and as to when the respondent could come in to show cause against the decree nisi, *Held Per Phear*, J

(i) that the parties against whom the decree was made cannot come in to show cause against it,

(ii) that it was only intended that any party other than the parties to the suit should do so,

(iii) and that, consequently, the petitioner was entitled to have the decree made absolute without looking too close as to whether the respondent had sufficient notice of the motion, 4 B.L.R. (O.C.J.) 52 P

(11) Notice of application to make decree nisi absolute when decree nisi has been served on respondent.

• When a decree nisi has been served on the respondent, in a divorce suit, it is not necessary to give him notice of an application to make such decree absolute. 18 C. 413 Q

(12) Inability to serve decree nisi on respondent.

An application was made on behalf of the petitioner to make absolute a decree nisi for the dissolution of his marriage with the respondent, the petitioner was not able to find out the whereabouts of the respondent

**2. — "Every decree . . . be a decree nisi not to be made absolute, etc."**

—(Concluded).

**D.—PRACTICE IN APPLYING FOR DECREE ABSOLUTE—(Concluded).**

and co-respondent, and so was unable to serve them with copies of the decree nisi. Under the circumstances the decree was made absolute. 9 B L R App. 39. **R**

**(13) Petitioner if entitled to be allowed to have the petition taken off the file**

(a) The wife sued for a dissolution of marriage and had obtained a decree nisi. Subsequently, however, the Queen's Proctor intervened, and delivered pleas charging the petitioner with adultery. She then sought to have her petition taken off the file. Held she could not be allowed to do so. The Judge said that he considered that public morality was concerned and that a sham case founded on collusion should be exposed. *Gray v. Gray*, 2 Sw. & Tr. 263 cited in 6 B 416 (450). **S**

(b) It is wholly in the discretion of the Court to permit such a step or not. *Per Wrightman, J.* in *Gray v. Gray*, 2 Sw. & Tr. 266, cited in (*Ibid*) **T**

**(14) Attempt to oust King's Proctor**

(a) It has been held that the Court will not allow a petitioner to withdraw his petition if he thereby simply wants to oust the King's Proctor. *Gray v. Gray*, 2 S. & T 266, 30 L.J.P. 199, 4 L.T. 478, See, also, 6 B. 416. **U**

(b) Nor will it allow him to alter a prayer for judicial separation for the purpose of ousting the King's Proctor. *Drummond v. Drummond*, 2 S. & T. 269, 30 L.J.P. 177, 4 L.T. 416. **Y**

(c) The court will not allow the petitioner to oust the Queen's Proctor by altering the prayer for dissolution of marriage into one for judicial separation. *Gray v Gray*, 30 L.J.P & M 177. **W**

(d) As to whether the petitioner would be allowed to withdraw the suit by offering to pay all costs incurred up to the time by reason of the intervention of the Queen's Proctor, see *Gray v Gray*, 2 Sw & Tr 263, affirmed on appeal, 2 Sw & Tr 266, *Macrae on Divorce*, 1871, p. 56. **X**

**(15) Solicitor's oversight, effect of.**

Solicitor's oversight does not prejudice the client with the Court. *Wickham v. W.*, 6 P.D. 11. **Y**

**(16) Solicitor's costs not being paid is no bar to making decree absolute.**

The fact that the solicitor's costs have not been paid will not bar the making of decree absolute. *Patterson v. P. and G.*, L.R., 2 P. & D. 192 **Z**

**3.—"Any person shall be at liberty, etc."**

**1) The words "any person" do not include the respondent or co-respondent or any person acting at his instance.**

(a) The words "any person" in the section apply, both in this Act and the corresponding portion of the English Statute, to some independent third party 6 B. 416 (436). **A**

(b) The Court will not act upon an intervention when satisfied that it is made at the instance of the respondent or co-respondent. *Clements v. Clements*, 3 Sw. & Tr. 394 cited in 6 B. 416 (436). **B**

(c) The respondent or co-respondent has no right to show cause against the decree being made absolute. *Stoate v. Stoate*, 2 Sw. & Tr. 384. See, also, *Forster v. Forster and Berridge*, 3 Sw. & Tr. 151, cited in 6 B 416 (486-487). **C**

## 4.—"Show cause why the said decree should not be made absolute."

## INTERVENTION.

## A.—GENERAL PRINCIPLES AS TO INTERVENTION.

## (1) Principles governing intervention in English Law.

The following propositions have been laid down by the Court of Appeal in "England as regards the practice of intervention"—

- (i) "That the Act 23 & 24 Vict c 144, S. 7, authorizes intervention by any person where material facts have not been brought before the Court; whether by intention or through accident. *Howarth v. Howarth*, 9 P.D. 218; 51 L.T. 872. D
- (ii) "That it is doubtful whether where the petitioner after the decree *nisi* is guilty of conduct disentitling him or her to have the decree made absolute, the right to intervene is confined to the Queen's Proctor? (*Ibid*) E
- (iii) "That where a respondent is not entitled to a new trial, intervention on the ground of fresh evidence as to facts prior to the decree *nisi*, will not be allowed if the intervenor is merely acting on behalf of, and in collusion with, the respondent. (*Ibid*) F
- (iv) "But that the fact that he is a near relative of the respondent is no ground for rejecting the intervention". (*Ibid*.) See Browne and Powles on Divorce, 7th Ed., 1905, p 181. G

## (2) Stay of proceedings for procuring attendance of petitioner

The Court may stay proceedings for procuring the attendance of the petitioner at the hearing of the intervention proceedings, if the Court deems fit to procure such attendance. *Pollock v. Pollock, Dean and Macnamara*, 4 Sw. & Tr. 266. H

## (3) Application for leave to intervene, how made.

"Application for leave to intervene in any cause must be made to the Judge by motion, supported by affidavit." Browne and Powles on Divorce, Seventh Edition, 1905, p 462, Divorce Rule 23. I

## (4) Application for intervention, when made.

"Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the Judge." Browne and Powles on Divorce, Seventh Edition, 1905, p 462. J

(5) Adultery of petitioner after decree *nisi*, if ground for reversing the decree.

- (a) In a recent case Lord Penzance held that the adultery of the petitioner subsequent to the decree *nisi* was a ground for reversing such decree. His Lordship said—"When the Act empowers cause to be shown why the decree should not be made absolute by reason of material facts not being brought before the Court, I consider that the Court is bound to take notice of any material facts not previously brought before the Court, and it is not confined to the reception of facts occurring before the decree *nisi*. . . . I see no reason so to narrow the meaning of the words 'not brought before the Court.' Adultery since the decree *nisi* is not the less a fact not brought before the Court because from the date of its occurrence it was impossible that it should have been so brought before the Court. If, indeed, the words necessarily implied any shortcoming or default on the part of

## 4.—“ Show cause why the said decree should not be made absolute ”

—(Continued).

## INTERVENTION—(Continued).

## A.—GENERAL PRINCIPLES AS TO INTERVENTION—(Concluded).

the petitioner, they would be confined in their application as contended. But there are no expressions in the statute from which such an implication can properly be drawn, and the Court is therefore bound to give them their natural and full interpretation ” *Hulse v. Hulse and Tatam*, L.R., 2 P. 357, 41 L.J., P. & M. 19, cf *Rogers v. Rogers*, (1894) P. 161, 63 L.J., P. & M. 97. See, also, *Rattigan on Divorce*, 1897, p. 119. K

- (b) This was also the conclusion arrived at by Court of Appeal in *Howarth v. Howarth*, (9 P D 218), in which case Lord Justice Cotton remarked. “ I am not satisfied that subsequent adultery does not come within the words ‘ facts not brought before the Court ’ ” Though it was a fact that could not be brought before the Court at the trial, it comes within the description of ‘ facts not brought before the Court ’ I see no reason why it may not be held that power is given to any one to intervene when, although there is no ground for saying that the decree ~~was~~ was wrong, it can be shown that the party applying for the divorce has so misconducted himself or herself before the decree was made absolute as, on the ground of public policy, not to be entitled to have it made absolute.” See *Howarth v. Howarth*, 9 P D. 218. L

- (c) The words “ not brought before the fact ” mean, therefore, not brought before the Court by accident or force of circumstances, as well as by intention. *Rattigan on Divorce*, 1897, p. 120. M

## B.—WHO CAN INTERVENE.

## (A) Intervention by Queen's Proctor.

## (1) Provision for intervention by Queen's Proctor in English Law.

Intervention is of two kinds—by the King's Proctor, or by one of the public. *Brown and Powles on Divorce*, 7th Ed., 1905, 461. N

## (2) This section is based on English Law—Provisions for intervention by Queen's Proctor.

Though this section is based on S. 7 of Matrimonial Causes Act, yet the provisions for the intervention of the Queen's Proctor, contained in the English Statute are not introduced into the Indian Divorce Act, 6 B. 416 (432). O

## (3) History of the section as to intervention by an officer of Government

- (a) As this section stood in the original draft of the Bill, it gave full power to any person to intervene through the Advocate-General at any time during the progress of the suit; but a difficulty as to who might be the proper person to represent the Advocate-General or Queen's Proctor under the English Act in the various districts to which the Indian Act was to be made applicable caused the section in question to be struck out by the Select Committee. See *Macrae on “ the Law of Divorce in India ”* cited in 6 B. 416 (433). P

**4.—“ Show cause why the said decree should not be made absolute ”**  
—(Continued).

**INTERVENTION—(Continued)**

**B.—WHO CAN INTERVENE—(Continued).**

**(A) Intervention by Queen's Proctor—(Continued).**

(b) It is to be regretted that such provision was not retained in the section when the Indian Divorce Act secured the assent of the Governor-General on the 26th February, 1869. *Per Bayley, J.* in 6 B. 416 (433) **Q**

(c) Neither the Indian Divorce Act, nor the C.P.C., gives any power to the petitioner, respondent or co-respondent to apply for a review of judgment or new trial through the instrumentality of a third person. 6 B. 416 (431). **R**

**(4) General principle governing intervention by Queen's Proctor.**

If the King's Proctor comes to the conclusion that a decree has been obtained contrary to the justice of the case, then it is his duty to intervene. *Crawford v. Crawford*, 11 P. D. at p. 157, (*per Hannen, P.*) **S**

**(5) Queen's Proctor may intervene on private information.**

Usually the Queen's Proctor intervenes on information privately communicated. Browne and Powles on Divorce, Seventh Edition, 1905, p. 161 **T**

**(6) He may also take action on the information supplied by the Court records**

Sometimes he takes action in consequence of papers in a cause being laid before him by order of the Court. Browne and Powles on Divorce, 7th Ed., 1905, 461. **U**

**(7) Court to send papers to Queen's Proctor**

(a) By S. 5 of the Matrimonial Causes Act, 1860 (23 and 24 Vict. c. 144), " In every case of a petition for a dissolution of marriage it shall be lawful for the Court, if it shall deem fit to direct all necessary papers in the matter to be sent to Her Majesty's Proctor, who shall, under the directions of the Attorney-General, instruct counsel to argue before the Court any question in relation to such matter, and which the Court may deem it necessary or expedient to have fully argued." Browne and Powles on Divorce, Seventh Edition, 1905, p. 182. **V**

(b) In a case where a husband had been long absent in New Zealand, a decree nisi was pronounced on his petition, but the papers were ordered to be laid before the Queen's Proctor for inquiry into the facts of the case. *Stevens v. Stevens*, 61 L. T. 844. See, also, *Boulton v. Boulton*, 2 S. and T. 405, 31 L. J. P. 27, 5 L. T. 362. **W**

(c) Under S. 19 of the Judicature Act, 1873, the same power to direct the papers to be sent to the Queen's Proctor is also vested in the Court of Appeal. *Le Sueur v. Le Sueur*, 2 P. D. 80, 36 L. T. 276. **X**

(d) Where a respondent denied the allegations of the petition, and the issues came on for trial at the same time as the issue raised on a plea of the Queen's Proctor "that the petition had been filed by arrangement with the respondent and others acting on his behalf," the Court held that the Queen's Proctor had nothing to do with the issues between the parties, and that his counsel had no right to comment on the evidence relating to them *Jessop v. Jessop*, 2 S. and T.

**4.—“Show cause why the said decree should not be made absolute”**

—(Continued).

**INTERVENTION—(Continued).**

**B.—WHO CAN INTERVENE—(Continued).**

**(A) Intervention by Queen's Proctor—(Continued).**

901; 30 L.J.P. 193, 4 L.T. 308; See, also, *Studholme v. Studholme*, 25 W.R. 165. (Eng.) Y

**(8) Time for intervention by Queen's Proctor—English law and practice.**

The king's Proctor ought not to intervene before decree nisi, except in cases where he charges collusion. *Hudson v. Hudson*, 1 P.D. at p. 168, *per Hannen*, P. Z

**(9) No leave necessary for intervention by Queen's Proctor.**

King's Proctor can intervene without leave. *Browne and Powles on Divorce*, 7th Ed, 1905, p. 462. A

**(10) Queen's Proctor must state particulars of charge.**

The Queen's Proctor is bound to give particulars of his charges in the same manner as any ordinary litigant. *Jessop v. Jessop*, 2 S. & T. 301; 30 L.J.P. 193, 4 L.T. 308, *Barnes v. Barnes*, 57 L.J.P. 4, 17 L.T. 286, See, also, *Gladstone v. Gladstone*, L.R., 3 P. & D. 260; 44 L.J. P. 46, 32 L.T. 404; *Pierce v. Pierce*, 66 L.T. 861. B

**(11) Liability of Queen's Proctor for costs of uncalled for intervention.**

The King's Proctor is now condemned in costs whenever the Court deems that his intervention was uncalled for. (Mat. C. Act., 1878 (41 Vict. c. 19), Ss. 1, 2). C

**(12) Application for amendment by Queen's Proctor—Costs,**

Where the Queen's Proctor applied for leave to amend certain dates, he was allowed to do so on payment of costs of amendment. *Tomkins v. Tomkins*, 20 W.R. 497 (Eng.). D

**(13) Effect of successful intervention by Queen's Proctor.**

When the intervention is successful the petition is dismissed and the decree rescinded. *Browne and Powles on Divorce*, 7th Ed, 1905, p. 466. E

**(14) Position of Queen's Proctor—His right to costs.**

(a) The Queen's Proctor is not regularly a party to the suit. The Queen's Proctor becomes a party to the suit under the circumstances defined by the statute of 23rd & 24th Vict. C 144. That statute has two objects, one to give to the whole of the public the power to give information to the Court in the interval between the decree nisi and the decree absolute, which would relieve the Court from being misled by the petitioner and from pronouncing a decree under circumstances where the petitioner is not entitled to such a decree. Another and a special power is contained in the section that where the Queen's Proctor has the power to intervene in a case of collusion, he may intervene and become a party to the suit to prove that case of collusion, and then, it says, that the Queen's Proctor shall be entitled to his costs." *Per Lord Westbury* in moving the judgment of the House of Lords in *Lautour v. Her Majesty's Proctor*, 10 H.L.C. 685 (699) cited in 6 B. 416 (437-438). F

(b) There may be cases in which the Queen's Proctor is to be treated as one of the public coming in to bring before the Court material facts for

4.—“*Show cause why the said decree should not be made absolute*”  
 —(Continued).

INTERVENTION—(Continued).

B.—WHO CAN INTERVENE—(Continued).

(A) Intervention by Queen's Proctor—(Continued).

The Court's information which had not been presented to it by either the petitioner or by the respondent. In such a case he is not entitled to his costs under the statute. *Per Lord Westbury* in moving the judgment of the House of Lords in *Lautour v. Her Majesty's Proctor*, 16 H.L.C. 685 (699) cited in C. B. 416 (437-438). See, also, *Bowen v. Bowen*, 3 Sw. & Tr. 530. G

(15) Practice as to intervention by Queen's Proctor.

- (a) In *Boulton v. Boulton*, (2 Sw. & Tr. 405), where, an application to make absolute a decree *nisi* for dissolution at the suit of the husband, it appeared that affidavit had been filed by the respondents which alleged the husband's bigamy and conviction thereof, the Judge ordinarily refused to make the decree absolute and directed the Registrar to inform the Queen's Proctor that such affidavits had been filed and permitted the petitioner to file affidavits in answer. See *Boulton v. Boulton*, 2 Sw. & Tr. 105, cited in 6 B. 416 (439) H
- (b) Any person, and the Queen's Proctor as one of the public, may enter an appearance and file affidavits in opposition to a decree *nisi* being made absolute at any time before it is made absolute. *Bowen v. Bowen*, 3 Sw. & Tr. 530 cited in 6 B. 416 (440). I
- (c) The obvious intention of the Legislature is that, up to the last moment an opportunity should be given to every person, and especially to the Queen's Proctor, of preventing a decree *nisi* for dissolution of marriage being made absolute if there were grounds for rescinding it. *Bowen v. Bowen* 3 Sw. & Tr. 530, cited in 6 B. 416 (440). J
- (d) A wife guilty of adultery is not entitled to petition for dissolution of marriage on the ground of any matrimonial offence committed by the husband, even though the wife's adultery be committed subsequent to the filing of her petition. *Drummond v. Drummond*, 2 Sw. & Tr. 269, cited in 6 B. 416 (440). K
- (e) Thus where the wife petitioned for dissolution of marriage, on the ground of her husband's cruelty and adultery, the husband did not appear, but the Queen's Proctor obtained the leave of the Court to intervene and pleaded collusion and adultery of the petitioner. At the hearing, evidence was given of the cruelty of the husband and of the adultery of the wife subsequently to the filing of the petition. Held the petition ought to be dismissed. *Drummond v. Drummond*, 2 Sw. & Tr. 269, cited in 6 B. 416 (440). L
- (f) In one case, the Queen's Proctor, two months after the decree *nisi* filed a plea, and six months after the decree *nisi*, filed affidavits alleging that when the petitioner (the husband) presented his petition for the dissolution of his marriage on the ground of his wife's adultery, he was and had been for many years cohabiting with a female other than the respondent and habitually committing adultery with her. Held the decree *nisi* was properly rescinded on the facts alleged being proved.



## 4.—“Show cause why the said decree should not be made absolute.”

—(Continued).

## INTERVENTION—(Continued).

## B.—WHO CAN INTERVENE—(Continued).

## (A) Intervention by Queen's Proctor—(Concluded)

*Latour v. Latour*, 2 Sw. & Tr. 524 = 10 H L C 625, cited in 6 B. 416 (439). M

- (g) The King's Proctor intervened in a nullity suit, petitioner having already instructed her solicitor to take steps to get the decree *rescinded*. The Court allowed the decree to be rescinded and the petition dismissed on the petitioner's own motion, with the consent of the King's Proctor. *A v. A* (1901), p 284, 70 L.J.P. 90, 85 L T 171; and see further as to intervention of Queen's Proctor generally, *Bell v. Bell*, 58 L.J.P. 54 N

## (B)—Intervention by private persons

## (1) Party to the suit cannot intervene

- (a) No one who is a party to the suit can obtain leave to intervene *Stoate v Stoate*, 2 S & T 384 30 L J P. 173, 5 L T 138. O
- (b) Parties against whom a decree *rescinded* under the Act is passed cannot come to show cause against it *Re Phear, J.*, in 4 B L R. (O.C J) 52. P
- (c) It is the intention of the Legislature that only a person other than a party can do so. (*Ibid*) Q

## (2) Intervention by respondent

A respondent against whom a decree *rescinded* for dissolution of marriage has been pronounced cannot personally intervene to prevent the decree being made absolute *Stoate v Stoate*, 30 L J.P 173, 2 S & T. 384, 5 L.T 138 R

## (3) Intervention by a person at respondent's instance

An—will not be allowed by the Court. \*See *Clements v Clements*, 3 Sw & Tr 394, cited in 6 B. 416 (436). S

## (4) Intervention by friend of respondent.

Where a friend of the co-respondent attempted to intervene but did not bring forward a single fact of importance to the notice of the Court on affidavit, the Court dismissed the application and condemned him in costs *Forster v Forster*, 3 S. & T 151, 32 L.J P 206, P.L T 148. T

## (5) Remedy open to respondent

The only remedies open to the respondent are, either to procure the intervention of the King's Proctor or to move for a new trial. *Stoate v. Stoate*, 30 L J.P. 173, 2 S & T. 384, 5 L T. 133. See, also, *Pattenden v. Pattenden*, 19 L T, 612. U

## (6) Intervention by respondent in nullity suit.

The Court will not in a nullity suit on the ground of impotence, make a decree absolute on the application of the respondent. *Halfen v. Bedington*, 6 P.D. 13; 50 L J.P. 61; 44 L.T. 252. V

## (7) Intervention by respondent's solicitor.

- (a) What the respondent clearly cannot do for himself he cannot indirectly get his solicitor to do for him. 6 B. 416 (445). W

## 4.—“ Show cause why the said decree should not be made absolute ”

—(Continued).

## INTERVENTION—(Continued).

## B.—WHO CAN INTERVENE—(Continued).

## (B)—Intervention by private persons—(Continued)

- (b) Serious inconveniences would follow and much injustice be done in this country if a respondent were to be allowed to instruct his solicitor to make allegations against a petitioner which he himself with ample time and opportunity had abstained from bringing forward before the decree was passed. 6 B. 416 (445) **X**

## (8) Limits as to intervention by respondent or his solicitor

- (a) But if the respondent or his solicitor, by means of affidavit filed after decree nisi is passed and before it is made absolute, brings to the notice of the court facts which would disentitle the petitioner to any relief, the court would not be justified in making the decree absolute until the charges made in the affidavit against the petitioner are cleared up. 6 B. 416 (450). **Y**
- (b) Having regard to the fact that the Courts in India are without the assistance of a Queen's Proctor, they are bound to exercise more than ordinary caution in cases where serious charges against the petitioner are brought to the notice of the court, by whomsoever, and whenever they are brought. 6 B. 416 (451). See also, 6 P.R. 1888 **Z**
- (c) Even where the respondent or his solicitor files affidavits after decree nisi conveying serious charges against the petitioner, the Court is bound to make inquiries and have the matters cleared up. 6 B. 416 (451) **A**
- (d) That inquiry cannot be effectually made merely by requiring affidavits to be filed by the petitioner or on her or his behalf. The simple denial by the petitioner would be of little value. 6 B. 416 (451) **B**
- (e) In this case for the purpose of proper investigation of the case it was thought to be indispensably necessary that the petitioner should be in person present at court for examination. 6 B. 416 (452) **C**

## (9) Principle as to the rule that respondent or his friend cannot intervene

- (a) “ It was the intention of the Legislature to allow an independent third person to intervene for the purpose of giving information to the court, which the parties themselves had wilfully withheld. *Per Sir Cresswell, Cresswell in Forster v. Forster* 3 Sw. and Tr. 154, cited in 6 B. 416 (444). **D**
- (b) A respondent himself has no right to show cause against a decree being made absolute. 6 B. 416, *Clements v. Clements*, 3 Sw. and Tr. 394, *Stoate v. Stoate*, 2 Sw. and Tr. 384 cited in 6 B. 416 (444). **E**
- (c) The expression of opinion made by Judges in English cases shows that a respondent has no right to put forward a friend or his attorney to intervene on his behalf. 6 B. 416 (444), See, also, *Clements v. Clements*, 3 Sw. and Tr. 394, *Stoate v. Stoate*, 2 Sw. and Tr. 384, cited in 6 B. 416 (444). **F**

## (10) Respondent can apply for review of judgment.

The respondent or co-respondent can apply for review of judgment. See Rattigan on Divorce 1897, p. 117. **G**

## (11) Intervention by co-respondent

A co-respondent who had appeared in a divorce suit, but had not defended, was not afterwards allowed to show cause against the decree being made absolute. *Harries v. Harries*, 80 L. T. 262 (1902). **H**

4.—“Show cause why the said decree should not be made absolute”  
—(Continued).

INTERVENTION—(Continued).

B.—WHO CAN INTERVENE—(Continued.)

(B)—Intervention by private persons—(Continued).

(12) Relative of respondent may intervene.

The nearest relationship to a respondent does not disqualify a person from intervening. *Dearing v. Dearing*, L.R.P. and D. 581; cited in argument in 6 B. 416 (422). I

(13) Unauthorized intervention.

Where, in opposition to a decree nisi, an appearance was entered on behalf of an individual who—it subsequently appeared—had not authorized the intervention, and an appearance was then entered on behalf of another intervenor, the Court refused to take notice of the intervention of such other intervenor *Clements v. Clements*, 3 S. and T. 94, 33 L.J.P. 74, 10 L.T. 352. See, also, *Forster v. Forster*, 3 S. and T. 151, 32 L.J.P. 206, 9 L.T. 148. J

(14) Intervention of party charged with adultery

(a) Where a husband in his answer alleged adultery against his wife, but did not ask for a dissolution, the Court allowed the alleged adulterer to intervene *Wheeler v. Wheeler*, 14 P.D. 154, 58 L.J.P. 65, 61 L.T. 306. K

(b) Where the wife charged her husband with adultery with a certain lady and with “other woman unknown,” and the husband’s counsel stated that he was not in a position to contest the adultery, the lady specifically charged obtained leave to intervene, and succeeded in negativing the charges made against her. *Wade v. Wade*, (1903), P. 16, 72 L.J.P. 1, 87 L.T. 751. L

(c) Where an answer to a petition for dissolution charges misconduct with third persons, but claims no relief of any sort or kind, such third persons will not be allowed to intervene. *Browne and Powles on Divorce*, Seventh Edition, 1905, p. 184. M

(d) But if the answer claims relief, it will be treated as a cross-petition, and intervention will be allowed *Lowe v. Lowe*, (1899), p. 204, 68 L.J.P. 60, 80 L.T. 575, *Harrop v. Harrop*, (1899), p. 61; 68 L.J.P. 58; 80 L.T. 171. N

(e) Where the King’s Proctor has intervened and alleged adultery on the part of the petitioner in a divorce suit, the Court has no power to allow the person with whom such adultery is alleged to have been committed to intervene in the proceedings. *Grieve v. Grieve*, (1893) P. 288, 63 L.J.P. 29, 69 L.T. 462, See, also, *Carew v. Carew*, (1894) P. 31; 62 L.J.P. 74. O

(15) Grounds on which intervention by alleged adulterer is allowed.

(a) The reasons why an alleged adulterer is made a party are (1) that he may protect himself and (2) on grounds of public policy which requires that divorces should not be lightly granted. *Fisher v. Keane*, L.R. 11 Ch. D. 353, *Carrier v. Carrier*, 34 L.J. Mat. 47; *Wheeler v. Wheeler and Rhodes*, L.R. 14 P.D. 154 (156); *Jones v. Jones*, P. 165 (169); *Bell v. Bell*, L.R. 8 P.D. 217 cited in argument in 30 C. 489 (494)=7 C.W.N. 504. P

## 4.—“Show cause why the said decree should not be made absolute.”

—(Continued).

## INTERVENTION—(Continued).

## B.—WHO CAN INTERVENE—(Concluded).

## (B)—Intervention by private persons—(Continued).

- (b) The jurisdiction of the Divorce Court is of a special character, and is conferred upon it not merely for the interest of the parties concerned, but for the protection of the public. See *Carrier v Carrier*, 31 L. J. (N.S.) (P.M. & A.) 47, *Wheeler v Wheeler*, L. R. 14 P.D. 154 (156), *Jones v Jones*, (1896), P. 165 (169), cited in argument in 7 C.W.N. 504 (507). Q

## (16) Intervention by alleged adulterers

In a wife's petition for dissolution of marriage on the ground of her husband's adultery with a certain woman, the latter woman applied and obtained a rule calling upon the petitioner to show cause why she should not be allowed to intervene. 30 C. 490 (note). R

## (17) Petition for judicial separation—Intervention by alleged adulterers.

- (a) The Court would refuse to allow a lady charged with adultery on a wife's petition for judicial separation to intervene. *Browne and Powles*, on Divorce, Seventh Edition, 1905, P. 185. S

- (b) Because the practice of the Ecclesiastical Courts which would govern the case, affords no precedent for an intervention under such circumstances. *Farnell v Farnell*, 76 L. T. 167 (1897). T

## (18) Ex parte hearing—Decree nisi—Procedure after—Application by husband to intervene.

“Where a suit for dissolution of marriage by a wife, on an *ex parte* hearing on account of the failure of the husband to appear or file an answer, resulted in a decree nisi being passed, held, on a subsequent application to intervene, based on affidavits alleging *inter alia* collusion on the part of the wife, presented by the husband under S. 16 of the Act before the decree was made absolute that when the matter came on for the decree to be made absolute, the husband could not be allowed to intervene or be heard, but that the affidavits should be filed and that information should be given to the wife that the decree would not be made absolute, till the matters set out in the affidavits alleging collusion had been cleared up. 17 C. 570. U

## (19) Practice of Courts in case of intervention by private parties.

“In India, where there is no public officer corresponding to the Queen's Proctor, a Judge exercising jurisdiction under Act IV of 1869 ought to make a large use of his power to look into any matters which may come under his notice, affecting the proper exercise of the discretionary power of the Court to grant or withhold a divorce under specified circumstances, even though such matters are not brought to his notice by a party to the proceedings or an intervenor.” *Ratigan on Divorce*, 1897, p. 116, 6 P.R. 1888; 6 B 416 (451). V

## (20) Intervention by private person—Security for costs—Practice

“Where a person other than the King's Proctor intervenes against a decree being made absolute, the party who has obtained the decree may apply that such intervenor be ordered to give security for costs pending the

## 4.—“Show cause why the said decree should not be made absolute”

—(Continued).

## INTERVENTION—(Continued).

## B.—WHO CAN INTERVENE—(Concluded).

## (B)—Intervention by private persons—(Concluded).

inquiry.” Browne and Powles on Divorce, Seventh Edition, 1905,  
p. 463. W

(21) Husband and wife coming together again after decree *nisi*—Effect.

“Where after decree *nisi* the parties came together again, the Court, on motion of Queen’s Proctor, without requiring him to file a plea, rescinded the decree *nisi*, and dismissed petition on being satisfied as to facts”  
*Flower v. Flower*, (1893), P. 290, 63 L J P. 28. X

## C.—GROUNDS FOR INTERVENTION

## (1) Suppression of material fact sufficient ground for intervention.

The fact that material facts have not been brought to the notice of the Court is a sufficient ground for intervention whether such facts have been intentionally or accidentally withheld *Howarth v Howarth*, 9 P D. at p. 225, *per Cotton*, L.J. Y

## (2) Mere suppression of material facts no bar to making decree absolute, if petitioner is entitled to such decree in spite of such facts.

(a) The mere fact that material facts have been suppressed does not empower the Court to withhold a decree for dissolution, when, on all the facts being disclosed, it appears that the petitioner is entitled to a decree.  
*Alexandra v. Alexandra*, L.R., 2 P. & D., 164. Z

(b) If “material facts” have been kept from the knowledge of the Court, but it appear on all the facts being known that the petitioner is nevertheless entitled to a divorce, the Court will not refuse to make the decree absolute. Browne and Powles on Divorce, Seventh Edition, 1905, p. 180. A

(3) Case where decree *nisi* was made absolute in spite of material fact being suppressed.

Thus, where a petition contained two charges of adultery, and alleged that neither of them had been condoned, and the Queen’s Proctor intervening subsequent to a decree *nisi* showed that one had been condoned, the decree was allowed to stand on the ground of the uncondoned adultery. *Alexandra v. Alexandra*, L.R., 2 P. & D., 164; 39 L.J.P. 84, 23 L.T. 268. B

## (4) Collusion would be a bar to making decree absolute.

—, though the facts which the parties colluded to suppress would not suffice to support a counter-charge. *Bulter v. Bulter*, 15 P.D. 66; 59 L J.P. 25; 62 L.T. 344; See also *Churchward v. Churchward*, (1895), P. 7, 64 L.J. P. 18; 71 L T. 782. C

## (5) What facts may be raised by intervening party.

(a) A party intervening is not barred from setting up an issue on facts which have been pleaded by and found against the respondent. *Harding v. Harding and Lance*, 34 L.J. P. & M. 9. D

(b) But he is not allowed to rely on charges which have been pleaded, but abandoned at the trial after evidence given in support of them. *Foster v. Foister and Berridge*, 32 L.J. P. & M. 206. E

## 4.—“Show cause why the said decree should not be made absolute”

—(Concluded).

## INTERVENTION—(Concluded).

## C.—GROUNDS FOR INTEVENTION—(Concluded).

- (c) If, however, no evidence have been offered in support of a charge which has been pleaded, it cannot be said to have been ever “brought before the Court,” and an intervenor may set it up. *Masters v. Masters*, 34 L.J. P. & M. 7. • F.

(6) Decree *nisi* being obtained on false charge of adultery—Evidence.

- (a) The King's Proctor may intervene to show cause why a decree should not be made absolute on the ground that the charge of adultery on which it was granted was not true. *Browne and Powles on Divorce*. Seventh Edition, 1905, p. 181. *Crawford v. Crawford*, 11 P.D. 150; 55 L.J.P. 42, 55 L.T. 304. G
- (b) He is at liberty to adduce evidence of fresh material facts. *Crawford v. Crawford*, 11 P.D. 150, 55 L.J.P. 42, 55 L.T. 304. H
- (c) When the Queen's Proctor alleges matter which would be ground for reversing a decree *nisi*, and such allegations are admitted by the petitioner, the Court will act on such admission without requiring further proof. *Boulton v. Boulton*, 31 L.J.P. 115. See also *Pollock v. Pollock*, 34 L.J.P. 49, *Sheldon v. Sheldon*, 4 S. & T. 75, 34 L.J.P. 80. I

## 5 “Collusion.”

N.B.—See notes under S. 10 “Collusion.”

## Suppression of facts not sufficient to establish counter-charge may be collusion.

In this case Lord Justice Lopes said “In my opinion an agreement between the parties to a divorce suit to withhold from the Court pertinent and material facts which might have been adduced on the trial in evidence in support of a counter-charge against the respondent and co-respondent amounts to collusion, even though the suppressed fact might not have been sufficient to have established the counter-charge” *Per Lord Justice Lopes in Butler v. Butler*, 15 P.D. 66; 59 L.J.P. & M. 25. See also *Churchward v. Churchward*, (1895), p. 7, 64 L.J.P. & M. 18, 71 L.T. 792; *Browne and Powles on Divorce*, 7th Ed., pp. 180, 181. K

## 6.—“Not being brought before the Court.”

## “Not being brought before the Court”—Meaning of the expression.

The words “not being brought before the Court” mean “not brought before the Court at any time up to the date of intervention.” See *Rattigan on Divorce*, 1897, p. 119. See also, *Hulse v. Hulse*, and *Tavernor*, (1894), p. 161, 63 L.J.P. & M. 97, and other cases, cited under “INTERVENTION—A.—GENERAL.” K 1

## 7.—“Costs.”

N.B.—See also Notes under S. 95, *infra*(1) Contents of decree *nisi* for dissolution of marriage—Costs—Custody of children.

- (a) A decree *nisi* for dissolution decrees that the marriage be dissolved (setting

## 7.—“Costs” —(Concluded).

out the grounds on which such dissolution is decreed), “unless sufficient cause be shown to the Court why this decree, should not be made absolute within six months from the date thereof.” *Browne and Powles on Divorce*, 7th Ed., 1905, p. 457 L

(b) The co-respondent (if any) is then formally condemned in the costs “incurred and to be incurred on behalf of the petitioner.” (*Ibid*). M

(c) If the custody of the children of the marriage has been asked for and granted at the hearing, “it is ordered that such children to remain in the custody of the petitioner until further order of the Court, but it is directed that such children be not removed out of the jurisdiction of the Court without its sanction.” *Browne and Powles on Divorce*, Seventh Edition, (1905), p. 457 N

(d) If the petitioner be the husband, he is further ordered to pay the respondent’s taxed costs, up to the sum ordered to be secured to cover the wife’s costs of the hearing (*Ibid*). O

(e) If, on the other hand, the petitioner is the wife, the husband will, be formally condemned in her full costs (*Ibid*). P

## (2) Intervenor, when condemned in costs.

(a) The intervenor will be condemned in costs if he fails to substantiate his assertion. *Forster v Forster and Bieridge*, 32 L J P. & M., 206 *Virian v Virian and Waterford*, 39 L J. P. & M., 51. Q

(b) But where a third party intervenes, or the Queen’s Proctor intervenes as one of the public, the Court has no power to make any order as to the costs of the intervention proceedings. *Virian v. Virian and Waterford*, 39 L J. P. & M., 54, L R., 2 P & D., 100, *Lautour v. Lautour*, 33 L J. P. & M., 89, and *Bowen v Bowen and Evans*, 3 Sw. & Tr., 530. R

## (3) Application by attorney for withdrawal or dismissal of suit and for payment of his taxed costs by respondent.

In a divorce suit by the wife against her husband, the attorney for the petitioner, applied for an order for the withdrawal or dismissal of the suit, and for payment of his taxed costs by the respondent, the ground for the application was, that the parties had amicably settled the suit and had returned to cohabitation. The Court granted the application in respect to costs only, but refused to make order for the withdrawal or other final disposal of the suit and ordered that, the attorney should personally bear the costs of his application. 9 B L. S

Confirmation of  
decree for dissolution  
by District  
Judge.

17. Every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court.

Cases for confirmation of a decree for dissolution of marriage shall be heard (where the number of the Judges of the High Court is three or upwards) by a Court composed of three such Judges, 2 and in case of difference the opinion of the majority shall prevail, or (where the number of the Judges of the High Court is two) by

a Court composed of such two Judges, and in case of difference the opinion of the Senior Judge shall prevail.

The High Court, if it think further enquiry or additional evidence to be necessary, may direct such enquiry to be made or such evidence to be taken.

The result of such enquiry and the additional evidence shall be certified to the High Court by the District Judge, and the High Court shall thereupon make an order confirming the decree for dissolution of marriage, or such other order as to the Court seems fit.

Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs

During the progress of the suit in the Court of the District Judge, any person, suspecting that any parties to the suit are or have been acting in collusion for the purpose of obtaining a divorce, shall be at liberty, in such manner as the High Court by general or special order from time to time directs, to apply to the High Court to remove the suit under section 8, and the High Court shall thereupon, if it think fit, remove such suit and try and determine the same as a Court of original jurisdiction, and the provisions contained in section sixteen shall apply to every suit so removed; or it may direct the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make a decree in accordance with the justice of the case

(Notes).

I—"Confirmation."

A—GENERAL

(1) Decree *nisi* effect of.

' Decree *nisi* does not dissolve the marriage, 4 B L.R.O C.J. 51, *Warter v. Warter*, 15 Pro. D. 162 cited in argument in 22 B. 612 (614.) T

(2) Re-marriage just after a fortnight after decree *nisi* a nullity.

(a) A decree *nisi* for dissolution of marriage was passed by a District Judge. Notwithstanding the prohibition contained in section 57 of the Act against the marriage of a divorcee at any time within six months after the decree *nisi* had been made absolute by the High Court, the petitioner went through the form of marriage with a certain person exactly a fortnight after the decree had been passed. *Held*, that the form of marriage was a mere nullity. A.W.N. (1905), 141=2 A L J 420 (F.B.). U

(b) Where it was found that the parties were in collusion in wishing to be divorced, the High Court in the exercise of its discretionary power, refused to confirm the decree for dissolution of marriage, on the



## 1.—“Confirmation”—(Continued).

## A.—GENERAL—(Continued).

ground that the petitioner herself had been guilty of adultery. A. W.N. (1905), 141=2 A L.J. 420 (F.B.). Y

## (3) Confirmation of decrees by High Court—Effect.

In suits for divorce, the judgment of the High Court confirming the decrees of the District Court ought to be regarded as the only judgment on the facts, since the decision of the District Court is subject to the confirmation of the High Court, 18 W.R. 480 (P.C.)=10 B.L.R. 301=I.A. Sup. vol. 106. W

## (4) Privy Council—Practice of not disturbing concurrent findings when departed from.

In cases of wrong exercise of discretion under this Act by the courts in India, the Privy Council may depart from the rule of not disturbing the concurrent findings of two lower courts on questions of fact. See 18 W.R. 480 (P.C.)=10 B.L.R. 301=I.A. Sup. vol. 106. X

## (5) Effect of Divorce on widow's right to administer estate.

(a) S. 201 of the Indian Succession Act (X of 1865) says “If the deceased has left a widow, administration shall be granted to the widow unless the court shall see cause to exclude her, either on the ground of some personal disqualification, or because she has no interest in the estate of the deceased.”

## “Illustrations”

- (i) “The widow is a lunatic or has committed adultery, or has been barred by her marriage settlement of all interest in her husband's estate, there is cause for excluding her from the administration.”
  - (ii) The widow has married again since the decease of her husband; this is not good cause for her exclusion S. 201 of Act X of 1865.
  - (b) So, if she have lived separate from her husband, deserted his children to lead an immoral life, or been divorced according to foreign law, she would be excluded from administration. See Whit Sto. Anglo Indian Codes, Vol. I, p 497 (note). Y
- (6) Administration to wife dying after a judicial separation or protection order—English law.

(a) Where a wife has been judicially separated or has obtained a protection order, under Stat. 20 & 21 Vict. C. 85, S. 21, and afterwards dies in the life time of her husband, intestate, the Court will decree administration, limited to such property as she acquired since the judicial separation or protection order to the next of kin of the wife; as to the remainder, administration will be granted to the husband. In the goods of Worman, 1 Sw. & Tr. 513; see also *In the goods of Waraday*, 2 Sw. & Tr. 369; *In the goods of Weir*, 2 Sw. and Tr. 451; *In the goods of Stephenson*, L.R. 1 P. & D. 289, cited in Williams on Executors 10th Ed. Vol. I, p. 321. Z

(b) But the husband has no right to the administration if the marriage has been dissolved on the ground of his adultery and desertion. *In the goods of*, Hay L.R. 1 P. & D. 51; 35 L.J. P. & M. 3. cited in Williams on Executors, 10th Ed. Vol. I, p. 322 (note). A

## 1.—“Confirmation”—(Continued).

## A.—GENERAL—(Concluded).

- (c) If a wife has been divorced a *meura et thoro*, for adultery, on her part, she forfeits her right to the administration. *Pettifer v. James*, Bundury 16, cited in Williams on Executors, 10th Ed., Vol I, p. 328. **B**
- (d) The Court has a discretion granted by statute on the matter of granting letters of administration. The widow is entitled to the administration in the first instance; and though divorced a *meura et thoro* she is the widow still. But where she has been divorced from her husband for adultery on her part, the case is a proper one for the discretion of the Court to refuse her such a right. *Per Sir H. Jenner in In the goods of Davies*, 2 Curt. 628 cited in William on Executors, 10th Ed., Vol., I, p. 328 (note). **C**
- (e) Now by S. 16 of 20 and 21 Vict. C. 85, a judicial separation is substituted for divorce a *meura et thoro*; but it would seem that similar principles apply. See *In the goods of Thler*, L.R. 3 P. & D. 50 cited in William on Executors, 10th Ed., Vol I, p. 328 (note) **D**

## (7) Non-survival of right to sue for divorce to executors or administrators.

S. 268 of Act X of 1865 (Succession) says. “All demands whatsoever and all rights. ... existing in favour of or against a person at the time of his decease, survive to or against his executors or administrators, except ... in cases where, after the death of the party, the relief sought could not be enjoyed, or granting it would be nugatory.” **E**

## Illustration.

A sues for divorce. A dies. The cause of action does not survive to his representative **F**

## (8) Effect of divorce on domicile.

- (a) The general rule is that the wife's domicile during the marriage follows the domicile of her husband. See S. 16 of Act X of 1865 (Succession). **G**
- (b) But the explanation to that section states that “the wife's domicile no longer follows that of her husband if they be separated by the sentence of a competent court.” See Explanation to S. 16 of Act X of 1865 (Succession). **G**
- (c) A sentence of a *meura et thoro* or one of judicial separation is sufficient to prevent the wife's domicile following that of her husband. See *Dolphin v. Dolphin*, 7 H.L.C. 416, Whit Sto. Anglo Indian Codes, Vol. I, p. 343. **H**
- (d) But the parties merely living apart under a separation-deed will not have that effect. *Shaw v. A.G.*, L.R. 2 P. & D. 156 cited in Whit Sto. Anglo Indian Codes, Vol. I, p. 313. **I**
- (e) In the case of persons domiciled in British India a foreign Court is not a “Competent Court” within the meaning of the Explanation to S. 16 of the Succession Act (X of 1865). See *Shaw v. A.G.*, L.R. 2 P. & D. 156 cited in Whit Sto. A.I. Codes, Vol. I, p. 343. **J**

## (9) Rule made by the Bombay High Court.

The following rule was made by the High Court at Bombay under S. 17 of this Act:—“Cases for confirmation of a decree for dissolution of marriage, received from a District Judge under S. 17 of the Act IV of 1869, shall not be heard till after the expiration of six months from the pronouncing of such decree.” See Notn. dated 23rd Nov 1870, B.G. G., 1870, Pt. I, p. 1278. Printed in the Bombay List of Local Rules and Orders, Vol. I, Ed. 1896, pp. 32 and 33. **K**

## 1.—“Confirmation”.—(Continued).

## B.—PRACTICE AS TO CONFIRMATION.

- (10) District Judge passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation.

See 35 P.R. 1887.

L

(1) Necessity for a motion for a High Court to make decree *nisi* absolute.

(a) The High Court should not make a decree *nisi* for dissolution of marriage absolute without a motion being made to it for that purpose. 6 A.L.J. 793=6 M.L.T. 96. M

(b) Hence, when after the passing of the decree *nisi* for dissolution of marriage, no one represented either the petitioner or the respondent and co-respondent in the High Court, *held* no order could be made on the reference for confirmation of such decree, unless a motion were made to the Court for that purpose. 6 A.L.J. 793=6 M.L.T. 96 N

(c) Under S. 12 of the Act, the duties of a Court in the investigation of a suit for a divorce are that, upon any petition for a dissolution of marriage being presented, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged but also whether or not the petitioner has been in any manner accessory, or co-concurring at the adultery, or has condoned the same, and shall enquire into any counter-charge which may be made against the petitioner. 6 A.L.J. 793=6 M.L.T. 96. O

(d) In a suit for divorce by the husband as petitioner against his wife and another person as co-respondent, the Court of the Judicial Commissioner of Oudh, where the suit was instituted, passed a decree *nisi*, and the record of the case was forwarded to the High Court for confirmation under S. 17 of the Act. The petitioner and the respondent, his wife, also forwarded to the High Court through the Registrar of the Court of the Judicial Commissioner a petition on which they expressed their intention of living together as man and wife and asked the Court not to make the decree absolute on the 2nd June, the case came before the Court, when an order was passed that it should stand over for a fortnight to enable the petitioners to appear in person or by pleader. At the adjourned hearing both the petitioner and the respondent were represented by one Vakil, and he prayed the Court not to make the decree *nisi* absolute.

Held, that the Court should accede to the prayer of the petition and not make absolute the decree passed by the Judicial Commissioner of Oudh. Further, that a suit for a divorce is to be dealt with like all other cases between private litigants, and therefore the High Court should not make a decree *nisi* absolute without a motion being made to it to that effect.

Held, also that proceedings in a Divorce Court are quasi-criminal, and that they are governed by rules in many respects vastly different from those which govern ordinary civil litigation, especially in the matter of compromise on mutual agreement between the parties. *Jugtan and Misser v Nergha Singh*, 6 C. 493=7 C.L.R. 347 ... 453

Held, further, that as in the Indian Divorce Act no express power is given to the parties to the suit to prevent a decree *nisi* passed in it by the District Judge from being made absolute, the principles of the

**1.—“Confirmation”**—(Concluded).

**B.—PRACTICE AS TO CONFIRMATION**—(Concluded).

practice of the English Divorce Act in such a matter might well be followed and an order be made at the desire of both parties staying the proceedings in the cause and not setting aside the decree *nisi* which cannot be done, 10 A 559, *Lewis v. Lewis*, 30 L J.P. & M. 199

**(2) Original summons personally served on the respondent—Decree nisi passed ex parte—Application for making the decree absolute** **P**

The original summons, in a suit for divorce had been served personally on the respondent, but as no appearance was entered by him, the suit was heard *ex parte* and the allegations of adultery and cruelty, set out in the petition, having been duly proved, the usual decree *nisi* was passed. Where, subsequent to this, an application on behalf of the petitioner to have the decree *nisi* made absolute was made and no copy of the decree had been served or notice of the motion given to the respondent on account of his whereabouts being unknown to the petitioner then, held, sufficient cause being shown for making the decree absolute, the decree was to be made absolute. 19 C 539. **Q**

**(3) Decree for nullity of marriage—Confirmation by High Court—Practice—Procedure**

Under this Act, a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncement thereof. 23 B. 460. **R**

**2.—“Cases for confirmation—shall be heard—by three such Judges, etc.”**

**Scope and object of the provision contained in the second clause.**

(a) This clause is intended to secure a strong Court for the confirmation of the decrees mentioned therein. See speech by Hon'ble Mr. Maine in the Legislative Council on 26 Feb. 1869, printed in Fort St. Geo. Gazette Suppl., March 31st 1869, p 10. **S**

(b) The last para of this clause would probably be inoperative since there is no Court in India composed of less than three Judges. See speech by Hon'ble Mr. Maine in the Legislative Council on 26th Feb. 1869, printed at Fort St. George Gazette Suppl., March 31st 1869 at p 10. **T**

**IV.—Nullity of Marriage.**

**18** Any husband or wife may present a petition <sup>2</sup> to the District Court or to the High Court, praying that his or her marriage may be declared null and void.

Petition for  
decree of nullity <sup>1</sup>

**1.—“Petition for decree of nullity.”**

**(1) Presumption is in favour of validity of marriage.**

(a) The legal presumption is always in favour of the validity of marriages. *Cotterall v. Sweetman*, 1 Robert 304, (1845). **U**

(b) In some cases this presumption arises from the fact of the parties having lived together as man and wife for some considerable time. See *Shephard, In re George v. Ibbot*, 10 D 1 Ch. 456; 73 L. J. Ch. 401; 90 L. T. 249. **V**

**(2) Statutes relating to marriage, construction of.**

(a) In Statutes relating to marriage, which prescribes formalities to be observed in its solemnization, mere prohibitory words are not to be interpreted

**1.—“Petition for decree of nullity”**—(Continued).

as creating a nullity if such prohibitions are not attended to. In order to create a nullity such nullity must be specifically declared in the statute. See *Cotterall v. Sweetman*, 1 Robert, 317 (1845); *Browne and Powles on Divorce*, 7th Ed., 1905, p. 94. **W**

(b) The same rule of construction must be adopted in construing Acts of the Colonial Legislature. (*Ibid*). **X**

**(3) Void marriages, effect of lapse of time on.**

(a) In case of marriages that are null and void no lapse of time is, by itself, a bar to the inquiry as to their validity or invalidity. *Dums v. Donovan*, 3 Hagg. 304 (1830). **Y**

(b) But, often relief is not given in suits for nullity of marriage, unless the petitioner is reasonably prompt in seeking such relief. *M. v. C.* or *Mansfield v Cuno*, L.R., 2 P.& D. 414; 41 L.J.P. 37; 26 L.T. 321. **Z**

**(4) Age of parties—How affects right to relief.**

(a) There is no actual age-limit beyond which the right to obtain a decree of nullity ceases. *Williams v. Houfray*, 2 S. & T. 240. **A**

(b) But in some old cases, the Ecclesiastical Courts have refused to proceed where the parties were of an advanced age. *Briggs v. Morgan*, 2 Hagg. Con. C. 324. (1820). **B**

**N.B.**—It will be noted that the decisions of the Ecclesiastical Courts and the principles on which those Courts have acted are still of value inasmuch as the English Courts, in making decrees of nullity, are bound to follow them (See s. 22 of the Matrimonial Causes Act, 1857), and the Indian Courts are directed by S. 7 of this Act, to act and give relief as the English Courts do **f**

**(5) Decree of separation, how far bars relief on ground of nullity of marriage.**

A suit for nullity of marriage cannot be entertained after a decree of separation has been obtained on the ground of the adultery of one of the parties, *Guest v. Guest*, 2 Hagg. Con. C. 321 (1820) **G**

**(6) Voidable marriage and void marriage—Difference—English Law.**

(a) A marriage voidable, but not void, cannot be questioned after the death of either party. *P v. S.*, 37 L.J.P. 80; 19 L.T. 22, *A. v. B.*, L.R. 1 P. & D. 559. **D**

(b) A marriage void *ab initio* can be questioned at any time (*Ibid*). *Browne & Powles on Divorce*, 7th Ed., 1905, pp. 98, 89. **E**

(c) The only kind of marriage which the English law recognises is one which is essentially “the voluntary union for life of one man with one woman to the exclusion of all others”. *Re Ullee, The Nawab Nazim of Bengal's Infants* (1885), 53 L.T. 711; affirmed, 54 L.T. 286, C.A. *Ardaseer Cursetjee v. Peroseboye*, (1856), 10 Moo. P.C.C. 375. **F**

**(7) Burden of proof in suits for nullity of marriage.**

The—— is on the party seeking to invalidate the marriage. *Cuno v. Cuno* L.R. 2 H.L. S.C. Ap. 300; 29 L.T. 816. See also *Shephard. In re George v. Phyer*, (1904) 1 Ch. 456 73 L.J. Ch. 401; 90 L.T. 249. **G**

## 1.—"Petition for decree of nullity"—(Continued).

## (8) Essentials of a valid marriage—English Law.

The requisites of a valid marriage according to English law are .—

- (i) That each of the parties should, as regards age, mental capacity, and otherwise, be capable of contracting marriage.
- (ii) That they should not by reason of kindred or affinity be prohibited from marrying one another.
- (iii) That there should not be a valid subsisting marriage of either of the parties with any other person.

**N B.**—It is immaterial that there may be good faith and an honest belief in the death of the existing wife or husband and that the circumstances may be such as would not sustain an indictment for bigamy. A marriage during the life-time of an existing wife or husband must necessarily be void.

- (iv) That the parties, understanding the nature of the contract, should freely consent to marry one another; and
- (v) That certain forms and ceremonies should be observed. XVI Laws of England 278. See also Browne and Powles on Divorce, 7th Ed., 1905, pp. 92, 93. H

## (9) Other essentials of legal marriage are the following —

- (i) It can be contracted only by *single persons*, which term includes widowers, widows, and divorced persons.
- (ii) The parties must not be within the prohibited degrees of consanguinity or affinity.
- (iii) Both the parties to the marriage must consent to the marriage.
- (iv) They must be of sound mind.
- (v) They must be able to perform the duties of matrimony.
- (vi) The formal requisites as to "banns," "licenses" etc., prescribed by law must be satisfied.

**N B.**—These last requisites as to "banns," "licences" etc., are merely formal; and a deficiency in them renders the marriage void only when such requisites were known to be wanting by both the parties to the marriage. But the other requisites as to consent, affinity, etc., are essential, and must be satisfied before the marriage can be recognised as valid. According to the laws of England, if any of the first five particulars mentioned above be wanting, in the case of the marriage of persons domiciled in England, such marriage would be void whatever be the place of its solemnization. See *Rez v. Wroxtton*, 4 B. & Ad. 641; 1 N. & M 712; *Brook v. Brook*, 9 H. L. Cas. 193; *Fenton v. Livingstone*, 3 Macq. H. L. Cas 497; *Mette v. Mette*, 1 S. & T 416; *Miles v. Chilton*, 1 Robert 697 (1849); Browne and Powles on Divorce, 7th Ed., 1905, pp. 92, 93, 94. H-1

## (10) Marriage of minors not null and void.

Want of age, or minority, is not a disability. Marriage between minors is not void on that account, though it be without the consent of guardians. The statute requires consent, but does not now invalidate a marriage solemnized without it. 4 Geo. 4, C. 76, Ss. 16, 17, App. A; Coke on Litt. Vol. 1, 1. 2, C 4, Sect. 104; *R. v. Birmingham*, 5 B. & C. 85. I

## (11) Irregularities in solemnization, effect of.

More irregularities in the solemnization of marriage do not render the marriage null and void. See *Clowes v. Clowes*, 3 Curt. 193 (1842). J

1.—“*Petition for decree of nullity*”—(Continued).

## EXAMPLES.

## (12) The following irregularities have been held not to invalidate the marriage:—

## (i) SOLEMNIZATION OF MARRIAGE THE DAY BEFORE THE GRANTING OF THE LICENSE.

The———will not invalidate the marriage, where the wife was ignorant of such fact. *Greaves v Greaves*, cited in Browne and Powles on Divorce, 7th Ed., 1905, p. 98. K

## (ii) WHERE LICENSE HAS BEEN OBTAINED BY FRAUD.

——, even that will not invalidate the marriage, unless both parties were cognizant of such fraud. *Cloves v. Cloves*, 3 Curt 193 (1842). L

## (iii) WIFE IMPOSING ON HER HUSBAND A FALSE DESCRIPTION OF HER NAME AND CONDITION.

——, will not by itself render the marriage invalid Browne and Powles on Divorce, 7th Ed , 1905, p 98. M

## (iv) PARTIES OBTAINING LICENSES IN ASSUMED NAMES

—— will not be, by itself, a ground to declare the marriage null and void *Cole v. Butt*, 1 Hagg. Con. C 134. N

## (v) PARTIAL MISDESCRIPTION IN LICENSE.

(a) — of one of the parties to the marriage will not render the marriage invalid. *Beavan v. McMahon*, 2 S. and T 230, 30 L.J.P. 61; 3 L.T. 820. " O

(b) Thus, in one case, there was a partial departure in the true name of one of the parties to the marriage in the license obtained by the other party to the marriage. This party obtained the license in the altered name for the purpose of concealing the intended marriage. Held that the above facts would not invalidate the marriage if the altered name represented the real person, and if such licence was obtained with the consent or by the direction, of such person. (*Ibid*). P

## (vi) MISTAKE IN LICENSE.

The fact that by mistake a party is described in the license, as having two additional Christian names, will not by itself invalidate the marriage. *Haswell v. Haswell*, 51 L.J.P. 15. Q

## (vii) DISPARITY OF FORTUNE.

Mere——will be no ground to declare marriage null and void [So held by the Ecclesiastical Courts]. *Eving v. Wheatly*, 2 Hagg. Con. C. 175, see also *Wakefield v. Mackey*, 1 Phill. 134 (Notes). R

(viii) MISTAKE AS TO THE QUALITIES OF THE PERSON. "

—— would not affect the validity of marriage. (*Ibid*) S

## (ix) FRAUD.

It has been recently held that a marriage cannot be declared null and void on the ground of fraud in its inducement. *Templeton v. Tye*, L.R. 2 P. and D. 420. T

I.—“*Petition for decree of nullity*”—(Continued).

## (x) MARRIAGES SOLEMNIZED AFTER THE TIME ALLOWED BY LAW.

(a) A——may yet be valid in law. *Reg. v. Clarke*, 10 Cox. C. C. 474; 16 L.T. 429. U

(b) Thus, marriages solemnized after the lapse of three months from the publication of the banns, have been rendered valid, where the parties have not done so knowingly and wilfully. *Reg. v. Clarke*, 10 Cox. C. C. 474; 16 L. T. 429. Y

[N.B.—The English Law requires marriages by banns to be solemnized within three months after the complete publication of the banns. Sec. 4 Geo. IV. C. 76, S. 9.]

## (13) In the following cases also, the Courts have held the marriage valid, although there were irregularities in the publication of the banns:—

## (i) ASSUMED NAME GENERALLY USED—EFFECT.

Where the name given has been assumed by the party so long, and under such circumstances that it has, as it were, practically superseded the real name of the party, such irregularity in the name would not affect the validity of the marriage *Duddear v. Fancut*, 3 Phill 580, *Re v. St Faith's*, 3 D. & R 318, *Re v. Billinghamurst*, 3 M. & S 250, But see *Re v. Tinkshelf*, 1 B. & Ad. 190 W

## (ii) THE WOMAN BEING PUBLISHED AS widow, WHEN SHE OUGHT TO BE PUBLISHED AS spinster.

—, is not such irregularity as would invalidate the marriage, provided there is no fraud in either. *Mayhew v. Mayhew*, 2 Phill. 11 (1812). X

## (iii) WRONG NAME IN THE PUBLICATION OF THE BANNS

— would not make the marriage void, if there be no fraud in such publication (*Ibid*). Y

## (iv) ILLEGITIMATE CHILDREN, DESCRIPTION OF.

Where illegitimate children are published by the name of either parent, such publication would not affect the validity of the marriage. See *Wakefield v. Mackey*, 1 Phill. 134 (Notes), *Sullivan v. Oldacre*, 3 Phill 45. Z

## (v) SECOND MARRIAGE OF A WOMAN, SHE BEING DESCRIBED BY HER FIRST MARRIED NAME.

In this case, the wife obtained a decree dissolving her marriage with her husband. She subsequently remarried him after the publication of the banns. In the publication she was described by her married name whereas, she usually passed in the interval by her maiden name. *Held* that the irregularity, if any, did not affect the validity of the marriage. *Fendall v. Goldsmid*, 2 P.D. 263. A

## (14) Where marriage was contracted in England by foreigners, with the object of evading the laws of their own country.

(a)—, such marriage is not null and void merely on that ground. See *Simonin v. Mallae*, 2 S. & T. 67; 29 L. J. P. 97; 2 L. T. 327. B

(b) In this case the parties to the marriage were French people domiciled in France. They solemnized their marriage in England in order to avoid the provision of the French law that the consent of their parents ought to be obtained to the marriage, which consent they were unable to obtain. The English law allowed such a marriage without consent of parents. *Held* that the fact that the parties intended to avoid the French law by solemnizing the marriage in England, did not, by itself, render the marriage null and void (*Ibid*) C



1.—“*Petition for decree of nullity*”—(Concluded).(15) **Where foreigners marry in England within the prohibited degrees of relationship of their country.**

- (a) ———, such marriage would not be recognized as void by the English Courts. *Sottomayor v. De Barros*, 3 P.D. 1; 47 L.J.P. 23; 37 L.T. 415. **D**
- (b) Even if such marriages can be legalized under certain conditions according to the laws of that country (say, by papal dispensation) if such conditions are not satisfied, the marriage will be null and void. (*Ibid*). **E**
- (c) In one case, two persons who were first cousins, married in England, according to the laws of England. They were subjects of Portugal, and domiciled in that country, and according to the laws of that country, first cousins, in order to render their marriage with one another valid, must first obtain the papal dispensation. In this case the parties failed to obtain such dispensation. Held that the marriage cannot be recognized as valid by the English Courts. (*Ibid*). **F**

(16) **Suits for nullity, Test of jurisdiction—English Law.**

- (a) In suits for nullity, the test of jurisdiction is residence, not domicile. *Roberts* (otherwise *Brennan*) v. *Brennan*, (1902) P. 143; 71 L.J. P. 74; 86 L.T. 599. **G**

**N.B.**—But in suits instituted in this country residence has been made the test of jurisdiction, whether the relief prayed for the dissolution of marriage, judicial separation or declaration of nullity of marriage. See S. 2 of the Act.

- (b) In one case, where the parties had an Irish domicile, and the marriage took place in the Isle of Man, it was held that the English Courts had jurisdiction to pronounce a decree of nullity of marriage on the ground of the residence of the parties in England. *Roberts* (otherwise *Brennan*) v. *Brennan*, (1902) P. 143; 71 L.J. P. 74. **I**

(17) **Grounds for a petition to declare marriage null and void.**

- (a) The ——— must be such as existed at the time of the marriage. *Brown v. Brown*, 1 Hagg. E.R. 524 (1828)\*. **J**

- (b) No impediment supervening after the marriage will give a right to present such petition. (*Ibid*). **K**

**N.B.**—For specific grounds on which a decree of nullity can be granted. See S. 19, *infra*.

2—“*Any husband or wife may present a petition.*”(1) **Who can commence proceedings for nullity of Marriage—English Law.**

- (a) Any person having an interest in having the marriage annulled may commence proceedings for nullity of marriage. *Bowser v. Ricketts*, 1 Hagg. Con. C. 213 (1795); *Tres v. Quin*, 2 Phill. 14; *Sherwood v. Ray*, 1 Moo. P. C. C. 396 (1839). **L**

- (b) But, where the marriage is sought to be annulled on the ground of the impotence of one of the parties, it is only the party who suffers an injury from such impotence that can petition for nullity. *P. v. S.* 37 L.J. P. 80; 19 L.T. 22. **M**

2.—“Any husband or wife may present a petition”—(Continued).

- (c) A Civil suit for the purpose of annulling a marriage, for reasons other than impotence may, it seems, be brought by persons having a financial interest in the matter. *Faremouth v. Watson* (1811), 1 Phillim, 355. N
- (d) Thus a suit for the annulling of a marriage was allowed to be brought by the sisters of a man who married the deceased wife's sister, on the ground that the plaintiffs were interested in the question of the man having issue. See *Faremouth v. Watson*, (1811) 1 Phillim, 355. O

(2) Suits by third parties—English Law and Practice.

In the absence of precedent, the Court has declined to entertain a suit for nullity by a third party, unless both the parties to the marriage are before it, on the ground that to do so would be contrary to natural justice. *Wells v. Cottam*, 33 L J., Mat. 41. P

(3) Pecuniary interest.

- (a) A —is the only interest recognized by law as entitling a person to commence proceedings for nullity of marriage. *Beavan v. McMohan and B*, 2 Sw. & Tr. 60. Q
- (b) A slight interest has been held sufficient. *Faremouth v. Watson*, 1 Phillim. 355. R
- (c) In this case the interest deemed sufficient was that of the husband's sisters in their brother's property under their mother's will, contingent on his death without lawful issue. *Faremouth v. Watson*, 1 Phillim, 355. S
- (d) Here the husband had married his deceased wife's sister and such a marriage, though not void till 1835, was voidable at the suit of an interested person. *Faremouth v. Watson*, Phillim 355. T

(4) Persons who have been allowed to institute suits for nullity.

(i) FATHER.

- (a) A father has been allowed to petition for annulling the marriage of his child. *Beavan v. McMohan*, 2 S. and T 58; 28 L.J P 127; 2 L T. 255. U
- (b) A father may institute a suit to declare his daughter's marriage null and void. For he is liable to maintain his children's legitimate issue, should the parents die or fail to maintain them. *Sherwood v. Roy*, 1 Moo. P. C. 397, and 43 Eliz. C. 2, S. 7. Y
- (c) But if he die pending suit, his legal representative cannot carry on the suit at the deceased's estate does not remain liable to the obligation created by the Act of Elizabeth, and so the suit abates. *Beavan v. McMohan*, 2 S. and T. 58; 28 L.J. P. 127; 2 L. T. 255. W

(ii) MOTHER.

- (a) On the father's death, the mother cannot continue the suit, as she had no interest in it when it commenced. *Beavan v. McMohan*, 2 S. and T. 58; 28 L.J. P. 127; 2 L. T. 255. X
- (b) But it appears that she could recommence a suit in her own right. (*Ibid.*) Y

(iii) WIDOWED MOTHER.

- A mother, if she be a widow, can present such a petition. (*Ibid.*) Z

(iv) GRAND-FATHER.

A—, who, under 43 Eliz. C. 7 may be called upon to maintain a pauper grandchild, may institute a suit to annul his grandchild's marriage (*Ibid*); *Sherwood v. Roy*, 1 Moo. P.C. 397. A

N.B.—The statute of Elizabeth compels a man to maintain his grand-children, if legitimate, in case of death or failure of their parents to do so. 43 Eliz. C. 2, S. 7. B

**2.—“ Any husband or wife may present a petition ”—(Concluded).**

**(v) GRAND-MOTHER.**

A—may maintain a similar petition under similar circumstances as the grandfather (*Ibid*), Browne and Powles on Divorce, 7th Ed, 1905, pp. 95, 96. **C**

**(vi) PERSONS ENTITLED IN REMAINDER.**

—have been allowed to bring suits of nullity to declare a marriage void by reason of consanguinity. *Maynard v. Heselrige*, 1 Add. 16, note. See also *F. v. W*, 1 Phillim. 355. **C-1**

**(vii) PERSON INTERESTED WHO THINKS THERE IS A LEGAL DEFECT MAY APPLY.** **D**

Every —, and has a right to a decree if his application is well founded. *Petrie v. Tondear*, 1 Hagg. C.R. 139. **E**

**(5) Lapse of time.**

(a)—is not a bar to the suit *per se*. *B. v. M.*, 2 Rob. 580. **F**

(b) But it may affect the issue materially. *H. v. C.*, 29 L.J., Mat. 81. **G**

(c) Particularly as regards the wife. *B. v. B*, 1 Ec. & Ad. 260 **H**

(d) It may prejudice, and perhaps, be fatal to a suit not brought by the party injured. *Norton v. Seton*, 3 Phill 159 **I**

(e) The petitioner should be prompt in action, and sincere in motive, i.e., prompt on discovery of the impotence. *M v. C*, L R 2 P & D. 419, and see *Briggs v. Morgan*, 3 Phill 332. **J**

(f) But when the impotence is, undoubted, mere delay (i.e., lapse of time alone, without some aggravating circumstances, such as knowledge of the defect and indifference to it, or insincerity), is not sufficient to disentitle the injured party to relief. *W v. R*, 1 P D 405, *B v. B*, 1 Ec. & Ad., 248, *Castleden v. C*, 9 H.L.C 191, *M. v. B*, 3 Sw. & Tr, 550, 89 L J, Mat. 203. (b) *M*, otherwise *D v. D*, 10 P.D. 75, *M. v. C*, L R, 2 P. & D., 414, 41 L J, Mat 37, *H. v. C.*, 29 L J, Mat. 81, See also *Cuno v. C L.R.*, 2 H L, Sc App 300, *Mansfield v. Cuno*, 42 L J., Mat. 65. **K**

**(6) Contents of decree nisi for nullity of marriage**

“ A decree nisi for nullity of marriage decrees “that the marriage in fact had and solemnized on the day of 19 , at , in the country of , between A.B (otherwise C ) the petitioner, and J. B, the respondent, be pronounced and declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever by reason of (setting forth the grounds on which such marriage is declared null and void), and that the said A.B. (otherwise C) be pronounced to have been and to be free from all bond of marriage with the said J. B., unless sufficient cause be shown to the Court why this decree should not be made absolute within six months from this date :” and the decree concludes by condemning the respondent in the costs “incurred and to be incurred” on behalf of the petitioner.” Browne and Powles on Divorce, 7th Edition, 1905, p. 457. **L**

**(7) Relief by answer, practice as to English law.**

The Court can give relief by answer in suits for nullity ; so a respondent who denies the allegation in the petition may pray for a restitution of conjugal rights without making the usual demand for return to co-habitation. See Browne and Powles on Divorce, 7th Ed., pp. 383, 404, 405. **M**

19. Such decree may be made on any of the following grounds:—

(1) That the respondent was impotent at the time of the marriage<sup>1</sup> and at the time of the institution of the suit;

(2) That the parties are within the prohibited degrees of consanguinity<sup>2</sup> (whether natural or legal) or affinity;

(3) That either party was a lunatic or idiot<sup>3</sup> at the time of the marriage,

(4) That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud.<sup>4</sup>

*1.—“That the respondent was impotent at the time of the marriage, etc.”*

A.—GENERAL.

(1) When marriage is voidable for impotence—English law.

Inability to consummate a marriage is now the only cause for which, though not void, a marriage may be avoided on the ground of impotence. *Brown v. Brown*, (1828), 1 Hagg. Ecc. 523. N

(2) Consummation practically impossible—Effect on marriage

(a) If the condition of one of the parties thereto at the time of a marriage renders consummation practically impossible this makes the marriage voidable only, and not void. *Brown v. Brown*, (1828), 1 Hagg. Ecc. 523; *Turner v. Thompson*, (1888), 13 P.D. 37. O

**N B.**—A defect arising subsequently is no ground for relief. *Brown v. Brown*, (1828), 1 Hagg. Ecc. 523. P

(b) Such marriages are deemed valid for all civil purposes unless a sentence of nullity is actually obtained during the life-time of the parties. *Elliott v. Gurn*, (1812), 2 Phillim. 16. Q

(3) There must be no possibility of capacity.

(a) When there is a possibility of capacity the Court cannot separate the parties. *Welde v. Welde*, 2 Lee. 587. R

(b) That is, unless incapacity is likely to be permanent, or the remedy is not permitted by the respondent, the Court will refuse a decree. *Dixon's Law and Practice in Divorce*, Fourth Edition, 34. S

(c) Though a cure be highly improbable, if possible, the Court usually averts the decree. *Stagg v. Edgecombe*, 32 L. J., Mat. 153. T

(4) Incurable malformation.

Natural—of the sexual organs, admitting of a *partial connexion* only, is also a ground to grant a decree of nullity. *D. v. A.*, 1 Rob. Ecc. R. 276. U

**1.—“That the respondent was impotent at the time of the marriage, etc.”**  
—(Continued).

**A.—GENERAL—(Continued).**

**(5) Impediment—Curable by a surgical operation.**

(a) The impediment though curable by a surgical operation is a ground of nullity if the operation would be attended with great danger to life.  
Dixon's Law and Practice in Divorce, 4th Ed., p. 35. **Y**

(b) The Court cannot compel a party to undergo an operation. *L v. W.*, 51 L.J., Mat. 23. **W**

(c) Such a malformation may be considered incurable, and it is not a condition precedent to the petitioner's right to a decree, under such circumstances, that he should call upon the respondent to submit to an operation. *W. v. H.*, 30 L.J., Mat. 73; *L. v. L.*, 7 P.D. 16. **X**

**(6) If the incapable party refuses to undergo an operation to remove the incapacity.**

Hence, one party being capable and the other not,—, the Court, on proof that all reasonable efforts to persuade him or her to do so have failed, will make a decree of nullity. *W v. H*, 30 L J., Mat. 73; *L. v. L.*, 7 P.D. 16. **Y**

**(7) Defect of formation not existing at the time of marriage, but supervening afterwards.**

A—, is no ground for a sentence of nullity. *Brown v. B.*, 1 Hagg Ecc. 523. **Z**

**(8) Who can apply in case of impotency—Party who is not impotent should generally apply.**

In suits for this purpose, the party who is fit must almost invariably be the petitioner. *Norton v. Seton*, (1819) 3 Phillim, 147 **A**

**N.B.**—The reason for the above is that no one may take advantage of his own wrong. **B**

**(9) The party who is disqualified may also apply under certain circumstances.**

(a) Sometimes, though rarely, what, at first sight, appear to be exceptions to this arise, as where the party who is not fit was unaware of the defect, or where the party who is fit has treated the marriage as if it were void, but has refused to take any steps to make it so. *G. v. G.*, falsely called *K.* (1903), 25 T.L.R. 328, C. A.; *A. v. A.*, sued as *B.* (1887), 19 L.R. Ir. 403. **B**

(b) Thus, in one case, where both husband and wife were apparently fit for sexual intercourse, but the wife refused to undergo a slight operation to make her fit for her husband, the Court allowed a petition to be filed by the wife for avoiding the marriage. *G. v. G.*, (1903), 25 T L.R. 328, C.A. **C**

**(10) Other cases where the party who is not fit can apply for decree of nullity.**

The party who is not fit was also allowed to come into Court as petitioner in the following cases.—

(i) In a case where the wife who was fit was alleged to have obtained some sort of relief from a Court of her Church. *A. v. A.*, (1887), 19 L. R. Tr. 403. **D**

(ii) Where the husband who was fit refused to co-habit after the civil and religious ceremony, such a conduct on his part was held to amount to desertion. *De Laubenque v. De Laubenque*, (1899), p. 42. **E**

1.—“That the respondent was impotent at the time of the marriage, etc.”  
—(Continued).

A.—GENERAL—(Concluded).

(11) Suit must be instituted with reasonable promptness—Effect of delay.

(a) Either party must resort to the Court as soon as he or she discovers that the other, from malformation or other defect, is incapable of sexual intercourse. *L.*, otherwise, *B. v. B.*, (1895), P. 274. **F**

(b) And delay, however long, in bringing a suit for this purpose is not in itself a bar. *L.*, otherwise *B., v. B.*, (1895), P. 274. **G**

**N.B**—In the above case seven years' delay by the wife was held to be no bar. In another case, where seventeen years elapsed between the marriage and decree, it was held that even such delay was not bar to the suit. *S. v. B.*, (1905), 21 T.L.R. 219. **G-1**

(12) Proof of impotency.

(a) If the incapacity be *propter frigidity*, the law requires, before a suit can be commenced, a sufficient co-habitation to establish the fact. *Laws of England*, Vol. XVI, pp. 441, 472. **H**

(b) Proof that a wife is incapable of becoming a mother is not a sufficient ground for a decree of nullity, if she be otherwise *apta viro*. See *D-e v. A-g*, falsely calling herself D - e (1845), 1 Rob Eccl. 279; *Laws of England*. Vol XVI, p. 472. **I**

(13) Inference of incapacity.

Disobedience of the order for medical inspection and a disregard of repeated requests to consummate justify the inference of incapacity. See *B. v. B*, 1901, P. 39. **J**

(14) Refusal to submit to inspection—Effect.

If a husband or a wife refuses to submit to inspection, the Court may nevertheless grant a decree *Sparrow*, falsely, called *Harrison v. Harrison*, (1841), 3 Curt. 16, *E v. E*. (otherwise T.) (1900) 50 W.B. 607; *B. v. B.*, (1901), P. 39, *W. v. S.*, (1905), P. 231. **K**

(15) Suit for restitution of conjugal rights—Right to declaration of nullity of marriage.

It is competent to the Court, in a suit for restitution of conjugal rights, to make a declaration of nullity of marriage, if the respondent shows himself entitled thereto. (*I'er Garth, C.J., and Wilson, J.*), 12 C. 706 (F.B.). **L**

(16) Prayer for custody of children of void marriage.

A prayer for the custody of children of a void marriage may be inserted in the petition for nullity. *Langworthy v. Langworthy*, (1886), 11 P.D. 85, C A., *per Cotton*, L J., at p. 88, explaining the Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), s. 35; *Jackson v. Jackson*, (1908) P. 308. **M**

B.—EXAMPLES.

(1) Decrees for nullity of marriage have been granted to the husband in the following cases:—

## 1.—“That the respondent was impotent at the time of the marriage, etc.”

—(Continued).

## B —EXAMPLES—(Continued).

## (i) WIFE HAVING NO UTERUS.

Where the wife had no uterus and a vagina forming a *cul de sac* which made complete *coitus* impossible, a decree of nullity was granted to the husband. *D e v. A—g*, (1845), 1 Rob Eccl. 279. • **N**

## (ii) WIFE LABOURING UNDER A CONGENITAL MALFORMATION.

Where the wife was labouring under a congenital malformation rendering consummation impossible, and which was only removable at considerable risk to her life. *W—v H—*, falsely called *W—* (1861), 2 Sw. & Tr 240. **O**

## (iii) WIFE'S REFUSAL TO SUBMIT TO REMEDIES CONSIDERED DANGEROUS.

In one case, where a middle aged wife successfully resisted for nearly three years, but no malformation was found to exist, and she refused to submit to remedies, because they were considered dangerous,—under the above circumstances a decree was granted to the husband (*A—v. A—* (1871), L R. 2 P and D 287. **P**

## (iv) WIFE SUFFERING FROM HYSTERIA AND HAVING NO SEXUAL DESIRE.

(a) In another case a decree was granted to the husband where his wife, aged eighteen, and who was of a hysterical temper, struck her husband when he attempted and threatened to drown herself, refused the remedies and said that she had no sexual desire *I'. v. L*, falsely called *P.* (1873), 3 P D. 73, n **Q**

(b) The husband's attempts at intercourse with his wife brought on *hysteria*. She refused to submit to an inspection. On evidence of co-habitation for three years without consummation, the Court made a decree of nullity in his favour. *H. v. I'.*, L R, 3 P. and D. 126. **R**

## (v) WIFE'S REFUSAL TO SUBMIT TO EXAMINATION, ETC.

(a) A third case the following particulars were proved,—Cohabitation for three years, husband's attempts exciting hysteria and fight, and the wife's refusal to submit to examination. *Heid* husband was entitled to the decree. *H. v. P.* (1873), L R 3 P. and D. 126. **S**

(b) A decree was granted to the husband in a case where it was found that there was no attempt on the part of the husband, but there was a refusal to submit to his examination on the wife's part. *S. v. S.*, (1908), 24 T.L.R. 253. **T**

## (vi) PERSISTENT REFUSAL OF A PARTY.

Cases have arisen where incapacity of a party has been inferred from persistent refusal. See *S. v. A.*, (1874), 3 P. & D. 72. **U**

## (vii) WILFUL REFUSAL OF MARITAL INTERCOURSE

(a) ——— is not in itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence. *Dixon's Law and Practice in Divorce*, Fourth Ed., 37. **Y**

(b) But where a wife has hitherto resisted, and continues to resist all attempts at marital intercourse, the Court, inferring incapacity from the refusal, decrees nullity. *S. v. A.*, 3 P. & D. 72. **W**

1.—“*That the respondent was impotent at the time of the marriage, etc.*”  
—(Continued).

B.—EXAMPLES—(Continued).

(viii) REFUSAL TO SUBMIT TO OPERATION CONSIDERED SLIGHTLY DANGEROUS.

A decree was granted to the husband under the following circumstances,—wife aged twenty-three being *vaginismus*, slept with husband occasionally for three years, and refused a slightly dangerous operation. *L v. L.*, (1892), 7 P. & D. 16. X

(ix) WIFE'S CRUELTY TOWARDS HUSBAND.

In this case the wife resisted full intercourse for six months, called her husband a brute, declined to have children, and refused inspection. *Held* husband was entitled to a decree. *F v. E*, otherwise T (1900), 50 W.R. (Eng) 607. Y

(2) Decrees of nullity of marriage have been *refused to the husband* in the following cases.

(i) PARTIES LIVING TOGETHER FOR A LONG PERIOD.

Where the parties lived together for nine years and the Court was not satisfied as to the attempts by the husband, a decree for nullity was refused. *S. v. A*, (1878), 3 P. & D. 72. Z

(ii) SECOND MARRIAGE OF WIFE.

A decree was refused in a case of a second marriage of the wife after effective co-habitation with the first husband. *Briggs v. Morgan*, (1820), 3 Phillim. 325. A

(iii) INCAPABILITY OF CONCEPTION.

(a) Mere—is not a sufficient ground alone. *Dixons Law and Practice in Divorce*, Fourth Ed., 34. B

(b) The only question is whether the wife (or husband) is or is not capable of sexual intercourse, or, if at present incapable, whether that incapacity can be removed. (*Ibid*) C

(3) Decrees for nullity were *granted to the wife* in the following case.

(i) HUSBAND IMPOTENT AND LEAVING THE COUNTRY.

In a case where the husband and wife were aged forty-one and seventeen respectively, and eleven years later she was *virgo intacta*, and the husband having confessed his impotence, left the country. A decree was granted to the wife. *Pollard v. Wyburn*, (1823), 1 Hagg. Ecc. 725. D

(ii) HUSBAND INCURABLY IMPOTENT

In one case where there was a separation at the end of three months, and there was no perfect sign of virginity or of connection, but the husband, although he had no visible defect, was believed to be incurably impotent, a decree was granted to the wife. *G—s*, falsely called *T—e*, v. *T—e*, (1854), 1 Ecc. & Ad. 389. E

(iii) WIFE'S SEDUCTION BEFORE MARRIAGE.

In a case where wife was seduced by another before marriage and the husband admitted impotence, a decree was granted to the wife. *R* otherwise *K. v. R.*, (1907), 24 T.L.R. 65. F

(iv) CONDUCT OF THE PARTIES.

A decree was also granted to the wife in a case where the following circumstances were found to exist—separate beds, 8 months after marriage,



d.—“That the respondent was impotent at the time of the marriage, etc.”

—(Continued).

B.—EXAMPLES—(Concluded).

against wife's wish ; afterwards same bed and attempts ; deed of separation unwillingly executed by wife ; husband refused examination. *B. v. B.*, (1901), P. 39. G

(v) PRESUMPTION OF IMPOTENCE TO BE ATTRIBUTED TO THE HUSBAND.

If both parties to the marriage appear capable, the impotence must be attributed to the husband unless the woman resist. *Per Curiam in M—s v. M—c.*, (1853), 2 Rob. Ecol. 625. H-I

(4) Decrees of nullity were refused to the wife in the following cases.

(i) EVIDENCE OF INCAPACITY BEING NOT CONCLUSIVE.

Where the doctor's evidence was uncertain and the husband denied, the wife's assertions as to incapacity were not accepted. *U. v. J.*, (1867) L.R. 1 P. & D. 460. But see also *P. v. P.* (1909), 25 T.L.R. 638, in which the Court pronounced the incapacity of the wife on her own statements.

(ii) HUSBAND'S INCAPACITY NOT BEING PERMANENT. J

Where during a co-habitation of three months, two attempts were made, unsuccessful owing to the husband's habit of self-abuse, and where the husband refused to give up the habit and left the wife, the Court refused to assume permanent incapacity in the husband. *E. v. E.*, (1863), 3 Sw. & Tr. 240. K

(iii) INCAPACITY OF THE HUSBAND CURABLE UNDER GREAT MORAL RESTRAINT.

Where the———arose from a defect, not apparent, but curable under great moral restraint and there was no report of the wife's condition, the Court refused to grant her a decree. *S. v. E.*, 3 Sw. & Tr. 246. L

C.—PRACTICE IN CASE OF ALLEGED IMPOTENCE—MEDICAL EXAMINATION AS TO ALLEGED IMPOTENCY.

(1) Necessity for medical evidence regarding impotency.

In nullity cases on the ground of impotence medical evidence as to the condition of the parties is necessary. *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 405. M

(2) Application for the appointment of medical inspectors.

(a) For the purpose of obtaining the necessary medical evidence, the solicitor for the petitioner, as soon as the answer is filed or the time for doing so has expired, or no appearance has been entered, should take out a summons for the appointment of medical inspectors for the purpose of examining the parties. *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 405. N

(b) When a suit for nullity of marriage by reason of impotence is in a position to be set down, application should be made on summons, to the registrar for an order for the appointment of medical inspectors and for the hearing of the case *in camera*. *Matrimonial Causes Act, 1857* (20 & 21 Vict., c. 85) s. 22. O

(3) Service of summons.

Personal or substituted service of the summons is necessary only if the respondent has not entered an appearance. *Laws of England*, Vol. XVI, pp. 509, 527. P

- 1.—“*That the respondent was impotent at the time of the marriage, etc.*”  
—(Concluded).

C.—PRACTICE IN CASE OF ALLEGED IMPOTENCE—MEDICAL EXAMINATION AS TO ALLEGED IMPOTENCY—(Concluded).

(4) Appointment of medical inspectors.

These inspectors are always appointed by the registrar, and neither of the parties has any voice in the matter. *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 405. Q

(5) Who can obtain the appointment of medical inspectors.

Either party can obtain the appointment of medical inspectors. (*Ibid*) R

(6) Effect of either party refusing to obey order for medical examination.

If either party refuse to obey the order for medical examination, the other party is not to be thereby prejudiced, and the petitioner will not be prevented from proceeding to trial. (*Ibid*) S

(7) Medical inspectors to be sworn—Parties to be identified in their presence

The medical inspectors have to attend before the Registrar to be sworn, and the parties have to be identified in their presence. *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 406. T

(8) Liability for fees of medical inspector.

The solicitor for the party claiming a decree of nullity is responsible for the medical inspector's fees. *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 406. U

(9) Application for the hearing of such cases in *camera*

The general practice is for the petitioner to make an— *Browne and Powles on Divorce*, seventh Ed., 1905, p. 405. V

D.—THREE YEARS' RULE IN ENGLAND.

(1) Ascertainment of incapacitated person—Three years' rule in England.

(a) In the absence of an apparent physical infirmity, *co-habitation for three years* has been invariably required, to ascertain with whom the fault lies. *Scott v. Jones*, 2 N. C. 38. W

(b) But the general rule requiring three years' co-habitation is not absolutely binding when the actual co-habitation has been sufficiently long to enable the husband, if capable, to overcome any temporary impediment to consummation. *N. v. M.*, 2 Rob. 625. X

(2) Application of the three years' rule.

The three years' rule only applies when the impotence is left to be presumed from continued non-consummation; and not when it arises from another manifest cause. *F. v. D.*, 4 Sw. & Tr. 94. Y

(3) Cases where the three years' rule is not adhered to.

(a) Where a visible defect of an incurable nature announces the incapacity of man or woman, the Court acts upon it without regard to the length of co-habitation. *Greenstreet v. Comyns*, 2 Phill. 10. Z

(b) Where the infirmity charged can be ascertained at once, the *triennialis cohabitatio* is unnecessary. *Briggs v. Morgan*, 3 Phill. 329. A

(c) Hence the three years' rule is not compulsory. The Court is not bound to adopt the letter in exclusion of the spirit of the rule. *A. v. B.*, 1 E. & A. (Sp.) 15. B

(d) Thus in one case nullity was pronounced after a co-habitation of three months only, upon a medical certificate, apparently conclusive, that the impotence would be permanent. *G. v. T.*, 1 E. & A. 389. C

2—"That the parties are within the prohibited degrees of consanguinity."

(1) Prohibited degrees in this country not same as in England.

- (a) The "prohibited degrees" referred to in the section do not necessarily mean the degrees prohibited by the law of England. 12 C 706; 17 C. 324. D
- (b) The English prohibited degrees is not the law for christians in India. 12 C. 706 (730) **F B.** E
- (c) Nor was it the law applicable to christians in India generally before the forming of this Act. 12 C. 706 (728). F
- (d) The application of the English law of prohibited degrees to all christians in India would be a most momentous change in the marriage law of the large majority of the christians in India. The Courts will not presume such a change to have been effected by the Act unless the intention of the legislature to make the change has been expressed in unmistakable language. 12 C. 706, (731). G
- (e) As to the law as to prohibited degrees in England. See *Brook v. Brook*, 9 H.L.C. 214 cited in 12 C. 706 (710-711). H
- (f) As to the extent to which the law of England was carried by the English into India. See 1 M.I.A. 305, 1 M.I.A. 175, 1 B.L.R. (O.C.J.) 87, 9 M.I.A. 397. I
- (g) As to the powers of Indian Courts in matters of granting divorce, etc., prior to the Divorce Act. See 12 C 706 (722-728) J
- (h) Among Hindus and Muhammadans the questions relating to marriage are governed by their personal laws. As regards the followers of other religions, the rule of equity, justice, and good conscience, as found in the usages of the class to which they belong, would regulate the question regarding marriage 32 C. 187=9 C.W.N. 323=1 C.L.J. 55. See, also, 12 C. 706 (**F.B.**) K
- (i) Where all that was known in respect of the parties to a marriage was that they were Roman Catholics with Portuguese names, it not having been found whether they were of English or any other European descent, or of native or mixed parentage, held, that the prohibited degrees for the parties to the marriage were not the degrees prohibited by the law of England, but those prohibited by the customary law of the class to which they belonged, i.e., the law of the Roman Catholic church as applied in India. 12 C. 706 (**F.B.**) L

(2) Marriage properly and duly performed—Presumption of validity.

- (a) Where a man and a woman intend to become husband and wife, and a ceremony of marriage is performed between them by a clergyman competent to perform a valid marriage, the presumption is in favour of everything necessary to give validity to such marriage, and it is one of exceptional strength, and, unless rebutted by evidence, a strong distinct, satisfactory and conclusive, such presumption must prevail. (*Per Gaitth, C.J., and Wilson, J.*) (*Piers v. Piers*). (2 H.L.C. 331, *F.*) 12 C. 706 (**F.B.**) M
- (b) The presumption in favour of everything necessary to give validity to a marriage is one of exceptional strength, and the evidence to rebut the presumption must be strong, distinct, satisfactory and conclusive. 9 C. W. N. 323=1 C. L. J. 55=32 C. 187. N

2.—“That the parties are within the prohibited degrees of consanguinity”  
—(Continued).

(3) **Roman Catholic marriages.**

(a) As according to the rule of the Church of Rome, a dispensation from the proper ecclesiastical authority is necessary to give validity to a marriage between a man and the sister of his deceased wife, held that, where the parties were Roman Catholics and intended to become husband and wife, and a ceremony of marriage was performed between them by a Clergyman competent to perform a valid marriage, the Court was bound to presume that a dispensation necessary to remove the obstacle to the marriage on the ground of affinity had been obtained. 12 C. 706 (F.B.) O

(b) The Courts in India will not disallow the marriage of a Roman Catholic of Indian domicile, who has obtained the necessary dispensation, with his deceased wife's sister, though, by the law of her own Church, she may be incapable of contracting the marriage. 9 C.W.N. 323 = 1 C. L. J. 55 = 32 C. 187. P

(4) **Relief provided for by this Act only applies to Christian marriages.**

(a) The marriages contemplated by the Divorce Act of 1869 are those founded on the Christian principle of a union of one man and one woman to the exclusion of others. 17 M. 235 (245) (F.B.) Q-R

N B.—On this subject, see also notes under S. 2 *supra*.

(b) The Act does not therefore contemplate relief in cases, where the parties have been married under the rites of Hindu Law, a Hindu marriage not being monogamous. (*Ibid*). S

(c) Polygamy cannot possibly be recognised as a legal institution among any class of Christians in this country. U. B. R. (1897—1901), Vol. II, 488 (494). T

(d) A Christian, who has a wife married to him as a Christian, cannot, by the profession of a conversion to a polygamous religion, form a legal union with another woman. U.B.R. (1897—1901), Vol. II, 488 (494). U

(5) **Suit for nullity of marriage—First wife being the uterine half sister of second wife—Domicile.**

The petitioner, a member of the Church of England came to India in 1867, his domicile of origin then being English, and married a certain lady in 1871; but his domicile at the date of this marriage was uncertain. Four years after the death of the first wife, he contracted a second marriage in 1887. The first wife having been the uterine half-sister of his second wife, he petitioned for a decree of nullity of marriage, on the ground that the parties to the marriage were within the prohibited degrees of affinity. Held, that, either the petitioner carried with him to India the laws as to capacity to marry by which he was originally governed, or he was governed by the law of the class to which he belonged, and that upon no view of the case could the marriage be supported. 17 C 321. See also 16 A. 212 (215). Y

(6) **Law governing validity of marriage—Domicile.**

(a) “It is a well-recognized principle of law that the question of personal capacity to enter into any contract is to be decided by the law of domicil. It is, however, urged that this does not apply to the contract of marriage, and that a marriage valid according to the law of the country where it is solemnized is valid everywhere. This, in our opinion, is not a correct statement of the law. The law of a

2.—“*That the parties are within the prohibited degrees of consanguinity*”

—(Continued).

country where marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted, but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile, and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized.” *Sottomayor v. De Barros*, 3 P. D. 1—C. A. W

- (b) Personal capacity to contract marriage depends, when the domicils of the man and woman are different, upon the law of the man's domicile. If, therefore, the marriage is valid by the law of the man's domicile, it is valid, although it may be invalid by the law of the woman's domicile *Sottomayor v. De Barros*, 5 P. D. 94, Dicey's Conflict of Laws, 1896, p. 626 X

(7) English marriages, validity of Marriages of Jews and Quakers.

- (a) The validity of a marriage in England, as regards forms and ceremonies, now almost entirely depends on the observance of statutory provisions. XVI Laws of England, Vol. XVI, p. 279 Y

N.B.—See Notes under S. 18, *supra*

- (b) But marriages according to the usages of Jews and Quakers are to a large extent exempt from the provision. (*Ibid*) Z

- (c) The English Law with respect to the prohibited degrees of consanguinity and affinity affects all persons domiciled in England, including Jews and Quakers, wherever the marriage may take place. *Re De Wilton*, *De Wilton v Montefiore*, (1900) 2 Ch. 481., A

- (d) And on the other hand, if the law of the domicile of each of the parties is complied with in this respect, the marriage will be recognised as valid, although it may be within the prohibited degrees according to English Law. *Re Bozzelli's Settlement*, *Husey-Hunt v. Bozzelli*, (1902), 1 Ch. 751. B

- (e) A Jew and his niece, both domiciled in England, went through a form of civil marriage and afterwards a marriage according to the usages of the Jews, at Wiesbaden, and also subsequently at Paris, and it was held that the marriage was void, although it would have been valid according to the local law and also according to Jewish law. *Re De Wilton*, *De Wilton v Montefiore*, (1900), 2 Ch. 481 C

- (f) The usages of the Jews permit marriages between a man and his deceased wife's sister, or deceased wife's niece or deceased nephew's wife. Laws of England, Vol. XVI, p. 286. D

(8) Void and voidable marriages—Difference—Relationship by consanguinity.

- (a) Petitions as to nullity are of two classes according as they relate to marriages which are void *ab initio*, or only voidable. Laws of England, Vol. XVI, p. 499. E

- (b) As void marriages have, even in the absence of judicial proceedings, no effect in law, it is not absolutely necessary to obtain a decree of nullity. Laws of England, Vol. XVI, p. 499. F

## 2.—“That the parties are within the prohibited degrees of consanguinity”.

—(Continued).

## (9) Bigamy or consanguinity.

(a) This is specially the case in cases of bigamy or consanguinity which are absolutely void. Laws of England, Vol. XVI, p. 499. G

(b) In such cases there can be no doubt that the marriage is void. Laws of England, Vol. XVI, p. 499. H

(c) A marriage between persons within the prohibited degrees of consanguinity or affinity is absolutely null and void for all purposes whatsoever. Marriage Act, 1835 (5 & 6 Will. 4 C. 54), s. 2, *Re Wood, Ex parte Naden*, (1874), 9 Ch. App. 670. I

N.B.—Formerly such a marriage was only voidable by sentence of the Ecclesiastical court during the life time of the parties. *Elliot v. Gurr*, (1812), 2 Phillim 16. J

(d) The prohibited degrees, which have received statutory recognition, were expressed in a table set forth by authority in (1563). See Stat. (1536) 28 Hen. 8, c. 7, Ss. 11, Stat. (1536) 28 Hen. 87, c. 16, s. 2, Stat. (1540), 32 Hen. 8, c. 38, Stat. (1558), 1 Eliz c. 1, s. 3. K

N.B.—The two former statutes, though repealed by Stat. (1554) 1 & 2 Ph. & M.c. 8, may be referred to as explaining the Stat. (1540) 32 Hen. 8, c. 38, which was confirmed by Stat. (1558), 1 Eliz C. 1, s. 3; See *R. v. Chadwick*, (1847), 11 Q B 173, *Brook v. Brook*, (1861), 9 H.L. Cas. 193. L

## (10) Insanity and want of consent.

(a) The rule as to the absolute invalidity of marriages does not apply with equal force if want of consent (including insanity) be the ground. XVI Laws of England, p. 499. M

(b) But a decree may be obtained, as of right, whatever the merits of the parties, and is often of great importance by way of preserving evidence of the facts alleged (*Ibid*). N

## (11) Relationship by half blood.

In reference to the prohibited degrees, relationship by the half blood is a bar to marriage equally with relationship by the whole blood. *R. v. Brighton (Inhabitants)*, (1861), 1 B. & S. 447 (Marriage with daughter of half-sister of deceased wife), *In the Goods of Mette, Mette v. Mette*, (1859), 28 L J. (P. & M) 117 (half-sister of deceased wife). O

## (12) Illegitimate relationship.

And illegitimate equally with legitimate relationship *R v. Brighton, (Inhabitants)*, (1861), 1 B. & S. 447 *Blackmore v. Brider*, (1816), 2 Phillim. 359, *R v Chadwick*, (1847), 11 Q.B 173, 205, *R v. St. Giles in-the fields (Inhabitants)* (1847), 11 Q B 173, approved in *Brook v. Brook*, (1861), 9 H L Cas 193 P

## (13) Mere carnal connection with a woman.

But carnal connection without an actual and legal marriage does not constitute affinity. *Wing v Taylor*, (1861), 30 L J. (P M. & A.) 258. Q

## (14) Affinity to wife's kindred

A husband is of affinity to his wife's kindred. Laws of England, Vol. XVI, p. 284 R

## (15) Affinity to husband's kindred.

And a wife of affinity to her husband's kindred. (*Ibid*.) S

**2.—“That the parties are within the prohibited degrees of consanguinity”**

—(Continued).

**(16) Affinity between kindred of husband and kindred of wife.**

But the kindred of a husband are not of affinity to the kindred of his wife.

(*Ibid.*)

T

**(17) Marriage between two brothers and two sisters.**

And therefore, two brothers, for instance, may marry two sisters. (*Ibid.*) <sup>U</sup>

**(18) Marriage with deceased wife's sister or half sister—English Law.**

(a) Before the 28th August, 1907, a marriage with a deceased wife's sister or half-sister was void as being within the prohibited degrees of affinity. Laws of England, Vol. XVI, p. 284. Y

(b) “It is now provided that no such marriage, whether contracted before or after that date, within the realm or without, shall be deemed to have been or shall be void or voidable as a civil contract by reason only of such affinity, provided that in case any such marriage was, before the 28th August, 1907, annulled, or that either party thereto, after the marriage and during the life of the other party, did before that date lawfully marry another person, it is to be deemed to have become void upon and after the day on which it was so annulled, or on which either party so lawfully married another person.” Deceased Wife's Sister's Marriage Act, 1907 (7 Edw 7, C. 47), S. 1. W

(c) With regard to marriages in the colonies with a deceased's wife's sister, the rule was that if each of the parties was, at the date of the marriage, domiciled in a place where such a marriage was legal, it would be recognised as legal in England, and the issue of the marriage as legitimate for all purposes except the right of inheriting real property or a title or dignity in the United Kingdom. See *Brook v. Brook*, (1861), 9 H. L. Cas. 193. X

**N.B.—1** The word “sister” in the above mentioned statute includes a sister of the half-blood 7 Edw., VII C 47. s 5. Y

**N.B.—2.** But the Act does not legalise a marriage with the sister of a divorced wife, or of a wife who has divorced her husband, during the life-time of such wife. (*Ibid.*), S 3 (2). Z

**N.B.—3.** Nothing in the Act relieves any clergymen of the Church of England who marries or has married his deceased wife's sister, from liability to ecclesiastical censure therefor. (*Ibid.*, s. 4). A

**(19) Indian Law as to deceased wife's sister.**

In India there is no *lex domicile*. There is no enactment absolutely forbidding the marriage of a domiciled British Indian subject with his deceased wife's sister. 32 C. 187=9 C.W.N. 323=1 C.L.J. 55, 12 C. 706. B

**(20) Marriage with deceased wife's sister—Roman Catholic Christian of Indian domicile—Marriage valid, when.**

The Courts in India will not disallow a Roman Catholic Christian of Indian domicile, who has obtained the necessary dispensation, from marrying his deceased wife's sister, though by the law of the church to which the latter belongs, she may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law. 32 C. 187=9 C.W.N. 323=1 C.L.J. 55; 12 C. 706. C

**2.—“That the parties are within the prohibited degrees of consanguinity”**  
 —(Concluded).

**(21) “Natural or legal”—Meaning of the terms—Relationship by adoption**

(a) The word in brackets “whether natural or legal” qualifying the word consanguinity point to consanguinity by adoption, 12 C. 706 (729) (F.B.). **D**

(a) Thus it prevents a Native Christian, who has been adopted, on the one hand from marrying the daughter of his adoptive father, etc., and, on the other hand from, marrying a woman too nearly related to him by birth. 12 C. 706 (729) F.B. **E**

**3.—“That either party was a lunatic or idiot.”**

**(1) Reason of the rule as to insanity being a ground for a suit for nullity.**

“Without soundness of mind there is no legal consent—none binding in law—insanity vitiates all acts.” *Portsmouth v. Portsmouth*, 1 Hagg. E. R. 360; *Hull v. Hull*, 17 L.T. 235. **F**

**(2) Suit by insane husband after recovering his reason.**

A husband or wife, on recovering reason, may sue for nullity, if insane when married. *Turner v. Meyers*, 1 Hagg. C.R. 414. **G**

**(3) Suit by guardian.**

Where in a nullity suit a guardian ad litem has been assigned to a lunatic, if in the course of the suit it is alleged that the lunatic has recovered his or her sanity, the Court will not make a decree at the instance of the guardian till that question is settled. *Hancock v. Peaty*, L.R., 1 P. & D. 335; 36 L.J.P. 57. **H**

**(4) Doubt as to alleged insanity—Effect.**

No order ought to be made under rule 196 of the Divorce Rules, if there is a *bona fide* doubt as to the patient's sanity. See *Fry v. Fry*, (1890), 15 P.D. 50, 59 L.J.P. 43, 62 L.T. 501. **I**

**4.—“Nothing in this section shall affect...force or fraud.”**

**(1) Scope of the provision.**

There was a slight difference in the Committee as to the last clause of S. 19. The High Courts inherit from the Supreme Courts, which in their turn inherited from the Ecclesiastical Courts, a jurisdiction to make decrees of nullity of marriage on the ground of force or fraud. It is very rarely put into execution. It is the opinion of some that force or fraud should be specific and distinct ground of nullity, as is done in the New York Code. The objection is that force is quite unknown among Europeans and equally so among Native Christians. The extraordinary publicity of native marriages is a complete security against force. As regards fraud, the select committee would have had a difficult undertaking in hand if it had tried to define the kind of fraud which should invalidate a marriage. Absolute personation of one man by another (from which the jurisdiction has apparently descended), is practically impossible in modern society. As to the other kinds of fraud, take a very strong case. If a ticket-of-leave man comes to India from Australia, and, concealing his antecedents, marries an European woman, is the marriage to be set aside? A more cruel imposition can scarcely be imagined and yet modern ideas would seem to require the marriage to be maintained. The Select Committee however, did not wish to take away from the High



**4 —“ Nothing in this section shall affect . . . force or fraud ”—(Continued).**

Courts any jurisdiction which they at present possess. If those Courts are ever called upon to exercise it, they will discover and apply for themselves the proper existing limitation.

See speech by Hon'ble Mr. Maine in the Legislative Council on the 26th Feb. 1869 printed in the Fort St. George Gazette. Supplement, March 31st 1869, p. 7. J

**(2) Fraudulent misrepresentation—Effect—English Law.**

(a) “Fraudulent misrepresentation or concealment does not, apart from duress or imbecility of mind amounting to insanity, affect the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract.” See *Portsmouth (Countess) v. Portsmouth (Earl)*, (1828), 1 Hagg. Ecc. 355, and note (1) *Mess v. Moss*, (1897), P 263. K

**N.B.**—The Law in this country differs.

(b) In one case where the wife, who was pregnant by another man at the time of the marriage, deliberately deceived the husband as to her condition and previous conduct, it was held that that was no ground for questioning the validity of the marriage, *Templeton v. Tyree*, (1872) L.R. 2 P. & D. 420, Field's Marriage Annuling Bill, (1848), 2 H. L. Cas. 48, *Sullivan v. Sullivan*, (1818), 2 Hagg. Cons. 238. L

**(3) Threat or duress.**

But the marriage would be invalid if a person is induced to go through a ceremony of marriage by threats or duress *Bailett (falsely called Rice) v. Rice*, (1894), 72 L T 122 M

**(4) Examples of threats or duress.**

**(i) THREAT TO BLOW OUT BRAINS, ETC.**

A girl of sixteen who rejected the advances of the respondent was threatened by him that her brains would be blown out unless she consented to marry him. A pistol was also pointed at her. She afterwards consented to marry him on condition that he would put away the pistol. A few days later she was intercepted by him on a railway journey and on the pretence that they were going to see her mother taken to a registering office where the ceremony was performed, during which ceremony she fainted. The marriage was not consummated. Under the above circumstances the marriage was declared null and void. *Rice v. Rice*, (1894), 72 L T. 122. But see also *Cooper v. Crame*, (1891), P. 369 N

**(ii) THREAT OF BANKRUPTCY PROCEEDINGS, ETC.**

In one case were an heiress of twenty-two years of age was threatened with bankruptcy proceedings unless she married the respondents, and where, just before the marriage ceremony the respondents threatened to shoot her if she showed that she was not acting of her free will, and where the parties separated immediately after the ceremony, thus leaving the marriage unconsummated, a decree of nullity was pronounced. *Scott v. Sebright*, (1886), 12 P.D. 21 O

**(iii) MARRIAGE WITH GUARDIAN.**

Where a girl of twelve was married to her guardian in whose custody she was, and where there was also evidence of duress, the marriage was declared void. *Harford v. Morris*, (1776), 2 Hagg. Cons. 423. P

4.—“*Nothing in this section shall affect . . . force or fraud*”—(Concluded).

(iv) ENTICEMENT FROM SCHOOL.

For a case where a decree of nullity was granted in the case of a marriage of a minor was enticed away from school and married, under representations peculiarly base and fraudulent, see *Miss Turner's Case*, *McQueen's Practice in Parl.*, Div. 642, *Edin Rev.*, Vol 47, p 100. *Mrs. Wharton's case*, *ibid*, 475. see also *Scott v. Sebright*, 12 P.D. 21. Q

(5) Intoxication.

So also a marriage ceremony, which a person is induced to undergo while in a state of intoxication would be invalid. *Sullivan v. Sullivan*, 2 Hagg. Cons. 238. R

(6) Erroneous belief as to nature of marriage ceremony.

So also a marriage ceremony which a person is induced to undergo on an erroneous belief as to the nature of the ceremony is void. *Ford v. Stur*, (1896), p. 1. S

(7) Example of erroneous belief as to nature of ceremony.

Where a girl of seventeen was induced to go through the ceremony of marriage being led to believe that it was merely a ceremony of betrothal, and the marriage was never consummated, the Court granted a decree of nullity of marriage. *Ford v. Stur*, (1896), p. 1., *Hall v. Hall*, (1908), 24 T.L.R. 756. T

(8) Want of real consent by one of the parties.

—to the marriage makes it invalid, XVI. Laws of England, 279. U

(9) Pregnancy.

Pregnancy by another man, and concealment of it at the time of marrying, does not render the marriage void. *Mos. v. Moss*, P. 1897, 263. Y

(10) 'Mistake'.

(a) "It is necessary for a valid marriage that the parties should consent to marry one another. If, therefore, there is a mistake in the person with whom the contract is made, as where A. goes through a ceremony of marriage with B, thinking he is marrying C, or in the case of a marriage in masquerade, where one party has no knowledge who the other may be, the marriage is void." *R v. Mills*, (1844), 10 Cl. & Fin. 534. W

(b) But no other kind of mistake will affect the validity of a marriage. *Sullivan v. Sullivan*, (1818), 2 Hagg Cons 238, *Per Sir W Scott*, at p. 246. X

(11) Plot to procure a marriage with an unworthy person.

"Even if a man is the victim of a plot to procure a marriage by him with a person in all respects unworthy, the validity of the marriage is not affected, provided he consents, any mistake as to the character or condition of the person he is marrying is immaterial." *Sullivan v. Sullivan* (1818), 2 Hagg. Con 238 *Per Sir W Scott*, at p 246 Y

20. Every decree of nullity of marriage made by a District

Confirmation of  
District Judge's  
decree.

Judge shall be subject to confirmation by the High Court, and the provisions of S. 17, clauses 1, 2, 3 and 4, shall, *mutatis mutandis*, apply to such

decrees.

## (Notes).

## General.

## (1) English Law and Indian Law, difference between.

According to the English Law, a decree of nullity of marriage is to be in the first instance a decree *nisi*, and is not to be made absolute till the expiration of six months from the date of the decree *nisi*, unless the Court for special reasons fixes a shorter period ; and during this period of interval, any person may intervene, as is provided for by this Act in suits for dissolution of marriage. This Act makes no provision for intervention in suits for nullity, whether such suits be instituted in the District or on the High Court. See Mat. C. Act. 1873, S. 1, Rattigan on Divorce, 1897, p. 148. Z

(2) Decree *nisi* for dissolution and decree *nisi* of nullity—Difference.

Except in the case of a decree made by a District Judge a decree of nullity is a final decree as soon as it is made, but it is otherwise in the case of a decree for dissolution (see S. 16). Further, unlike a decree *nisi* for dissolution of marriage, a decree of nullity made by a District Judge may be confirmed by the High Court immediately after it has been made. (See S. 17). See Rattigan on Divorce, 1897, p. 148. A

## (3) Marriage with an idiot, validity of.

(a) Among Christians, if a person is an idiot, at the time of the marriage, he or she is not capable of being bound by the transaction in any shape or form. 8 Bom. L.R. 982. B

(b) Civil disabilities, such as prior marriage, want of age, idiocy and the like make the contract void *ab initio* not merely voidable. These do not dissolve a marriage already made, but they render the parties incapable of contracting at all ; they do not put asunder those who are joined together, but they previously hinder the junction. *Per Curiam* in *Elliot v. Gurr*, 2 Phill. 16 cited and followed in 8 Bom. L.R. 982 (984). C

(c) If any person under the above mentioned legal disabilities come together, it is a meretricious, and not a matrimonial, union ; and so no sentence of avoidance is necessary. *Elliot v. Gurr*, (1834), 2 Phill. 16 cited and followed in 8 Bom. L.R. 982 (984). D

21. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.

Children of annulled marriage 1.

## . (Notes). .

1.—“ *Children of annulled marriage.*”

## (1) Principle of the section.

This section embodies a limited application of a principle which lawyers would gladly see engrafted on English Law. It is the principle that marriages contracted in good faith, but declared to be null, shall be maintained as far as possible. The section which is taken textually from the New York Code and resembles the provisions of the French Code, and the numerous systems descended from the Roman Law, permits the children to succeed as legitimate to the property of the party competent to marry, and thus relieves them, *pro tanto*, from the stigma of illegitimacy. See speech by Hon'ble Mr. Maine in the Legislative Council on the 26th Feb. 1869. Printed in the Fort St. George Gazette, Suppt 31st March 1869 at p. 7 E

## (2) Application of the section.

- (a) This section only applies to children of annulled marriages, where the annulment has been made on one of two grounds, *viz.*, on the ground that the former husband and wife was living, or on the ground of insanity. In both these cases, it is declared that the children “*begotten*” before the decree is made shall be entitled to succeed *in the same manner as legitimate children*. See Rattigan on Divorce, 1897, p. 148 F
- (b) Hence, where a marriage is annulled on any other ground except the two mentioned above, as for instance, where it is annulled on the ground of relationship within prohibited degrees, or on the ground that the consent of one of the parties to the marriage was obtained by fraud or force, the children of such marriage have no rights of succession under this section. (*Ibid*). G
- (c) The words used in the section are “children *begotten* before the decree is made”. The use of the word *begotten* includes all children “either born before the decree is made or within 280 days from the date when the parties last had access to each other previously to the making of the decree.” See Rattigan on Divorce, 1897, p. 149; Evidence Act, S 112. H
- (d) The section says that the children specified therein shall “succeed *in the same manner* as legitimate children”. The framers of the section have refrained from declaring that the children of marriages so annulled are legitimate. The framers of this Act purposely refrained from giving jurisdiction to the Courts in this country to make declarations of legitimacy, principally on the ground that such declarations would have no extra territorial effect. See Report of Select Committee, Rattigan on Divorce, 1897, p. 149. I
- (e) The right of succession conferred by this section to children of certain alleged marriages, is only “to the estate of the parent who at the time of the marriage was competent to contract”. Such children cannot claim to succeed to the estate of the other parent. Rattigan on Divorce, 1897, p. 149. J

## (3) Conflict of law arising out of this section.

The rule laid down in this section is not universally recognized. Thus, according to the English Law, the children of void marriages are illegitimate for all purposes. Hence difficulties may arise when the parent

1.—“*Children of annulled marriage*”—(Concluded).

of such children to whose property they ought to succeed according to this section has an English or any other foreign domicile. Differences may also arise according as such properties are moveable or immoveable, also as to whether the property left is in British India or elsewhere. See Succession Act, Ss. 5—19, See also the subject briefly discussed in Rattigan on Divorce, 1897, p. 149. **K**

## (4) Nullity suit, provision for child—English Law and Practice.

(a) Where a decree nisi was made declaring a *de facto* marriage void on account of an irregularity in its solemnization, the Court ordered a provision for the child to be inserted in the final decree. Browne and Powles on Divorce, Seventh Edition, 1905, p. 152. **L**

(b) The Court would even refuse to make the decree absolute until materials were furnished for deciding what provision ought to be made for children. *Langworthy v. Langworthy*, 11 P.D. 85, 55 L.J.P. 33; 54 L.T. 77C. **M**

(c) In England the Courts were held not to be empowered to make an order for the maintenance of children above the age of sixteen years. *Blandford v. Blandford*, (1892), p. 148, 61 L.J.P. 97, 67 L.T. 392. **N**

**N.B.**—This decision was, however, overruled by the Court of Appeal, in *Thomasset v. Thomasset*, (1894), p. 295, 63 L.J.P. 140; 71 L.T. 148.

(d) Hence Courts in England now make orders for maintenance of children up to the age of twenty one years Browne and Powles on Divorce, 7th Ed. 1905, p. 152. **O**

## (5) Power of Court to make provision for children not affected by agreement between parties.

The powers of the Courts conferred on them by statutes as to maintenance and education of children are not affected by any previous agreement between the parents. *Bishop v. Bishop*, (1897), p. 138, 66 L.J.P. 69, 76 L.T. 409. **P**

V.—*Judicial Separation*

22. No decree shall hereafter be made by a divorce *a mensa et toro*, but the husband or wife may obtain a decree of judicial separation on the ground of adultery <sup>1</sup>, or cruelty <sup>2</sup>, or desertion <sup>3</sup> without reasonable excuse for two years or upwards, <sup>4</sup> and such decree shall have the effect of a divorce *a mensa et toro* under the existing law, and such other legal effect as hereinafter mentioned.

(Notes).

General.

## (1) Corresponding English Law.

(a) The Matrimonial Causes Act (20 & 21 Vic. C. 85) S. 7, declares as follows.—

“No decree shall hereafter be made for a divorce *a mensa et thoro*, but in all cases in which a decree for a divorce *a mensa et thoro* might now be pronounced, the Court may pronounce a decree for judicial separation, which shall have the same force and the same consequences as a divorce *a mensa et thoro* now has.” **Q**

(b) S. 16 of the above Act 20 & 21 Vic. C. 85 declares as follows.—

**General—(Continued)**

"A sentence of judicial separation (which shall have the effect of a divorce *a mensa et thoro* under the existing law and such other legal effect as herein mentioned) may be obtained, either by the husband or the wife, on the ground of adultery, or cruelty, or desertion without cause for two years and upwards" See S. 16 of 20 & 21 Vic. C. 85; see Laws of England, Vol. XVI, p. 500 **R**

(c) A husband or wife may petition for a decree of judicial separation on the ground of adultery, of cruelty, or of desertion without cause for two years and upwards. Matrimonial Causes Act, 1857 (20 & 21 Vic. C. 85), Ss 7, 16 *Harding v Harding*, 1886, 11 P D. 101. **S**

**(2) Distinction between suits for judicial separation and suits for dissolution of marriage.**

The principal distinctions between suits for dissolution of marriage and for judicial separation are—

**(i) ADULTERY A NECESSARY ELEMENT IN LATTER SUITS.**

"Whereas adultery is a necessary element in a petition for dissolution, whether filed by a husband or a wife, it is not necessary to allege adultery in every petition for judicial separation." Browne and Powles on Divorce, Seventh Edition, 1905, p. 374. **T**

**(ii) DIFFERENCE AS REGARDS LIBERTY TO MARRY AGAIN.**

A decree of judicial separation does not operate as a divorce *a vinculo matrimonii*, in other words it does not dissolve the marriage tie, so that neither of the parties can marry again during the lifetime of the other unless one or other of them has taken proceedings for and obtained a decree of dissolution. Browne and Powles on Divorce, Seventh Edition, 1905, p. 374 **U**

**(iii) IN THE FORMER ALLEGED ADULTERER NOT MADE CO-RESPONDENT.**

In a suit for judicial separation by a husband, alleged adulterers are not made co-respondents. (*Ibid*). **Y**

**(iv) NO RIGHT OF INTERVENTION GIVEN TO ALLEGED ADULTERER IN SUITS FOR JUDICIAL SEPARATION.**

Neither can a person charged with adultery with one or other of the parties to a suit for judicial separation obtain leave to intervene and make themselves parties to the suit, as in a suit for dissolution of marriage. Browne and Powles on Divorce, 7th Ed., 1905, pp. 323—325, 374. **W**

**(v) PRACTICE AND PROCEDURE.**

**(1) Suit for dissolution of marriage, if decree for judicial separation can be passed in.**

In a suit for dissolution of marriage, if the petitioner fails to prove facts which would entitle him or her for the relief asked for, but facts are found on which a judicial separation can be granted, it is open to the Court in such a case to grant a decree of judicial separation *Smith v. Smith*, 1 Sw. & Tr. 359; *Bromfield v. Bromfield*, 41 L J.P. & M. 17, *Duplany v. Duplany*, (1892), p. 58. **X**

**(2) Petitioner for dissolution of marriage can ask for judicial separation only.**

The—, although facts be proved which entitle him or her to the former remedy and although the respondent objects to the alteration of the prayer. *Mycock v. Mycock*, 39 L.J.P. & M. 56, *Dent v Dent*, 4 Sw. & Tr. 105, 34 L J. P. & M. 118. **Y**

## General—(Continued).

- (3) Respondent in suit for restitution of conjugal rights may ask for judicial separation.

The——; and the Court, if it does not grant restitution to the petitioner, may grant judicial separation to the respondent. *Meara v. Meara*, 13 W.R. 50 (Eng.), *Russell v. Russell* (1895), p. 315, C.A.; see also S. 33, *infra*. Z

- (4) Respondent in suit for restitution can also ask for nullity of marriage.

The——, and the Court, if it does not grant restitution to the petitioner can grant a decree of nullity to the respondent. (*Ibid.*) A

- (5) Failure to comply with decree for restitution of conjugal rights—Effect—English and Indian Law—Difference.

The——is under the English laws to be deemed equivalent to "desertion without reasonable cause sufficient to justify a decree for judicial separation" against the party so failing to comply. But under the Indian Law, such conduct does not constitute by itself such desertion as would be a ground for judicial separation. See Rattigan on Divorce, 1897, pp. 151, 152 B

- (6) Molestation of petitioner by respondent after decree for judicial separation.

The——does not justify the Court in attaching the respondent for contempt. *Smith v. Smith*, 59 L. J. P. & M. 15, Rattigan on Divorce, 1897, p. 152. C

- (7) Petitioner or respondent being minor or lunatic—Guardian *ad litem*—English law and practice.

Where a petitioner or respondent in a suit for judicial separation is a minor or a lunatic or invalid, a guardian *ad litem* must be appointed. Browne and Powles on Divorce, Seventh Edition, 1905, p. 379. D

- (8) Trial by jury—English law and practice.

The Court has power to order a suit for judicial separation to be tried by a jury if either of the parties desire it, but it has been held that it is not obligatory on it to do so. *Marchmont v. Marchmont*, 27 L.J.P. 59. E

- (9) Decree for judicial separation—Effect.

The decree pronounced in a suit for judicial separation is a final decree; that is to say, it takes effect immediately from the day on which it is dated. See Browne and Powles on Divorce, 7th Ed., 1905, pp. 380, 457, 458. F

- (10) Compromise of suit, practice as to.

A suit for judicial separation may be compromised by agreement, and neither party is at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in its terms that they ought not to be bound by it. *Hooper v. Hooper*, 3 S. & T. 251 (*Ibid.*); 1 S. & T. 219; 29 L.J.P. 59 G

- 11) Compromise of suit, provision of Civil Procedure Code as to.

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the Court shall order

**General—(Concluded).**

such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit " See Civ. Pro. Code (V of 1908), O. XXIII, r. 3. H

**(12) Withdrawal of suit, practice as to**

See Notes under heading 4.—"*Desertion ... for two years or upwards.*"

**1.—"Adultery."**

N.B.—See Notes under S. 10, *supra*.

**2.—"Cruelty."**

N B.—See Notes under S. 10, *supra*.

**Decree of judicial separation obtained for cruelty—Evidence of cruelty.**

On a wife's petition for dissolution, by reason of her husband's adultery and cruelty, the charge of cruelty may be established by the production of a previous decree for judicial separation pronounced against him, on the ground of cruelty. *Bland v. Bland*, L.R., 1 P. & D. 237; 35 L.J.P. 104, *Green v. Green*, L.R. 3 P. & D. 121, 43 L.J.P. 6, 29 L.T. 251. See, also, *Ritchie v. Ritchie*, 4 Mac. H.L. Cas. 162. I

**3.—"Desertion."**

N B —See Notes under S. 10, *supra*.

**4.—"Desertion . . . for two years or upwards."****(r) Where desertion is not proved to have been for two years or upwards—Practice—Adjournment and withdrawal of suit.**

(a) The Court may adjourn the case until the time when the statutory period of two years would have elapsed. See *Wood v. Wood*, 13 P.D. 22; 57 L.J. P. & M. 48. J

(b) Such a power is given to the Court under S. 54 of this Act. See S. 54, *infra*. K

(c) The Court may also allow the suit to be withdrawn with liberty to bring a fresh suit when the period of two years is completed. See *Lapington v. Lapington*, 14 P.D. 21, 58 L.J. P. & M. 26. L

Such a power is given to the Court by Civ. Pro. Code.

**(2) Provision in the Civ. Pro. Code as to withdrawal of suits.**

(a) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit, or abandon part of his claim. See Civ. Pro. Code (V of 1908), O. XXIII, r. 1. M

(b) Where the Court is satisfied—

(i) that a suit must fail by reason of some formal defect, or

(ii) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim. (*Ibid.*)



**4.—“Desertion....for two years or upwards”—(Concluded).**

(c) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to above, he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. (*Ibid*).

(d) Nothing in the above rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others. (*Ibid*). N

**(3) Limitation in case of withdrawal of suits.**

In any fresh suit instituted on permission granted under the above rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. See Civ. Pro. Code (V of 1908), O XXIII, r. 2. O

**23. Application for judicial separation on any one of the grounds aforesaid may be made by either husband or wife by petition to the District Court or the High Court, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted <sup>1</sup>, may decree judicial separation accordingly**

**(Notes)**

**General.**

**(1) Corresponding English Law.**

Matrimonial Causes Act (20 & 21, Vict, c 85), S. 17, as amended by Matrimonial Causes Act, 1858 (21 & 22 Vict, c. 106), S. 19 provides as follows —“Application for restitution of conjugal rights, or for judicial separation on any one of the grounds aforesaid, may be made by either husband or wife by petition to the Court, and the Court, on being satisfied of the truth of the allegations therein contained, and that there is no legal ground why the same should not be granted, may decree such restitution of conjugal rights or judicial separation accordingly, and, where the application is by the wife, may make any order for alimony which shall be deemed just.” P

**(2) Scope and construction of section in the light of English authorities.**

(a) S. 23 of the Indian Divorce Act prescribes that in an application for judicial separation the Court on being satisfied of the truth of the statements made in the petition and *that there is no legal ground why the application should not be granted* may decree judicial separation. 8 A.L.J. 318 (321). Q

(b) This section closely corresponds with S. 17 of the Matrimonial Causes Act, 20 and 21, Vic, C. 85, as amended by 21 and 22, Vic., C. 108, S. 19. (*Ibid*). R

(c) The Act does not define the legal grounds which justify the Court in refusing to grant a decree to a petitioner for judicial separation. 8 A.L.J. 318 (322). S

## General—(Continued).

- (d) In the case of *Otway v. Otway*, 13 P. D. 141, it was held by the Court of Appeal in England that a judicial separation can only be granted where the petitioner comes to Court with a pure character and is free from all matrimonial misconduct. (*Ibid*). T
- (e) In that case (*Otway v. Otway*), 13 P.D. 141, a husband and wife had both been found guilty of adultery, and the husband had also been found guilty of aggravated cruelty. It was held by the Court of Appeal reversing the decision of *Bull, J.*, that the Court had no jurisdiction to make a decree for judicial separation on the ground of such cruelty, however aggravated its character might be. (*Ibid*). U
- (f) *Cotton, L.J.*, laid down the following as the true principle which should guide a Court in a case of the kind. He observed "In my opinion the true principle is this, that a wife having been guilty of adultery has put herself in such a position that she cannot be considered as an innocent party in any proceedings which might have been taken in the old Ecclesiastical Courts, or which might now be taken in the Court of Divorce, and therefore on that ground she is not in a position to come to that Court and ask it to give her any relief as to any matrimonial offence which the husband may have committed." *Otway v. Otway*, L.R., 13 P.D. 141, cited in 8 A.L.J. 318 (322). Y
- (g) *Fry, L. J.*, in the course of his judgment remarked — "The case is one which it appears to me ought to be considered with great care, because it is impossible not to feel a strong sense of repulsion at continuing the marriage tie between an adulterous man and an adulterous woman, where the man has been guilty of cruelty of the description of which the respondent in this case has been guilty." He states his conclusion as follows "The conclusion I have arrived at is that the principles which formerly governed the old Ecclesiastical Courts ought to prevail now, one of which is not to pronounce a decree for a divorce, "*a mensa et thoro*" in favour of an adulteress." (*Ibid*), cited in 8 A L.J. 318 (322). W
- (h) *Lopes, L. J.*, in his judgment observes .—"Now the authorities seem to me clearly to lay down that if a wife sued her husband for adultery and had herself been guilty of adultery, she was not entitled to any relief. That doctrine applies in this case unless it can be maintained that the fact of the husband having been found guilty of cruelty as well as adultery, entitles the wife to relief, when but for the cruelty she would have had no *locus standi*. I can find no authority for this proposition, and it is opposed to what I believe to be the principles on which the Ecclesiastical Courts have acted in granting decrees for a divorce *a mensa et thoro*, viz., that a wife or husband seeking such relief must come to the Court with a pure character and must be free from any matrimonial misconduct." 8 A.L.J. 318 at pp. 322, 323. X
- (3) To the above mentioned ruling in *Otway v. Otway* great weight necessarily attaches
- It is no doubt true that in the later case of *Constantinidis v. Constantinidis*, Jeune, P., granted a decree for dissolution of marriage in a case in which both the petitioner and respondent had been guilty of adultery. In that case it was held that although the discretion conferred

**General—(Concluded).**

by S. 31 of Act 20 and 21 Victoria, Chapter 85, is a judicial and not an arbitrary discretion, the cause for and circumstances under which the Court may exercise its discretion in favour of a guilty petitioner are to be taken in combination and according to their several degrees of force and also that the list of such causes is not a closed book and may be extended as occasion arises. The learned President in the course of his judgment in treating of the principles which should guide the Court in a matter of the kind, observes — "I think, therefore, one can find guidance only by reference to the general principles of justice and no principles of justice in regard to this matter seem to me clearer than these first, that the petitioner who has been convicted of adultery should not be allowed to obtain a divorce if such adultery, in any serious degree contributed to the misconduct of the respondent, and, secondly, that a respondent should not be allowed to avoid the consequences of proved misconduct by putting forward an act or acts of misconduct on the part of the petitioner for which the respondent was himself or herself in any serious degree responsible. To hold otherwise would be to allow a wrong-doer to profit by wrong-doing. I have no doubt that the legislature intended that the Court should act on these principles whether or not it intended that the Court should act on any other principles." Finding in that case that the respondent's conduct conduced to the adultery committed by the petitioner, the learned President granted a decree nisi. 8 A.L.J. 318 (323, 324) **Y**

**N.B.**—This ruling would not apply where the petitioner's conduct cannot be said to conduce to the respondent's adultery. 8 A.L.J. 318 at pp. 323, 324.

**(4) Final decree for judicial separation, contents of.**

A decree of judicial separation recites that the Judge "by his final decree pronounced and decreed a judicial separation between A.B., the petitioner, and C.B., the respondent by reason of (setting forth the grounds of such decree), and condemned the said respondent in the costs incurred and to be incurred on behalf of the said petitioner." If the Court has not given the petitioner the whole of the costs by reason of some of the charges being frivolous or for any other reason the decree will continue "except such costs," setting forth clearly what portion of the costs has been disallowed. Browne and Powles on Divorce, Seventh Edition, 1905, p. 457. **Z**

**(5) Effect of decree of judicial separation in previous suit.**

Where a wife, in answer to a husband's petition for dissolution on the ground of her adultery, pleaded that in a prior suit she had been judicially separated from him, the Court held that the prior decree was no bar to the suit. *Yeatman v. Yeatman*, 21 L.T. 733. **A**

**1.—"Legal ground why the application should not be granted."****A.—WHAT ARE SUCH LEGAL GROUNDS.****(1) Principal defences to a suit for judicial separation.**

The ——— at the present day are adultery, cruelty, condonation, and collusion committed by the party claiming relief. Browne and Powles on Divorce, Seventh Edition, 1905, p. 75. **B**

## 1.—“Legal ground why the application should not be granted”—(Contd.).

## A.—WHAT ARE SUCH LEGAL GROUNDS—(Concluded).

## (2) Judicial separation, decree for—Petitioner coming to Court with unclean hands.

Where the petitioner (wife) in an action for divorce *a mensa et thoro* has been guilty of adultery to which it cannot be said that her husband conduced, she is not entitled to a decree for judicial separation inasmuch as the petitioner herself does not come to Court with clean hands.  
8 A.L.J. 318. C

## (3) Petitioner guilty of adultery

It is only under exceptional circumstances that the Court will grant a decree for judicial separation to a petitioner who has been guilty of adultery.  
8 A L J 318 (321); *Ottway v Ottway*, 13 P D 141, *Drummond v Drummond*, 30 L.J. P. & M 177 D

## (4) Proof of adultery.

(a) Less is required to prove adultery to bar relief under this section than is required to found a decree of dissolution of marriage or of judicial separation *Forster v Forster*, 1 Hagg Cons. 144 E

(b) The mere fact of the husband's instituting a suit for dissolution on the ground of his wife's adultery is no proof of her adultery in a suit for judicial separation instituted by her on the ground of her husband's cruelty. The Court may grant her a decree of judicial separation notwithstanding her husband's suit. *Luncroft v. Bancroft*, 4 Sw. & Tr. 84, 34 L J P. & M 70 F

## (5) Negating charge of adultery

A wife may negative a charge of adultery by proving she was *inigo intacta*  
*Hunt v Hunt*, 1 Dea. & Sw Eec Cas 121 (1856) G

## (6) Condonation of petitioner's adultery

Where there is——the Court may, in its discretion, grant a decree of judicial separation, notwithstanding such adultery. *Gooch v. Gooch*, (1843) P. at p. 105. H

## (7) Petitioner's neglect or misconduct conducing to the respondent's guilt.

(a) The——will be a bar to relief being afforded to the petitioner. *Best v. Best*, 1 Add 411. I

(b) Thus, where the wife, by her own ill-temper, has been the cause of her being ill treated by her husband, she cannot obtain a judicial separation on the ground of her husband's cruelty so caused. (*Ibid.*) J

## (8) Petitioner's misconduct falling short of matrimonial offence leading to desertion of respondent.

(a) The——will be a bar to relief being granted to the petitioner. *Russell v. Russell*, (1895) P 315, *Yeatman v. Yeatman*, L.R. 1 P. at p. 491; *Oldroyd v. Oldroyd*, 65 L J. P. & M 113, 12 T L R. 442 K

(b) The reason of the above rule is that there is no “desertion without reasonable cause”, the desertion being very reasonable (*Ibid.*) L

(9) *Res judicata* and estoppel.

Another form of defence (by way of estoppel) may be that the allegations against the respondent are *res judicata*. See *Cioeci v. Cioeci*, 29 L.J.P. 30; (60);

**1.—“Legal ground why the application should not be granted”—(Contd.).**

**A.—WHAT ARE SUCH LEGAL GROUNDS—(Continued).**

*Finney v. Finney*, L.R., 1 P.&D. 483; 37 L.J.P. 43; 18 L.T. 489; *Robinson v. Robinson*, 2 P.D. 75; 46 L.J.P. 47, 36 L.T. 414; *Conrad v. Conrad*, L.R., 1 P. & D. 514; 37 L.J.P. 55, 18 L.T. 659. **M**

**N B.**—The following are a few notes of the defences before the ecclesiastical tribunals in cases of divorce *a mensa et thoro*. These rulings are still of value as the Divorce Court is bound to follow as nearly as possible the rules and principles of the ecclesiastical courts in dealing with suits for judicial separation. See Mat. C Act, 1857, S. 22. **M-1**

**(10) Petitioner being also guilty.**

(a) The Ecclesiastical Courts withheld from a guilty husband the remedy against a guilty wife, and *vice versa*, unless there were extenuating circumstances. *Forster v. Forster*, 1 Hagg. Cons. C. 144 (1790). See also *Astley v. Astley*, 1 Hagg. 722 (1828); *Beeby v. Beeby*, 1 Hagg. 790 (1799), *Anichini v. Anichini*, 2 Curt. 214 (1839). **N**

(b) But they recognised no distinction between a delinquency of one party committed before or after the other party's infidelity in its complete efficiency as a bar to a claim for relief. *Proctor v. Proctor*, 2 Hagg. Cons. C. 299 (1819). **O**

**(11) Improper conduct falling short of adultery.**

Improper conduct, short of adultery, was sometimes held sufficient to bar relief. *Forster v. Forster*, 1 Hagg. Cons. C. 144, *Astley v. Astley*, 1 Hagg. 790 (1799). See also as to pleading adultery in answer to a suit, on the ground of cruelty, in the Ecclesiastical Courts. *Cocksedge v. Cocksedge*, 1 Robert, 90 (1844). **P**

**(12) Condonation.**

It is clear that ——— will be a bar to relief. See Rattigan on Divorce, 1897, p. 152. **Q**

**(13) Collusion.**

So also ——— will be a bar to relief (*Ibid*). **R**

**(14) Connivance.**

So also ——— between the parties will bar relief. (*Ibid*.) **S**

**(15) Covenant not to sue.**

**(i) COVENANT NOT TO SUE.**

(a) An express ——— in respect of any misconduct on the part of the other party committed prior to the execution of the deed will be a bar to a suit by the covenantor in respect of such misconduct. *Rowley v. Rowley*, 34 L.J.P. & M. 97, *Hooper v. Hooper*, 3 Sw. & Tr. 251. **T**

(b) The reason of the above rule is that the party so covenanting is to be deemed to have surrendered any right to relief in respect of such misconduct. (*Ibid*). **U**

(c) A covenant not to sue affords a good defence to a suit brought in contravention of its terms. *Marshall v. Marshall*, 5 P.D. 19, *Clark v. Clark*, 10 P.D. 188. **Y**

**(ii) COVENANT BY TRUSTEE ON BEHALF OF WIFE.**

So, also, a reasonable covenant by the trustee of a deed on behalf of the wife will bind the wife. *Flower v. Flower*, 25 L.T. 902; *Cf. Hunt v. Hunt*, 31 L.J. Ch. 169. **W**

## I.—“Legal ground why the application should not be granted”—(Concluded).

## A.—WHAT ARE SUCH LEGAL GROUNDS—(Concluded).

## (iii) BREACHES OF COVENANT BY RESPONDENT—EFFECT ON PETITIONER'S COVENANT NOT TO SUE.

(a) Trifling ——— will not entitle the petitioner to bring a suit in spite of his or her covenant not to sue. *Besant v. Wood*, 12 Ch. D. 605. **X**

(b) But a total failure on the part of the respondent to carry out his or her part of the agreement would entitle the petitioner to bring a suit as, if no covenant had been entered into by him or to her not to sue. *Tress v. Tress*, 12 P.D. 128; but see also, *Parkinson v. Parkinson*, L.R. 2 P. 25. **Y**

## (iv) COVENANT NOT TO SUE, NEVER ACTED UPON.

A ——— is no bar to a suit *Cock v. Cock*, 3 Sw. & Tr. 514. **Z**

## (v) COVENANT NOT TO SUE OBTAINED BY IMPROPER MEANS.

(a) A ——— is no bar to a suit *Dagg v. Dagg and Speke*, 7 P.D. 17. **A**

(b) Covenant not to sue obtained without reasonable excuse not is a —a bar. *(Ibid)* **B**

## (vi) COVENANT FRAUDULENTLY OBTAINED.

A ——— is no bar to a suit *Crabbe v. Crabbe*, L.R. 1 P. 601, 37 L.J.P. & M. 42 **C**

## (vii) COVENANT NOT TO SUE IN RESPECT OF PREVIOUS MISCONDUCT.

A ——— is no bar to a suit in respect of subsequent misconduct. *Gooch v. Gooch*, (1893), P. at pp. 106, 107. **D**

## (viii) COVENANT NOT TO SUE IN RESPECT OF FUTURE ADULTERY.

(a) A ——— would be void as opposed to public policy. See S. 23 of the Contract Act, IX of 1872. **D-1**

(b) Though such covenant not to sue would, by itself, be no bar to a suit by the covenantor, yet, the conduct of a party entering into such a covenant may be construed either as connivance of the adultery or to amount to such wilful neglect or misconduct as has conduced to the adultery of the other party, and on that ground it may disentitle the petitioner to relief. See Rattigan on Divorce, 1897, pp. 157, 158. **E**

## (ix) AGREEMENT TO LIVE APART.

A mere ——— between the parties, in the absence of express covenant not to sue is no bar to a suit for judicial separation in respect of the other party's previous misconduct *Moore v. Moore*, 12 P.D. 193. **F**

## (x) SEPARATE LIVING UNDER DEED OF SEPARATION—INFERENCE FROM.

(a) A ——— may lead to an inference that a suit for Judicial separation by a party, so living was not instituted *bona fide*, but to gain some collateral ends. *Williams v. Williams*, L.R. 1 P. 178, 35 L.J.P. & M. 85. **G**

(b) A ——— will be a bar to a suit for judicial separation on the ground of “desertion” even though the deed contained no covenant not to sue; for in such a case there is no “desertion” as defined by the Act, the word implying that the abandonment must be against the wish of the person charging it. See S. 3, *supra*; *Cock v. Cock*, 3 Sw. & Tr. 514; 33 L.J.P. & M. 157; *Nott v. Nott*, L.R. 1 P. 251; 36 L.J.P. & M. 10. **H**

**N.B.** —On this subject see also notes under S. 33, *supra*.

## 1. — "Legal ground why the application should not be granted"—(Contd.).

## B.—WHAT ARE NOT SUCH LEGAL GROUNDS.

## (1) Cruelty.

(a) Cruelty was no bar to a suit by the husband for a divorce *a mensa et thoro* on the ground of the wife's adultery. *Harris v. Harris*, 2 Hagg. 411 (1829); *Dillon v. Dillon*, 3 Curt. 90 (1841); *Moorsom v. Moorsom*, 3 Hagg. 92 (1792); *Chambers v. Chambers*, 1 Hagg. Con. C. 452 (1810); *Tuthill v. Tuthill*, 31 L.J. P. 214. I

(b) But it was often pleaded in conjunction with a countercharge of adultery, because it was thought that it might tend to throw some light upon it. *Cocksedge v. Cocksedge*, 1 Robert 72 (1844); *Forster v. Forster*, 1 Hagg. Cons. C. 146 (1760); *Eldred v. Eldred*, 2 Curt. 380 (1840); *Arkley v. Arkley*, 3 Phill. Ecc. Rep. 500 (1821); *Chettle v. Chettle*, *Ibid.* 507 (1821). J

(c) Cruelty may also be a bar to relief if it can be shown to have conduced to the adultery of the other party. *Lempriere v. Lempriere*, L.R. 1 P. 569, 37 L.J.P. & M. 78; *Boreham v. Boreham*, L.R. 1 P. 77, 35 L.J.P. and M. 49. K

(d) Where petitioner sues for judicial separation on the ground of desertion by the other party, it is open to such other party to oppose the suit on the ground of the cruelty of the petitioner, when such cruelty has been the cause of the desertion of the respondent. *Emery v. Emery*, 1 Y. and J. 501; 6 Price 336; *Houlston v. Smith*, 10 Moore, 582. L

## (2) Delay and forbearance

Forbearance or delay in instituting proceedings, on the part of the wife, was not held by the Ecclesiastical Courts to be a bar to a decree, except under very special circumstances. *Ferreis v. Ferreis*, 1 Hagg. Cons. C. 130 (1788, 71). *Walker v. Walker*, 2 Phill. 153 (1813). M

## (3) Delay where cruelty is alleged by petitioner.

(a) Delay is not a bar to a suit for judicial separation on the ground of cruelty. *Smallwood v. Smallwood*, 2 S. & T. 397; 31 L.J.P. 3; 5 L.T. 324. N

(b) But it is a material fact for the consideration of the Court, as tending to show that there was no serious apprehension of further violence. *Smallwood v. Smallwood*, 2 S. & T. 397; 31 L.J.P. 3; 5 L.T. 324. O

## (4) Delay in case where adultery is alleged.

—would lead to the inference of an insensibility on the part of the petitioner of the injury sustained by him or her (*Ibid.*), *Matthews v. Matthews*, 1 Sw. and Tr. 499; 29 L.J.P. & M. 118. P

## (5) Delay in case where desertion is alleged.

—would lead to an inference that the petitioner is indifferent whether the respondent is present or absent. (*Ibid.*). Q

## (6) Delay may lead to inference of same collateral object sought to be gained by petitioner.

Delay may also lead to a presumption that the suit was instituted for some collateral object. *Cooke v. Cooke*, 3 S. and T. 126; 32 L.J.P. 154; 8 L.T. 644; *Matthews v. Matthews*, 1 S. and T. 499; 29 L.J.P. 118; *affirmed on appeal*, 3 S. & T. 161. R

**1.—“ Legal ground why the application should not be granted ”—(Concl'd.)**

**B.—WHAT ARE NOT SUCH LEGAL GROUNDS—(Concluded )**

**(7) Separation by agreement.**

Separation by articles or agreement and desertion were not considered by the Ecclesiastical Courts are bars to relief *Nash v. Nash*, 1 Hagg. Cons. C. 140 (1790), *Morgan v. Morgan*, 2 Curt. 686 (1811), *Reeves v. Reeves*, 2 Phill 125 (1813), *Sullivan v. Sullivan*, 2 Add. 302 (1824).

**(8) Desertion of petitioner.**

(a) Neither can it be said that desertion by the petitioner is a bar to a decree of judicial separation *Duplany v. Duplany*, (1892) P. 53, 61 L.J. P. 49, 66 L.T. 267, see also *Dixon v. Dixon*, 67 L.T. 394 T

(b) It is sometimes alleged, in answer to a suit for judicial separation, that the parties have been living apart under a deed, not as a direct bar to the suit, but as a fact, amongst others, to show that the petition was not presented *bona fide* *Williams v. Williams*, L.R. 1 P. & D. 178, 35 L.J.P. 85, 11 L.T. 770 See also *Brown v. Brown*, L.R. 3 P. & D. 202, 43 L.J.P. 47, 31 L.T. 272. U

(c) Desertion without reasonable excuse does not constitute any bar to a suit for judicial separation. 26 A. 553 (558), see also *Duplany v. Duplany*, L.R., 1892, P. 53, F. Y

**(9) Costs.**

Where in a suit by the wife for judicial separation, it was found that the wife had wilfully deserted the husband without reasonable excuse, it was held that each party should bear his and her own costs, though the Court allowed the wife's prayer. 26 A. 553 (558). W

**(10) Alimony.**

Where in a suit by the wife for judicial separation from her husband, it was found that the wife had been in possession of the family savings, and was in a prosperous condition, the Court declined to allow anything by way of alimony *pendente lite* 26 A. 553 (558). X

**(11) Impediment to martial intercourse supervening after marriage.**

An — does not constitute a defence for a suit instituted in consequence of adultery *M. v. M*, 31 L.J.P. 168. Y

**24. In every case of a judicial separation under this Act, the**

Separated wife deemed spinster with respect to after-acquired property<sup>1</sup>.

wife shall, from the date of the sentence, and whilst the separation continues, be considered as unmarried with respect to property of every description which she may acquire, or which may come to or devolve upon her

Such property may be disposed of by her in all respects as an unmarried woman, and on her decease the same shall, in case she dies intestate, go as the same would have gone if her husband had been then dead



Provided that, if any such wife again cohabits with her husband, all such property as she may be entitled to when such cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

(Notes).

General.

### Corresponding English Law.

The Matrimonial Causes Act (20 & 21, Vict., c. 85), S. 25, provides as follows:—

"In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her, and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead. provided, that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate.

These provisions extend to property vested in a wife as executrix, administratrix, or trustee since the sentence of separation or the commencement of the desertion (Matrimonial Causes Act, 1858, 21 & 22, Vict., c. 108, S. 7.) Z

### 1.—"Separated wife deemed spinster with respect to after-acquired property."

#### (1) Application of the section.

- (a) The section only applies to property which the wife may acquire or which may come to or devolve upon her after the date of the decree of judicial separation. The section, consequently, cannot apply to property which she is entitled to in possession at the date of the decree. *Waste v. Morland*, 38 Ch. D. 135, 57 L.J. Ch. 655, C.A., *Hill v. Cooper*, (1893), 2 Q.B. 85, *Rattigan on Divorce*, 1897, p. 160. A
- (b) This section applies to the wife's *chose-in-action*, which is not reduced into possession at the date of the decree. Such *chose-in-action* becomes the absolute property of the wife, just as if she were a *feme sole*. *Wells v. Malben*, 31 Beav. 48, 31 L.J. Ch. 344; *Johnson v. Lander*, L.R. 7 Eq. 228. B
- (c) So also, any property to which the wife is entitled in reversion at the date of the decree, and which subsequently falls into possession, would become her separate property. *In re Insole*, L.R. 1 Eq. 470; 35 L.J. Ch. 177. C
- (d) It should be pointed out that where the property acquired by the wife as separate property is acquired from her husband, the terms on which it was given to the wife must be considered in order to assign the rights of the parties in the event of their returning to cohabitation. *Nicol v. Nicol*, 31 Ch. D. 524, *Lush on Husband and wife*, 3rd Ed., 1910, p. 144. D

**1.—Separated wife deemed spinster with respect to after-acquired property—(Continued).**

(e) Thus in one case "a husband and wife when before the Divorce Court made an agreement in writing that if judicial separation should be decreed the wife should be permitted to enjoy during her life certain furniture. Judicial separation was decreed, and the wife took possession of the furniture. The husband and wife afterwards resumed cohabitation. In an action brought by the wife to recover the furniture it was held that the agreement in writing came to an end when cohabitation was resumed, and that as the wife was entitled to the furniture during separation only she took nothing under S. 25 of the Matrimonial Causes Act, 1857 which relates only to property acquired by the wife during separation." *Nicol v. Nicol*, 31 Ch. D. 524. **E**

**(2) Covenant in marriage settlement—Effect of**

In one case, a wife had covenanted in her marriage settlement to settle whatever property she might acquire during the intended coverture. Subsequently she obtained a decree of judicial separation. After such decree she became entitled to certain stocks. *Held* that they belonged to her as her absolute property, as the covenant had become inoperative by the decree. *Daves v. Grayke*, 30 Ch. D. 500, 54 L.J. Ch. 1096. **F**

**(3) Decree of separation removes restraint on anticipation.**

A decree of judicial separation removes any restraint on anticipation imposed on property settled to the separate use of a married woman. *Munt v. Glynes*, 41 L.J. Ch. 639. **G**

**(4) Revival of restraint on cessation of separation.**

The restraint on anticipation however revives on the cessation of separation.  
See Eversley's Domestic Relations, p. 149. **H**

**(5) Exception to the above**

But the restraint on anticipation would not revive although there is a cessation of the decree of judicial separation, if in the interval, the wife had altered the form of investment effected by the original trust. (*Ibid.*) **I**

**(6) Decree for judicial separation and protection order—Difference.**

In the case of the decree of judicial separation, the woman is to be regarded as a *feme sole* from "the date of the sentence", but the protection order has effect from the date of the desertion. A protection order has a retrospective effect, but a sentence of judicial separation has not. See Rattigan on Divorce, 1897, p. 160. **J**

**(7) Effect of marriage on proprietary rights—Succession Act, S. 4.**

(a) "No person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried." S. 4 of the Succession Act, X of 1865. **K**

(b) The Married Woman's Property Act (III of 1874) was passed to remedy some of the defects created by S. 4 of the Succession Act. The preamble of Act III of 1874 declares. "Whereas it is expedient to make such provision as hereinafter appears for the enjoyment of wages and earnings by woman married before the first day of January, 1866, and for insurances on lives by persons married before or after that day :

**1.—Separated wife deemed spinster with respect to after-acquired property—(Concluded).**

And whereas by the Indian Succession Act, 1865, S. 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried.

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debt of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wife, it is hereby enacted as follows, etc "

**(8) Death of either party while protection order or judicial separation order is in force—Effects on rights of succession of the other party.**

(a) If the parties are judicially separated, the wife's property after her death devolves as if her husband was dead. Lush on Husband and Wife, 3rd Ed., 1910, pp. 106, 139. **M**

(b) And the result is the same if the wife has obtained a protection order Lush on Husband and Wife, 3rd Ed., 1910, pp. 106, 137. **N**

(c) It is clear, that upon the death of the wife intestate after a decree of divorce has been pronounced the husband would have no right to a administration her effects (*Ibid*). **O**

(d) The husband has no right to administration if the wife dies intestate while a decree of judicial separation or protection order is in force Lush on Husband and Wife, 3rd Ed., 1910, p. 107, *In the goods of Norman* 1 Sw. & Tr. 513, *In the goods of Faraday*, 2 Sw. & Tr. 369 **P**

(e) Administration in such a case is granted to her next-of-kin. (*Ibid*). **Q**

**(9) "Property", meaning of.**

"Property" includes, in the case of a wife, any property to which she is entitled for an estate in remainder or reversion, or as a trustee, executrix or administratrix, and the date of the death of the testator or intestate shall be deemed to be the time at which any such wife becomes entitled as executrix or administratrix. See S. 3, *supra*. **R**

**25.** In every case of a judicial separation under this Act, the wife shall, whilst so separated, be considered as an unmarried woman for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation:

Provided that where, upon any such judicial separation, alimony has been decreed or ordered to be paid to the wife, and the same is not duly paid by the husband, he shall be liable for necessaries supplied for her use:

Separated wife deemed spinster for purposes of contract and suing.

Provided also that nothing shall prevent the wife from joining,\* at any time during such separation, in the exercise of any joint power given to herself and her husband

(Notes).

General.

(1) **Corresponding English Law.**

S. 26 of the Matrimonial Causes Act, 1857 (20 & 21, Vict., c. 85), provides\* as follows —

“In every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding, and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant, provided, that where upon any such judicial separation alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use, provided also, that nothing shall prevent the wife from joining, at any time during such separation, in the exercise of any joint power given to herself and her husband ” S

(2) **Practice of English Courts**

The practice of the English Courts is generally not to grant the husband a decree of judicial separation on the ground of the cruelty of the wife, unless he makes a suitable provision for her maintenance. *Forth v. Forth*, 36 L J. P & M. 122. T

(3) **Proprietary rights of woman, how affected by her marriage—English Law—History of the Law**

(a) Before the passing of the Married Women's Property Act, 1882, a married woman had not, under ordinary circumstances, any original capacity to contract as a *feme sole* Com. Dig B. & F Q., p. 241, Chlty on Contracts, 11th Ed., 174, Lush on Husband and Wife, 3rd Ed., 1910, p 338. U

(b) Her existence was, as it has been pointed out, merged in contemplation of law, in that of her husband. (*Ibid*) Y

(c) She could not possess property apart from her husband, and so long as the coverture continued she was incapable of entering into a legal contract. (*Ibid*). W

(d) A plea of coverture was a plea in bar to an action against a married woman on a contract made during marriage. (*Ibid*). W-1

(e) This incapacity to contract arose, in fact, out of her legal incapacity to possess property it was her want of a disposing power, and not, as is the case with an infant, the want of a disposing mind, that made her incapable of entering into a contract See *Corbett v. Pecknitz*, 1 T R, p 9, *Compton v Compton*, 2 Br Ch Capp. 386, 387 X

(f) She has at all times been able to contract as agent for another, whether for her husband, or for a third party. Lush on Husband and Wife, 3rd Ed., 1910, p 338. Y

## General—(Concluded).

- (g) There were exceptional circumstances under which the law permitted her to contract personally as a *feme sole* as, e.g., when her husband was convicted of felony, or was civilly dead or when she carried on a trade within the City of London. See *Sparrow v. Carruthers*, 2 W. B. L. 1197; *Ex parte Franks*, 7 Bing. 763, Lush on Husband and Wife, 3rd Ed., 1910, pp. 338, 339. Z
- (h) If she was deserted by her husband and obtained a protection order under the Matrimonial Causes Act, or if she was judicially separated from her husband, she was, as it has been pointed out, enabled by those statutes to acquire and possess property, and to enter into contracts, as a *feme sole*. (*Ibid*). A
- (i) But, save under such exceptional circumstances, she had no contracting capacity. (*Ibid*). B
- (j) Nor was she in any different position as regards her status, or capacity to contract, in equity. (*Ibid*). C
- (k) For though by the creation of 'separate estate' equity relieved her, to some extent, from the disability which the law imposed upon her, and secured to her the right to enjoy and dispose of property apart from her husband, it did not alter her status, or enable her to contract in any legal sense (*Ibid*). D
- (l) The Married Women's Property Act, 1870, though it created fresh separate estate, did not affect her status or remove her incapacity to enter into a legal contract. *Howard v. Bank of England*, L R 19 Eq. 295, 301, *Ex parte Holland, Re Henrage*, L R. 9 Ch. 307, *Ex parte Jones, In re Grissel*, 12 Ch. D 481. E

## I.—"Necessaries."

## A.—HUSBAND WHEN LIABLE FOR NECESSARIES OF WIFE.

## (1) When husband leaves wife without adequate provision.

A wife living apart from her husband on account of his misconduct becomes an agent of necessity to supply her wants upon his credit only if he leaves her without an adequate provision. Lush on Husband and Wife, 3rd Ed., 1910, p. 408. F

## (2) When wife has no sufficient means of her own.

If the husband deserts her, or compels her to leave him, and makes her an adequate allowance, or if she has adequate means of her own sufficient for all her reasonable wants, in either case she has no right by law to pledge his credit. (*Ibid*). See also *Eastland v Burchell*, 3 Q.B.D., p. 436; *Johnston v. Summer*, 3 H. & N., p. 266, *Clifford v. Laton*, M. & M. 102. G

## (3) Wife's separate means to be of present use to her.

In order to escape liability on the ground that the wife has separate means of her own, it is incumbent on the husband to show that the separate means of the wife consist of a fund on which she is reasonably capable of obtaining credit. *Thompson v. Hevey*, 4 Burr. 2177. H

## (4) Pension from Crown.

A pension from the Crown to the wife, revocable at pleasure, has been held not to constitute such a fund, as would enable the husband to escape liability. (*Ibid*). I

## 1.—“Necessaries”—(Continued).

## A.—HUSBAND WHEN LIABLE FOR NECESSARIES OF WIFE—(Continued).

## (5) Property settled in trust for the wife.

If property is settled in trust for the wife, it must be shown that the trustees have acted under the trust. *Barrett v. Booty*, 8 Taunt, 343. J

## (6) Wife's means or husband's allowance to be adequate

(a) In either case, whether the wife's provision be in the form of an allowance paid by the husband, or consist of separate means of her own, the husband would only be freed from liability on her contracts for necessaries if her allowance, or separate means, was adequate, having regard to his means and position. *Lush on Husband and Wife*, 3rd Ed, 1910, p. 409. K

(b) And therefore when the husband has been sued for necessaries of wife it has been a necessary question to leave to the jury whether her provision was adequate, having regard to his means and position. *Eastland v. Burchell*, 3 Q B D, p 436. L

(c) If it were not, she might supply the deficiency by pledging his credit. *Lush on Husband and wife*, 3rd Ed, 1910, p. 409. M

(d) If it was adequate, he has only been liable on her contract if his misconduct directly occasioned it (*Ibid*), pp, 409, 427 N

## (7) Both parties being in humble circumstances—Effect.

(a) If the parties are in humble circumstances, and the wife is as well able to earn her living as her husband, it is doubtful whether she would have any absolute right to pledge his credit for “necessaries” as his “agent of necessity.” See *Johnston v Summer*, 3 H. and N., p. 266. N-1

(b) At all events if the wife has maintained herself for a considerable time after the separation took place, the person who supplied her with necessaries would have to prove that she had become incapable of continuing to do so at the time he supplied her. *Burge v. Jones*, 7 L.J.Q B. 59. O

## (8) Parties to be actually married.

(a) It would appear to have been held that the agency of necessity that has been considered only arises between persons actually married. *Lush on Husband and wife*, 3rd Ed., (1910), p. 411. P

(b) For where a man was sued for necessaries supplied to a woman with whom he had lived for seventeen years, and whom he had deserted, and he pleaded in defence to the action that she was not his wife, it was left to the jury to say whether they were satisfied that she was not in fact his wife, with a direction that if they found she was not, he was not liable. (*Ibid*). Q

N B.—The above case was afterwards explained on the ground that the co-habitation had long ceased to the knowledge of the plaintiff, and the better opinion would now seem to be that the liability of the man for necessaries will continue, even after the co-habitation has ceased, unless the person supplying them has been informed of the separation (*Ibid*). *Munro v. De Chéman*, 4 Camp. 215, *Explained*, *Ryan v. Sans*, 12 Q.B. 460; and see also *Paule v. Goding*, 2 F. & F. 585. R

## I.—“Necessaries”—(Continued).

## A.—HUSBAND WHEN LIABLE FOR NECESSARIES OF WIFE—(Concluded).

## (9) Payment of alimony—Effect.

- (a) The wife has no right to pledge her husband's credit if a decree of judicial separation is pronounced and an order for alimony has been made, and it is proved that the alimony is regularly paid. See *Mat. Causes Act, 1857, S. 26.* S
- (b) But this disability of the wife does not apply to contracts made before the decree of judicial separation. *In re Wingfield & Blew, (1904), 2 Ch. 665.* T
- (c) Moreover in the case of contracts made after the decree, if the alimony is not paid, the wife's right to pledge his credit for necessaries revives. *Hunt v. De Blaquiere, 5 Bing. 550* U
- (d) The husband would also be liable for necessaries supplied to her before alimony was decreed, though the alimony payable under the decree dated back to the time of her contract. *Keegan v. Smith, 5 B. & C. 375* Y

## (10) Conduct of the husband.

Unless the husband has, by some acts on his part, allowed to the tradesman to deal with the wife as his “ostensible agent,” he trusts her at his peril, and it is immaterial whether he has notice of the allowance or not. *Turner v. Winter, Sel: N P 229, Clifford v. Luton, M. & M 102; Mizen v. Pick, 3 M. & W. 481, see also Hodgkinson v. Fletcher, 4 Camp. 70, Reeve v. Mynors of Conyngham, 2 C. & K. 146.* W

## B.—WHAT ARE NECESSARIES

## (1) General rule as to what are necessaries.

- (a) As to what are “necessaries” no fixed rule can be laid down.

“Necessaries is a relative word, varying with the rank, profession, position, and fortune of the party, that which might be necessary for a peeress would be extravagant and wasteful luxury for the wife of a village apothecary. In order to protect creditors, the Court will permit the test of the position which the parties have chosen to assume and parade, and not their real pecuniary means and resources, for the purpose of ascertaining whether the articles supplied are or are not, necessaries. Necessaries are things which cannot well be dispensed with, and, as supplied to a wife, things which it is reasonable she should enjoy, and not merely articles which she is compelled to purchase. That which is a necessary at one time may not be so at another. . . . It is, however, an elastic term, and many things are described by it which, in popular language, could hardly be termed necessaries, but have been brought within the category in order to further the ends of justice.” *Eversley's Domestic Relations, p. 291, Rattigan on Divorce, (1897), p. 163* X

- (b) A wife might pledge her husband's credit for whatever the jury find to be reasonable according to the means and position of the husband. *Lush on Husband and Wife, 3rd Ed., 1910, p. 412.* Y
- (c) The question as to what are necessaries is a mixed question of fact and law. *Joyram Marwari v. Mahadeb Sahay, 13 C.W.N. 643=86 C. 768; 1 Ind. Cas. 724.* Z

## 1.—“Necessaries”—(Continued).

## B.—WHAT ARE NECESSARIES—(Continued)

(d) The word “necessaries” is not confined in its strict sense to such articles as are necessary to support life, but extends to articles fit to maintain the particular person in the state, degree and station of life in which he is. *Joyram Marwar v Mahadeb Sahay*, 13 C W N. 643 = 36 C 768, 1 Ind. Cas. 724. (8 W.R. 217, 6 A 417, R.) **A**

## (2) Money borrowed for payment of necessities

Money borrowed for the payment of necessities may itself be a necessary. *Ex parte Vennall*, 10 M B R. 2. But see also *Knor v Bushell*, 3 C B N S 334 **B**

## (3) Furniture

Furniture for a house which she has taken for her own residence may be a “necessary” for a wife who lives apart from her husband. *Hunt v. De Blaquiere*, 5 Bing 550, *Baker v Sampson*, 14 C B N S. 383. **C**

## (4) Expense of residing at a watering place

The expense of a residence at a watering place, if it be reasonably necessary for her health may be a necessity. *Thompson v Hervey*, 4 Burr 2177 **D**

## (5) Cost of seeking restitution of conjugal rights.

Where a wife was deserted by her husband, the costs incurred by her in seeking restitution of conjugal rights were held to be “necessaries” for which her solicitor might sue the husband. *Wilson v. Ford*, L R 3 Ex 63 **E**

## (6) Legal expenses

(a) The wife’s solicitor may recover also for extra legal expenses which were reasonably incurred preliminary and incidental to a matrimonial suit. *Lush on Husband and wife*, 3rd Ed, 1910, p 414. **F**

(b) So also, for legal expenses incurred by the wife altogether apart from the suit, as, e g, in advising her as to dealing with the pressing claims of tradespeople, or preventing a distress. (*Ibid*). **G**

(c) The solicitor, moreover might recover if he showed that he acted with reasonable diligence, and *bona fide*, though the wife herself may have had no ground for instituting the proceedings and may have known it. See *Lush on Husband and wife*, 3rd Ed., 1910, p. 414, Note. **H**

(d) Where a husband was liable under these circumstances for his wife’s “necessaries” it was held that necessities supplied up to the date of the delivery of the statement of claim could be charged for. *Joll v. Fisher*, 5 C. & P 514. **I**

## (7) Payments made for the discharge of wife’s debts.

Whether payments made by a third party in discharge of the wife’s debts after her decease can be recovered, against the husband, the debts being contracted while she was living apart on account of her husband’s misconduct so that the husband would have been liable if sued by the person who supplied the goods, was considered doubtful in the case of *Jenkins v. Tucker*, 1 H Bl. 90. see also *Lush on Husband and Wife*, 3rd Ed., 1910, pp. 414, 415, 434. **J**



## 1.—“Necessaries”—(Continued).

## B.—WHAT ARE NECESSARIES—(Continued).

## (8) Luxuries.

The necessities for which the wife has been entitled by the law, under the circumstances that have been considered, to pledge her husband's credit, extend not only to bare necessities but also to many luxuries which he could withhold from her if they were living together. See *Bazeley v. Forder*, L R 3 Q.B. 559; *Frens v. Hutton*, 3 Esp 255. Lush on Husband and Wife, 3rd Ed., p. 411. K

## (9) Servants.

It may be reasonable under certain conditions, if such are the husband's circumstances and style of living, for the wife to be attended by liveried servant, if so she would be entitled to pledge her husband's credit for that purpose. See *Per Blackburn, J. in Basley v. Forder*, L.R. 3 Q B. 563 L

## (10) Necessaries procured for maintenance of child.

(a) A wife, who was living apart from her husband on account of his misconduct without adequate means, had obtained by an order of the Court, the custody of their infant child under seven and the question was whether the husband could be sued for necessities which the wife procured in order to maintain her child. The Court held that he could, on the following ground, that a wife living apart from her husband under the circumstances which were proved in that case, has a right to pledge his credit for necessities, *i.e.*, for whatever it may be reasonable for her under the circumstances to enjoy that it was reasonable for her to keep and maintain the child; and that therefore she had a right to pledge his credit for that purpose. Lush on Husband and Wife, 3rd Ed., 1910, p 412 M

(b) It is clear that as “necessaries” does not mean “necessities” the fact that it was not a “necessity” that she could incur the expenditure could not be material. (*Ibid*). N

(c) “The Lord Chief Justice, however, took the contrary view, apparently on the ground that the father not being liable (apart from the Poor Laws) to maintain the child he could not be liable for necessities supplied to it. The question, however (it may be pointed out), was not whether he was liable to supply “necessaries” to the child, but whether to maintain the child was a “necessary” for the wife. It was not suggested that the *child* could compel the *father* to pay for necessities procured for it by the mother, but whether for the wife to retain the child (which involved procuring necessities for it) was a necessary for which she could charge her husband.” See *Macready v. Taylor*, 7 Ir R. C.L. 256. O

(d) “Certainly if a wife under these circumstances is entitled to engage servants to attend upon her, and charge on her husband the cost of maintaining them, if she is entitled to pledge her husband's credit for necessities for her servants, it would be strange if it were held that she could not charge equally on her husband the cost of maintaining her child, whose custody the Court had entrusted to her, *i.e.*, to pledge her husband's credit for necessities for the child.” Lush on Husband and Wife, 3rd Ed., 1910, pp. 412, 413. P

## 1.—“Necessaries”—(Concluded).

## B.—WHAT ARE NECESSARIES—(Concluded).

- (e) The costs incurred by the wife in resisting an application by the husband for a *habeas corpus* to recover from her the custody of a child over seven years of age, were decided in a case in Ireland not to be a necessary for which the husband could be charged. See *Macready Taylor*, 7 Ir. R.C.L. 256. Q

## (11) Infant's necessities.

- (a) The infant's need of things may sometimes depend upon the peculiar circumstances, under which they are purchased and the use to which they are put. Thus articles, which, under ordinary circumstances, may not be deemed necessities, may be so regarded when purchased for the infant's wedding *Joyram Marwari v. Mahadeb Sahoy*, 13 C.W.N. 643=36 C. 768, 1 Ind. Cas 724. R
- (b) A person cannot recover, when he has supplied an infant with an article of which at the moment the latter was not in actual need, though the article might be otherwise suitable to his means and requirements, *e g*, when he was already plentifully supplied with such articles. (*Ibid*). S
- (c) A person, who takes upon himself to supply necessities to an infant, assumes for the purpose the business of a guardian, which he is bound to execute as a prudent guardian. He should as such make himself acquainted with his necessities and circumstances. (*Ibid*). T
- (d) The mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, when neither his parents nor his guardian did any thing towards his care or support. (*Ibid*). U

## (12) Debts contracted for pilgrimage.

Debts contracted by the guardian of a minor for pilgrimage not undertaken in the discharge of an urgent spiritual duty which it was obligatory on him to perform, are not necessities for which the minor would be held liable 20 B 62. Y

## (13) Buddhist Law—Wife's claim upon husband for maintenance.

- (a) By the Buddhist law of marriage, as administered in the Courts of British Burmah, it is the duty of the husband to provide subsistence for his wife and to furnish her with suitable clothes and ornaments. 10 C. 777 (P.C.) W
- (b) If he fails to do so, he is liable to pay debts contracted by her for necessities (*Ibid*). W-1
- (c) But it appears that this law would not be applicable where she has sufficient means of her own (*Ibid*). W-2
- (d) No authority has been found for saying that, where the wife has maintained herself, she can sue her husband for maintenance for the period during which she has done so. (*Ibid*) X

*Reversal of Decree of Separation.*

26. Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was

Decree of separation obtained during absence of husband or wife may be reversed

obtained in his or her absence <sup>1</sup>, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly, but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts or acts of the wife incurred, entered into or done between the times of the sentence of separation and of the reversal thereof.

**(Notes).****General**

- (1) **Resumption of cohabitation after decree for judicial separation—Effect.**

The———, such resumption *ipso facto* operates as an annulment of the decree. Thicknesse's Husband and wife, p. 175 Y

**1.—“His or her absence”**

- (1) **“His or her absence,” meaning of.**

“His or her absence” means the non-appearance in the suit, and not absence without knowledge or notice of the suit. See Rattigan on Divorce, 1897, p. 165. Z

- (2) **Petition for reversal of decree of judicial separation, contents of.**

In a petition for reversal of a decree of judicial separation not only is the non-appearance of the respondent in the former suit to be alleged, but the causes of such non-appearance, and the circumstances from which the Court may infer that the decree was wrong on the merits, must also be stated in the petition. *Phillips v Phillips*, L.R., 1 P. 169. 35 L.J P. & M 70. A

**VI.—Protection-Orders**

27. Any wife to whom section IV of the Indian Succession

Deserted wife may apply to Court for protection <sup>1</sup>.

Act, 1865, does not apply, may, when deserted by her husband, present a petition to the District Court or the High Court, at any time after such desertion, for an order to protect any property which she may have acquired or may acquire, and any property of which she may have become possessed or may become possessed after such desertion, against her husband or his creditors, or any person claiming under him.

(Notes).

1.—“*Deserted wife may apply to Court for protection.*”

## (1) Corresponding English Law.

(a) The Matrimonial Causes Act, 1858 (21 and 22 Vict. c. 108), S. 6, provides that—

“Every wife deserted by her husband, whereever resident in England, may, at any time after such desertion, apply to the said judge ordinary for an order to protect any money or property in England she may have acquired or may acquire by her own lawful industry, and any property she may have become possessed of or may become possessed of after such desertion, against her husband and his creditors, and any person claiming under him, and the judge ordinarily shall exercise in respect of every such application all the powers conferred upon the Court for Divorce and Matrimonial Causes under the twentieth and twenty-first Victoria, Chapter eighty-five, section twenty-one.”

(b) S. 21 of the Matrimonial Causes Act, 1857 (20 and 21 Vict. c. 85) provides as follows.—

“A wife deserted by her husband may, at any time after such desertion, if resident within the metropolitan district, apply to a police magistrate, or, if resident in the country, to justices in petty sessions, or in either case to the Court for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him, and such magistrate or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. Provided always, that every such order if made by a police magistrate or justices at petty sessions shall, within ten days after the making thereof, be entered with the registrar of the county Court within whose jurisdiction the wife is resident, and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof. Provided also, that if the husband or any creditor or other person claiming under the husband shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.”

(c) A wife deserted by her husband may at any time after such desertion apply to the Court, for an order to protect any money or property, which

**1.—“Deserted wife may apply to Court for protection”**—(Concluded).

has, or may, lawfully come to her after such desertion, against her husband and his creditors and any person claiming under him. See *Ex parte Aldridge* (1859), 1 Sw. & Tr. 83 (case of a seafaring man); *Cargill v. Cargill* (1858), 1 Sw. & Tr. 235; Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), S. 21. **B**

(d) And, if the Court be satisfied of the desertion, the order may be made so that such money or property shall belong to her as if she were a *feme sole*. (*Ibid.*) **C**

(e) A protection order may be made if the husband has absented himself, left his wife unprovided for, continued his absence and made no *bona fide* offer to return. (*Cargill v. Cargill* (1858), 1 Sw. & Tr. 236; *per Sir Cresswell Cresswell* at p. 236). **D**

**(2) Desertion to be proved.**

The Court must be satisfied that there has been actual desertion. *Ex parte Sewell*, 28 L.J.P. 8. **E**

**(3) Absence on business is no desertion.**

The absence of a husband in his ordinary occupation of a mariner does not constitute “desertion.” *Ex parte Aldridge*, 1 S. & T. 88. **F**

**(4) Service of summons on husband.**

The applicant must state what she knows of her husband's residence. If he be within the jurisdiction, he must be served personally with a summons. Divorce Rule 197, and see *Matthew v. Matthew* (1869), 19 L.T. 662. **G**

**(5) Protection order, contents of.**

The order made states the commencement of the desertion [Matrimonial Causes Act, 1858 (21 & 22, Vict., c. 108), S. 9] and must be in general terms, to avoid deciding rights as to property. *Ex parte Mullineux* (1858), 1 Sw. & Tr. 77. **H**

**(6) Protection order—Effect.**

The order is operative from the date of the desertion. *In the goods of Ellrott (Ann)* (1871), L.R. 2 P. & D. 274. **I**

**(7) Liability of husband or creditor taking wife's property after protection order.**

If the husband or his creditors or any person claiming under him take or keep protected wife's property after notice, he or they is or are liable to restore it, and also to pay twice the value thereof. Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), S. 21, see, also, S. 30, *infra*. **J**

**28.** The Court, if satisfied of the fact of such desertion, and that the same was without reasonable excuse, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and other property from her husband and all creditors and persons claiming under him. Every such order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

Court may grant protection-order<sup>1</sup>.

## (Notes).

## I.—“Protection-order.”

## (1) Corresponding English Law.

- (a) S. 9 of the Matrimonial Causes Act, 1858 (21 and 22 Vict. c. 108), provides that “every order..... shall state the time at which the desertion in consequence whereof the order is made commenced, and the order shall, as regards all persons dealing with such wife in reliance thereon, be conclusive as to the time when such desertion commenced.”
- (b) S. 7 of the same Act extends the operation of such orders to property “to which such wife has become or shall become entitled as executrix, administratrix, or trustee, since.....the commencement of the desertion; and the death of the testator or intestate shall be deemed to be the time when such wife became entitled as executrix or administratrix.”
- (c) S. 8 of the same Act enacts that “an order for protection of earnings or property shall be deemed valid until reversed or discharged, and no right or remedies prior to reversal or discharge shall be prejudiced by such reversal or discharge,” and S. 10 of the said Act makes provision for the indemnification of all persons acting on faith of the order without notice of its discharge, reversal or variation. See Rattigan on Divorce, 1897, p. 170.

See, also, 20 and 21 Vic c 85, S. 21; 21 and 22 Vic. c. 108, S. 6 noted under S. 27, *supra* K

## (2) Form of order

- (a) The order should be made in general terms: because the Court has no power to decide what title the wife has to any specific property. *Ex parte Mullineux*, 1 Sw. & Tr. 77, 27 L.J P. and M. 19 L
- (b) Although the order may be limited in its terms, that will not exclude from its operation any property which is not specified therein, and which falls into her possession after the desertion. *Cf. In re Wittingham's Trusts*, 10 L.T. 368, Rattigan on Divorce, 1897, p. 170. M

## (3) Order should be in general terms-effect of such order.

- (a) The Protection Order should in terms be for the protection of the whole of the wife's property. *Ex parte Mullineux*, 1 S. & T. 77; 27 L.J. P. 19; N
- (b) And even though a protection order was in terms limited to the wife's earnings and the property coming to her as executrix, administratrix, or trustee, it was held that a reversionary interest of the wife which had fallen into possession since the date of her desertion was, though in terms excluded, included in the terms of the order. *Re Whittingham's Trust*, 10 Jur. N.S. 818, 10 L.T. 368. O
- (c) The Court of Appeal, however, has since held that a protection order obtained by a married woman for desertion only constitutes her a *feme sole* in respect of her earnings and property acquired after desertion. Browne and Powles on Divorce, Seventh Edition, 1905, p. 169; *Hull v. Cooper*, (1898), 2 Q.B. 85; 62 L.J., Q.B. 423; 69 L.T. 216. P

## I —“ Protection-order ”—(Concluded).

(d) It has no effect on property acquired before desertion (*Ibid*), See, also, *Hughes, In re, Brandon v. Hughes*, (1899), 1 Ch. 529, 67 L.J., Ch. 279, 78 L.T. 432. Q

(e) A wife who has obtained a protection order is entitled to payment of a fund in Court representing a legacy bequeathed to her. *In re Kingsley*, 26 Beav. 84, 28 L.J. Ch. 80. R

## (4) Alimony pendente lite.

By obtaining a protection order a wife does not deprive herself of her right to alimony pendente lite in a subsequent matrimonial suit. *Hakewill v. Hakewill*, 30 L.J.P. 254. S

## (5) Protection orders—Effect.

Protection orders have a retrospective effect, extending back to the commencement of the desertion *Browne and Powles on Divorce*, Seventh Ed., 1905, p. 158. *In the goods of Elliott*, L.R. 2 P. & D. 274, See, also, *Ramsden v. Brearley*, L.R. 10 Q.B. 147, 44 L.J.Q.B. 46, 32 L.T. 21. T

## (6) Will of married woman.

Hence the will of a married woman made after the desertion has commenced, but before the order was obtained, is valid *In the goods of Elliott*, L.R. 2 P. & D. 274, 40 L.J.P. 76, 25 L.T. 203 U

## (7) Action of tort by married woman.

A married woman with an order of protection may bring an action of tort in her own name *Ramsden v. Brearley*, L.R. 10 Q.B. 147, 44 L.J.Q.B. 46, 32 L.T. 24 See further as to actions by married woman having protection orders *Thomas v. Head*, 2 F. & F. 88 V

## (8) Letters of administration.

In one case where a married woman who had obtained a protection order died intestate in the life of her husband, the Court granted letters of administration for the use and benefit of the children to their duly elected guardian *In the goods of Wren*, 2 S. & T. 451, 31 L.J.P. 88, 6 L.T. 131 See, also, *In the goods of Worman*, 1 S. & T. 513, 29 L.J.P. 164. W

The husband or any creditor of, or person claiming under him, may apply to the Court<sup>1</sup> by which such order was made for the discharge or variation thereof, and the Court, if the desertion has ceased, or if for any other reason it think fit so to do, may discharge or vary the order accordingly.

Discharge or variation of orders

(Notes).

General.

## Corresponding English Law.

S. 21 of the Matrimonial Causes Act, 1857, 20 & 21 Vic. c. 85 provides, as follows —

“ \* \* \* That it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the Court, or to the magistrate or justices by whom such order was made, for the discharge thereof.” X

1.—“ May apply to the Court.”

(1) What Court can discharge or vary the order.

It is only the Court which granted the order that can discharge or vary it  
See *Ex parte Sharpe*, 43 L J., M. C. 152 Y

(2) Application when to be made.

(a) The application for the discharge or variance of the order can be made at any time. See *Ex parte Hall*, 27 L J, P & M. 19. Z

(b) Such an application can be made even after the lifetime of the wife. See *Madge v Adams*, 6 L D. 54, 50 L J, P. & M 49, *Rattigan on Divorce*, 1897, p. 171; *Mahoney v M'Carthy*, (1892), p 21 A

(c) When a wife has obtained a protection order, her husband, and any creditor or person claiming under him, may apply to the Court for the discharge thereof. Matrimonial Causes Act, 1857 (20 & 21 Vict c 85), S 21. B

(3) Discharge of protection order—Effect.

The discharge of a protection order does not adversely affect persons who had *bona fide* made payments under the order. Matrimonial Causes Act, 1858 (21 & 22, Vict c 108), S 10 C

(4) Discharge of protection order—English Law and Practice

(a) An application to discharge a protection order is not limited to the life of a married woman. *Mudge v Adams*, 6 P D 54, 50 L J. P 49, 44 L T. 185. D

(b) In one case the Court allowed a claim to pronounce against the validity of the will of a married woman who had obtained a protection order and a counter-claim to discharge the protection order to be included in the same action. *Mudge v. Adams*, 6 P D 54, 50 L J P 49, 44 L T. 185 E

- (c) A protection order was set aside at the instance of the husband, after the death of the wife, it having been obtained without notice to the husband and by a false and fraudulent allegation of desertion and concealment of material facts. *Mahony v Mc'Carthy*, (1892), P. 21, 61 L.J.P. 41. F

30 If the husband, or any creditor of, or person claiming

Liability of husband seizing wife's property after notice of order.

under, the husband, seizes or continues to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to

return or deliver to her the specific property, and also to pay her a sum equal to double its value

(Note).

Corresponding English Law.

- S. 21 of the Matrimonial Causes Act, 1857 (20 and 21 Vic c 85) provides as follows:—

“ \* \* \* Provided also, that if the husband or any creditor of or person claiming under the husband shall seize or continue to hold any property, of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid.” F-1



31. So long as any such order of protection remains in force, the wife shall be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts and suing and being sued, as she would be under this Act if she obtained a decree of judicial separation.

(Notes).

(1) **Corresponding English Law.**

S. 21 of the Matrimonial Causes Act, 1857 (20 & 21 Vic. c. 85) provides as follows —

“If any such order of protection be made, the wife shall during the continuance thereof be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation.”

G

(2) **Protection order is retrospective in its effect.**

(a) A protection order has a retrospective operation. See *In re the goods of Elliott*, L.R. 2 P. 274, 40 L.J., P. & M. 76.

H

(b) In this respect it differs from a decree of judicial separation. See Notes under S. 24, *supra*

I

(3) **Action for libel by wife obtaining protection order.**

A wife who has obtained a protection order is entitled to maintain an action for libel in her own name *Ramsden v. Brearley*, L.R. 10 Q.B. 147 44 L.J., Q.B. 46.

J

(4) **Right of action not affected by wife's subsequent adultery.**

The right of action of wife who has obtained a protection order in respect of her earnings is not affected by her subsequent adultery. See *Thomas v. Head*, 2 F. & F. 88

K

(5) **No right of action for injury to property committed before date of protection order.**

A married woman who had obtained an order of protection cannot maintain an action for injuries to property committed before the date of such order. See *Midland Rail. Co v I'ye*, 10 C.B., N.S. 179.

L

(6) **Legacy bequeathed to wife after desertion and previous to protection order.**

A wife is entitled to have paid to her a—*In re Kingsley*, 26 Beav 84, See, also, *Cooke v. Fuller*, 26 Beav 99.

M

(7) **Decree of judicial separation and protection order—Difference—English Law.**

(a) “Whereas, in the case of a judicial separation, the husband is not liable in respect of any contract, act, or costs entered into, done, omitted or incurred by the wife during such separation, unless he has been ordered to pay her alimony and has failed to do so, when he is liable for “necessaries” supplied to her use (see S. 25), the husband of a woman who has obtained a protection order is not thereby freed from liability to contribute towards her maintenance.” *Oxford Guardians v. Barton*, 33 L.T. 375, *Rattigan on Divorce*, (1897), pp. 172, 173.

N

(b) A wife, who has obtained such protection order, has no authority to pledge her husband's credit: *Hakewell v. Hakewell*, 30 L.J. P. & M. 255.

O

(c) But she does not thereby deprive herself of her right to alimony *pendente lite* in a suit subsequently instituted by her for dissolution of marriage. (*Ibid.*)

P

VII.—*Restitution of Conjugal Rights.*

**32.** When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted<sup>1</sup>, may decree restitution of conjugal rights accordingly.

## (Notes).

## General.

## (1) Corresponding English Law

(a) The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), S. 5, further provides that—"if the respondent shall fail to comply with a decree of the Court for restitution of conjugal rights, such respondent shall thereupon be deemed to have been guilty of desertion without reasonable cause, and a suit for judicial separation may forthwith be instituted, and a sentence of judicial separation may be pronounced although the period of two years may not have elapsed since the failure to comply with the decree for restitution of conjugal rights, and when any husband who has been guilty of desertion by failure on his part to comply with a decree for restitution of conjugal rights has also been guilty of adultery, the wife may forthwith present a petition for dissolution of her marriage, and the Court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion. Such decree nisi shall not be made absolute until after the expiration of six calendar months from the pronouncing thereof, unless the Court shall fix a shorter time."

(b) By S. 5 of the said Act the English Court has power—"At any time before final decree on any application for restitution of conjugal rights, or after final decree, if the respondent shall fail to comply therewith, upon application for that purpose," to "make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties."

Q

## (2) Previous demand in writing necessary before restitution can be claimed in Court—English Law.

Before a petition is presented by a husband or wife for restitution of conjugal rights, a written demand for cohabitation and restitution of conjugal rights must be made by the intending petitioner to the party to be cited. Per *Hansen*, P, in *Marshall v Marshall*, (1879), 5 P D 19, at p. 23; Divorce rule 175, See *Field v Field*, (1888), 14 P D 26, C. A. Laws of England, Vol XVI, p 499.

R

## (3) Form of demand to be friendly.

(a) The demand must be friendly in form. See *Field v. Field*, (1888), 14 P D. 26, 58 L.J., P & M. 21.

S

**General—(Continued).**

(b) In one case, without any previous friendly communication between the parties, the wife's solicitor wrote demanding restitution of conjugal rights on her behalf and threatened legal proceedings in default. *Held* such a letter did not sufficiently comply with the rule as to demand. *Field v. Field*, 14 P. D. 26, 58 L. J. P. & M. 21; *Mason v. Mason*, 61 L. T. 304, *Smith v. Smith*, 15 P. D. 47, 59 L. J. P & M. 9 **T**

**(4) Demand to be in writing, but not necessarily in handwriting of the complaining party.**

The demand need not necessarily be written by the hand of the complaining party. (*Ibid.*) **U**

**(5) A demand written by a friend or solicitor of petitioner would be sufficient.**

The demand may be written by the solicitor for, or a friend, of the petitioner, as well as by the petitioner. *Browne and Powles on Divorce*, seventh Edition, 1905, p. 383. **Y**

**(6) Demand must show petitioner's willingness.**

The demand must be conciliatory and show willingness to return to cohabitation. *Field v. Field*, (1889), 14 P. D. 26, 58 L. J. P. 21, 59 L. T. 880, *Mason v. Mason*, 61 L. T. 304. **W**

**(7) Threat of legal proceedings does not vitiate the demand.**

If the demand be civil, and show a desire for cohabitation, it may threaten legal proceedings in case of refusal. *Smith v. Smith*, (1890), 15 P. D. 47, 59 L. J. P. 9, 62 L. T. 237 **X**

**(8) Demand is not to be hostile**

Although the demand must not be a hostile demand, it can hardly be expected to be of an affectionate nature, *Browne and Powles' on Divorce*, Seventh Edition, 1905, p. 383. *Elliot v. Elliot*, 1902, 85 L. T. 644 **Y**

**(9) Peremptory nature of demand does not vitiate it.**

Provided the request is clear, the Court will not inquire too closely into the peremptory character of the precise words which are used. *Elliot v. Elliot*, (1902), 85 L. T. 648. **Z**

**(10) Demand by husband should mention the place where the wife should come to him**

When the demand for cohabitation is made by a husband it should give the address where he desires his wife to come to him. *Browne and Powles' on Divorce*, Seventh Edition, 1905, p. 384. **A**

**(11) Demand by wife, form of**

(a) When the demand is made by a wife, if she is still residing at the matrimonial home, she should ask her husband to return home. *Browne and Powles' on Divorce*, Seventh Edition, 1905, p. 384 **B**

(b) If otherwise, she would ask him to receive her, where he is living at the time, or that he will inform her at what address he is willing to receive her. (*Ibid.*) **C**

**(12) Cases where it was held that the demand was sufficient**

(a) In this case, a letter from the wife and then one from her solicitor were held to be sufficient demand. *Mason v. Mason*, (1889), 61 L. T. 304 **D**

(b) A demand written by wife would be sufficient, though alluding to High Court proceedings. *Smith v. Smith*, (1890), 15 P. D. 11, 47 C. A. **E**

(c) A demand would be sufficient, though rather peremptory. *Elliot v. Elliot* (1901), 85 L. T. 648, **F**

## General—(Continued).

## (13) Motives of petitioner in asking for restitution are not material.

(a) The ———, and it is not open to the court to enquire into the sincerity or otherwise of the petitioner *Scott v. Scott*, 4 Sw. and Tr. 113, 34 L. J. P. and M. 23. **G**

(b) As observed by Hennen, P, in *Marshall v. Marshall*, 5 P. D. at p. 23 "So far are suits for restitution of conjugal rights from being in truth, or in fact, what theoretically, they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligation of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand". *Marshall v. Marshall*, 5 P. D. at p. 23. **H**

## (14) Proof of marriage necessary before restitution can be decreed

In a suit for restitution, the Court has no jurisdiction to make a decree until the marriage has been formally proved. *Scott v. Scott*, 4 S. & T. 113, 34 L. J. P. 23, 12 L. T. 211. **I**

## (15) Service of demand on respondent.

In cases where the whereabouts of the respondent are not known and cannot be discovered, the service of the demand may be made on the respondent's solicitor. *Macarthur v. Macarthur*, 58 L. J. P. & M. 70. **J**

## (16) Service of demand Substituted service—Practice of English Courts.

(a) If necessary, substituted service of the demand may be allowed. *Waters v. Waters*, (1875), 34 L. T. 33 (on father and by advertisement), *O'Shoehy* (1876), 34 L. T. 367 (on solicitor) **K**

(b) Where a petitioner had sent two demands to her husband, by registered letter, both of which had been returned unopened by the husband's solicitor, who subsequently refused to give the husband's address, or that of any third person through whom he might be communicated with, and it was also shown that the husband had left the country, the Court made an order for substituted service of such demand upon the husband's solicitor. *Tucker Ex parte*, (1897), P. 83; 66 L.J.P. 65, 77 L.T. 140. **L**

(c) The affidavit about service of notice of demand should show one or other following —

(i) That the demand was personally served. *Browne and Powles on Divorce*, Seventh Edition, 1905, p. 384. **M**

(ii) Or it must satisfy the Court that it was received by the proposed respondent. (*Ibid*). **N**

(iii) Or it must at least show that it was posted in a registered letter to the address at which he or she was residing. (*Ibid*). **O**

(iv) Otherwise an order will have to be obtained for substituted service of the demand (*Ibid*). **P**

## (17) Service on respondent who is a domiciled Englishman.

If a respondent in a suit for restitution is a domiciled Englishman, he may be served with any proceeding in such suit anywhere outside the jurisdiction of the Court. *Dicks v Dicks*, (1893), P. 275, 68 L J P. 118, *Bateman v. Bateman*, (1901), P. 136, 70 L.J P. 29, 84 L T. 64, 331. **Q**

## General—(Continued).

## (18) Where service on respondent is made abroad—Practice.

(a) If a respondent is served with a decree for restitution abroad, he should be allowed sufficient time to return to this country and comply with the order, if he desire to do so. *Bateman v. Bateman*, (1901), P. 136; 70 L.J.P. 29, 331; Browne and Powles on Divorce, Seventh Edition, 1905, p. 388. R

(b) And if the petitioner takes further proceedings in consequence of the respondent's non-compliance with such decree, such petitioner must satisfy the Court that sufficient time has been given to comply with it. *Bateman v. Bateman*, (1901), P. 136; 70 L.J.P. 29, 331. S

## (19) Affidavit in support of the petition, contents of—English Law and Practice.

(a) The affidavit in support of the petition must state sufficient facts to satisfy the Registrar that the above requirements as to the previous demand have been satisfied. Divorce Rule 175. T

(b) The affidavit must also state that, after a reasonable opportunity for compliance therewith, such restitution has been withheld. Divorce Rule 175. U

(c) Suits for restitution must be commenced by petition and affidavit in verification. Browne and Powles on Divorce, Seventh Edition, 1905, p. 383. See also (*Ibid*), pp. 259, 271. Y

(d) "The affidavit filed with the petition, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld. Browne and Powles on Divorce, Seventh Edition, 1905, p. 383, Divorce Rule 175. W

## (20) English Courts are bound by principles of Ecclesiastical Courts in suits for restitution.

The Court in England is still bound in suits for restitution of conjugal rights by the principles and rules of the Ecclesiastical Courts. See Mat. Ca. Act, 1857, S. 22. X

## (21) Decree for restitution, enforcement of.

(a) Disobedience to a decree for restitution is no longer punishable by attachment. *Weldon v. Weldon*, 54 L.J.P. 60, 52 L.T. 233. Y

(b) Matrimonial cohabitation, not matrimonial intercourse, is what the Court seeks to enforce. *Forster v. Forster* (1790), 1 Hagg Cons. 144, 154. Z

(c) Without cohabitation merely maintaining is not sufficient. *Weldon v. Weldon*, (1888), 9 F.D. 52. A

## (22) Provisions of the Code of Civil Procedure as to enforcement of decrees for restitution of conjugal rights.

(a) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced by his detention in the civil prison, or by the attachment of his property, or by both. See Civ. Pro. Code, V of 1908, O. XXI, r. 32. B

## General—(Continued).

- (b) Where any attachment made under the circumstances stated above has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application. (*Ibid*). C
- (c) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease. (*Ibid*) D

## (23) Refusal to comply with decree of restitution—Effect—English Law.

- (a) Where a husband or wife refuses to comply with a decree of restitution, the Court, on the further petition of the husband or wife, will, as a matter of course, grant him or her a decree of judicial separation. *Harding v Harding*, 11 P.D. 111; 55 L.J.P. 59; 56 L.T. 919. E
- (b) The statutory desertion arising under S. 5, of the English Matrimonial Causes Act from non-compliance with a decree for restitution, has all the consequences of ordinary desertion for two years *Paine v. Paine*, (1903), P. 263, 73 L.J.P. 1, 89 L.T. 588. F
- (c) Consequently such desertion is capable, after its condonation, of revival by subsequent adultery (*Ibid*). G
- (d) A wife obtained a decree for restitution, which not being complied with, she petitioned the Court for a decree of dissolution on the ground of desertion, arising from non-compliance with the decree, and adultery committed some time before. It was held that such desertion was on the same footing as desertion without cause for two years and upwards, and that the adultery was thereby revived. *Bigwood v. Bigwood*, 13 P.D. 89, 57 L.J.P. 80; 58 L.T. 642. H
- (e) Such statutory desertion will also revive adultery previously committed. *Bigwood v. Bigwood*, 13 P.D. 89, 57 L.J.P. 80; 58 L.T. 642. I

## (24) What is compliance by husband with decree for restitution.

- (a) It is not a sufficient compliance by a husband with a decree for restitution that he has provided his wife with a suitable establishment and sufficient income. *Weldon v. Weldon*, 9 P.D. 52; 53 L.J.P. 9 J
- (b) A husband by merely supplying his wife with a suitable establishment and sufficient allowance cannot be said to have completely complied with a decree for restitution passed against him. *Weldon v. Weldon*, 9 P.D. 52; 53 L.J.P. & M. 9. K
- (c) Where a husband has been served with a decree in a suit for restitution ordering him to take his wife back, he is bound to take the initiative by inviting her to return *Alexander v. Alexander*, 2 Sw. & Tr. 885; 30 L.J.P. & M. 73. L

## (25) Refusal to comply with decree for restitution by wife having separate estate—Effect.

- (a) Where a wife who has separate estate refuses to obey a decree for restitution, the Court may order her to settle a permanent maintenance on her husband. *Swift v. Swift*, 15 P.D. 118; 59 L.J.P. 61, 62 L.T. 669. M

## General—(Continued).

- (b) But not where such separate estate is settled to her use without power of anticipation. *Mitchell v. Mitchell*, (No. 1), (1891) P. 208; 60 L.J.P. 46; 64 L.T. 607. N

## (26) Refusal to comply with decree for restitution by husband—Effect.

A husband refusing to comply with a decree may be ordered to secure to his wife for their joint lives a "periodical payment," equal to one-third of their joint incomes. *Theobald v. Theobald*, 15 P.D. 26; 59 L.J.P. 21, 62 L.T. 187. O

## (27) Decree for restitution, contents of.

A decree of restitution of conjugal rights recites "that the judge by his final decree pronounced that the petitioner and respondent were and are lawful husband and wife, and ordered that the said respondent do within fourteen days from the service of this order on him return home to the petitioner, and render her conjugal rights (or vice versa), and (if a husband) within a like time file a certificate that he has so done, and condemned the said respondent in the costs incurred and to be incurred on behalf of the said petitioner." *Browne & Powles on Divorce*, 7th Ed. 1905, p. 458. P

## (28) Form of decree for restitution of conjugal rights.

## (i) WHERE THE HUSBAND IS THE RESPONDENT.

The form of decree for restitution, in cases where the husband is the respondent is as follows.—"That the husband do take the petitioner home and receive her as his wife, and render her conjugal rights." See *Weldon v. Weldon*, 9 P.D. at p. 53. Q

## (ii) WHERE THE WIFE IS THE RESPONDENT.

The form of the decree for restitution in cases where the wife is the respondent is as follows.—"That the wife do return and live with the husband and render him conjugal rights." See *Rattigan on Divorce*, 1897 p. 176. R

## (29) Decree for restitution should not decree possession of the person of the wife to husband.

- (a) A decree in a suit for restitution of conjugal rights should not decree possession of the person of the wife, but should declare the husband entitled to his conjugal rights, and order the wife to return to his protection. 8 W.R. 467. S

- (b) It is not competent to the Court to direct that the wife be bodily handed over to her husband. 9 W.R. 552; 8 W.R. 467; 2 Agra 337; 6 W.R. 105. T

- (c) It is not competent to the husband to take his wife by force and restrain her of her liberty until she is willing to render him conjugal rights. *Reg v. Jackson*, (1891), 1 Q.B. 671. U

- (d) Decrees for restitution of conjugal rights brought in the Courts in England, were enforced, not by the delivery of the person of the defendant, but by ordering the defendant into custody as for contempt of Court, in case of refusal to cohabit. *Shelford on the Law of Marriage and Divorce*, p. 576 cited in 6 W.R. 105 (106). Y

## General—(Concluded).

- (e) "A wife cannot be looked upon as property, moveable or immoveable, which passively undergoes transfer from one person to another. If she could be so dealt with, it would have to be determined whether she was moveable or immoveable, and some curious questions of limitation might arise, and, if the wife were property, she could not, obviously, be a party to the suit, as she is in this case, and always must be in suits of this nature. And, further, it seems to me repugnant to the principles of civilized society, whether European or British Indian, that an adult human being, wife or otherwise, should be delivered over as a horse or other brute animal might be."

"In truth, it seems to me that the function of the Court in a suit of this nature must be simply to determine, as between the husband and the wife, whether he is or is not entitled to his marital rights. If the decree of the Court be in his favour, the wife, as a party to that suit, is bound to yield obedience to the decree, and, if she refuses to do so, may be dealt with according to law. And in like manner, any other persons whose conduct may have entitled the husband to include them as defendants in the suit will be bound to comply with the decree, and may possibly be liable to pay damages to the aggrieved husband." 6 W.R. 105. W

**(30) Suit for restitution of conjugal rights brought against a wife and certain persons said to be detaining her from her husband—Form of decree.**

In a suit for restitution of conjugal rights brought against a wife and certain persons said to be detaining her from her husband, the proper form of decree is one enjoining the wife to return to her husband, and the other co-defendants to abstain from preventing her return. 2 N.W. P. 314. X

**1.—"And that there is no legal ground why the application should not be granted."**

See notes under "*Answer to a petition for restitution of conjugal rights*" under S. 33, *infra*.

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS**

**(1) Right of Hindu to maintain suit for restitution.**

A suit for restitution of conjugal rights may be maintained by a Hindu. 5 C. 500. Y

**(2) Law applicable to such cases.**

- (a) The same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, may not be equally so in the case of a Hindu. 5 C. 500. Z

(b) In suits for restitution of conjugal rights among Hindus the law applicable to the parties is the Hindu Law. 8 Ind. Cas. 4 2=8 M L.T. 314. A

**(3) When marriage is void no suit for restitution lies.**

- (a) A marriage between a Rajput and a Brahman girl is not allowed by Hindu Law. 2 Bom. L.R. 128. B

(b) Hence one of the parties to such a marriage cannot sue the other for restitution of conjugal rights. 2 Bom. L.R. 128. C



**1.—“And that there is no legal ground why the application should not be granted” —(Continued).**

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—(Continued).**

**(4) Cause of action in suits for restitution—Jurisdiction.**

- (a) The cause of action, in a suit by a husband for restitution of conjugal rights, consists in the wife's absenting herself from her husband's house without his consent, and it must, therefore, be deemed to arise at his house. 18 B. 316 (See also *Weldon v. Weldon*, 9 P.D. 52 R.) **D**
- (b) The plaintiff sued his wife for restitution of conjugal rights in the Court of the Subordinate Judge of Borsad, within whose local jurisdiction the plaintiff resided. The defendant contended (*inter alia*) that the Subordinate Judge of Borsad had no jurisdiction to entertain the suit, on the ground that she was living outside his jurisdiction. *Held*, that the Court of Borsad had jurisdiction. 18 B. 316. **E**

**(5) Wife being minor no bar to suit for restitution.**

- (a) In a suit for the restitution of conjugal rights between Hindus, the Lower Courts having found that the defendant wife was of sufficient age to be fit to live with her husband as wife, it was *held* that the suit was maintainable, in spite of the fact that the wife was a minor, although in some cases it might be necessary to impose suitable terms on the husband. 28 C. 37. **F**
- (b) If, as legal guardian of the person and property of his minor wife, a Hindu husband is entitled under the law to insist that she shall live with him, it seems useless to argue that he is not entitled to similar relief in a suit for restitution of conjugal rights, if the wife has attained an age at which she is considered fit to discharge her conjugal duties, though in the eye of the law she may still be a minor. 28 C. 37 at p. 45. **G**

**(6) Marriage during wife's infancy by her guardian—Non-consummation of marriage prior to suit—Suit for restitution by husband, if maintainable**

- (a) A, a Hindu aged nineteen years, was married in one of the approved forms of marriage to B, then of the age of eleven years, with the consent of B's guardians. After the marriage B lived at the house of her step-father, where A visited from time to time. The marriage was not consummated. Eleven years after the marriage, *viz.*, in 1884, the husband called upon the wife to go to his house and live with him, and she refused. He thereupon brought the present suit, praying for restitution of conjugal rights, and that the defendant might be ordered to take up her residence with him. The Court of first instance held that the suit was not maintainable. *Held*, in appeal, reversing the decree, that the suit was maintainable, and that the case should be remanded for a decision on the merits. 10 B. 301 (9 B. 529, *Reversed*) **H**
- (b) The following remarks of Sargent, C.J. are worthy of being noted:—

“Lastly, as to the discretion which the Court has been asked to exercise in favour of the defendant, because she had no voice in the choice of her husband, and has never adopted her guardian's choice, it was not suggested that the marriages of Hindu children are not perfectly

1.—“And that there is no legal ground why the application should not be granted”—(Continued).

A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—(Continued).

valid without the exercise of any volition on their part. It is plain, therefore, that the Court is virtually asked to disregard the precepts of Hindu law, which treats the marriage of daughters as a religious duty imposed on parents and guardians, and to look at the matter from the purely English point of view, which sees in marriage nothing but a contract to which the husband and wife must be consenting parties. As to the question of delicacy, which was much relied on by the learned Judge in the Division Court, we apprehend that the Civil Courts having assumed the jurisdiction cannot draw fine distinctions between a woman who has never lived with her husband and is averse to joining him and one who has lived with him and perhaps acquired a physical or moral loathing for him, and objects to returning. It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties, but as long as the law remains as it is, Civil Courts, in our opinion, cannot with due regard to consistency and uniformity of practice (except, perhaps, under the most special circumstances), recognise any plea of justification other than marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in *Scott v. Scott*, 34 L.J. 23, 10 B. 301 at pp. 312, 313. I

(7) Proof of marriage necessary before restitution can be granted.

- (a) When, in a suit for the restitution of conjugal rights, the validity of the marriage itself is disputed, it is not enough to find that the marriage took place, leaving it to be presumed that the rites and ceremonies necessary to constitute a legal marriage in the particular case were performed. 28 C. 37. J
- (b) The Court must find specifically what these rites and ceremonies are, and whether they were performed (*Ibid*) K
- (c) In a suit for restitution of conjugal rights the fact of the celebration of the marriage having been established, the presumption in the absence of anything to the contrary, is that all the necessary ceremonies have been complied with. 12 C. 140 cited in 28 C. 37 (49). L

(8) Defences in suits for restitution.—General rules as to.

- (a) A Judge has no discretion to refuse a decree for restitution of conjugal rights for other causes than those which in law justify a wife in refusing to return to live with her husband. 21 B. 610. M
- (b) The husband cannot abstain from passing a decree in favour of a plaintiff-spouse, because he considers that it would not be for the benefit of either side that the decree should be granted. (*Ibid*) N
- (c) “Civil Courts cannot with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances) recognise any plea of justification other than a marital offence by the complaining party as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott v. Scott*, 34 L. J. P. & M. 23.” See *Per Sargent*, C. J. in 10 B. 301, 21 B. 610 (613). O

**1.—“And that there is no legal ground why the application should not be granted”**—(*Continued*)

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS**—(*Continued*).

- (d) To bar a suit brought by a Hindu for restitution of conjugal rights, the defendant must set up some offence of a matrimonial nature such as would support a decree for judicial separation. 27 A. 96=24 A.W.N. 173. (8 A 78, 13 A. 126, R.) P

**(9) Impossibility of sexual intercourse owing to physical malformation.**

- (a) A plea by a wife that sexual intercourse with her is impossible owing to her incurable disease or physical malformation is not in itself a good defence to a suit by the husband for restitution of conjugal rights 21 B 610. Q

- (b) Marriage does not exist solely for sexual intercourse. It would manifestly be wrong to allow one of the parties to withdraw from the performance of the duties and obligations binding on him on a ground which gives him no just cause of complaint and of which the other party does not complain. *Per Pairsons, J*, in 21 B. 610 (613). R

**(10) Failure to perform ceremony necessary before consummation.**

Where a man who had been married to a woman, but had failed to go through the second ceremony, without which, according to the customs of his caste, the woman would have been defiled had he obtained possession of her, and had actually married a second wife, and left the first woman to believe that she was at liberty to contract another marriage, which, indeed, she has done—now sued for restitution of conjugal rights. *Held* that, though, after a first marriage, a man's right to the person of his wife was complete, yet, where, as in the present case, there were other ceremonies which were usual, but had been neglected and the claimant had not shown cause for his neglect, he was not entitled to a decree. 25 W.R. 386 S

**(11) Delay disentitles petitioner to relief**

- (a) Where for 15 years the husband never troubled about his wife, nor contributed to her support, never demanded her company and never in any way performed or offered to perform any of his duties as a husband; *Held*, that the husband was not entitled to any help from Courts as he had failed to take steps within reasonable time to assert his rights and to take up his rightful position as husband and protector of the wife. 4 Ind. Cas 974=126 P.W.R. 1909=125 P.L.R. 1909. T

- (b) “In our opinion it was incumbent on plaintiff, if he wished the Courts to help him, to take steps within reasonable time to assert his rights and to take up his rightful position as husband and protector of the lady. We do not think a delay of 15 years—or even of 10 years,—can be condoned. We do not at all agree with the learned Divisional Judge that, because defendant No. 1 has been living in her father's house and so plaintiff had no fear in regard to her preservation of chastity, the long neglect and indifference of plaintiff constitute no bar to the relief claimed. We think 15 years of indifference and neglect do bar the relief even though she may have been living the life of a nun. *Per Johnstone J*, in 4 Ind. Cas 974=126 P.W.R. 1909=125 P.L.R. 1909. U

*1.—“And that there is no legal ground why the application should not be granted”*—(Continued).

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS**—(Continued).

**(12) Plaintiff being out of caste.**

It is not a defence that the plaintiff is out of caste, nor ought a decree to be made conditional on the plaintiff being restored to caste 27 A. 96 = 24 A.W.N. 173. Y.

**(13) Effect of conversion of plaintiff.**

A suit cannot be maintained for the restitution of conjugal society by a Hindu husband, who has been repudiated by his wife on his conversion to Christianity. 5 W.R. 235. W

**(14) Desertion by husband.**

(a) Among Hindus a husband, who for years deliberately deserts his wife and fails to fulfil his obligations of giving her a home and of supporting her, is not entitled to enforce his marital rights and claim the custody of his wife. 82 P.R. 1908 X

(b) The following observations of the Court are worthy of being noted :—

“His wife either was ejected by him from his house or left his protection some time before 1898. He made a feeble attempt to get her back in that year but did not press his suit. Thereafter, though she was living only a few miles off with her father's family, he refrained from taking any steps to assert his marital rights for some eight years and admittedly made her no allowance. After this lapse of time he comes forward once again and endeavours to assert his right to her custody. The woman was present in Court before us, and in answer to questions put to her by us asserted that she had been turned out of her home by her husband some 16 years ago and vehemently protested that she should not be compelled to go back to him. She is fairly advanced in years and is suffering from gonitfe of a very pronounced type. Taking all these facts into consideration, we have no doubt that the husband actually deserted the wife and abandoned her and that his present claim is preferred not so much for the purpose of recovering his wife as for ulterior purposes. In face of such desertion and abandonment, we hold that he has no longer any legal claim to her custody. A Court is not bound to decree a claim by a husband for custody of his wife. It has a discretion in such cases and there is ample authority for the proposition that it should refuse to exercise that discretion in favour of a husband who has ill-treated or deserted his wife or been guilty of some other matrimonial offence.” 82 P.R. 1908. (*Per Rattigan, J.*) (See also 78 P.R. 1893; 95 P.R. 1898, 28 C. 37, 28 C. 751, 29 A. 222, cited and followed). Y

**(15) Failure by husband to perform his marital obligations.**

(a) A gross failure by the husband of the performance of the obligations which the marriage contract imposes upon him for the benefit of the wife might, if properly proved, afford good grounds for refusing him the assistance of the Court.” 11 M.I.A. 551, cited in 82 P.R. 1908 at p. 390. Z

**1.—“And that there is no legal ground why the application should not be granted”**—(*Continued*).

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—**(*Continued*).

(b) “In the present case we have it clearly established that the husband has for years past failed to fulfil the obligations of giving his wife a home and of supporting her and her child, and it is, in our opinion, too late for him, after this lapse of time, during which she has been dependent on her own family for support, to come forward and assert his right as her husband” *Per Rattigan, J* in 82 P R. 1908 at p 390. **A**

**(16) Cruelty.**

— by petition is a bar to relief See 1 B 164, 5 C 500, 4 N.W.P. 109 **A-1**

**(17) Rule as to what is cruelty is same as under English Law**

In a suit by a Hindu husband against his wife for the restitution of conjugal rights, the criterion of legal cruelty, justifying the wife's desertion, is the same in this country as in England, viz., whether there has been actual violence of such a character as to endanger personal health or safety, or whether there is the reasonable apprehension of it. 1 B. 164. **B**

**(18) Revival of condoned cruelty by subsequent offence.**

(a) Where cruelty on the part of the husband has been condoned by the wife, a much smaller measure of offence would be sufficient to neutralize the condonation, than would have justified the wife, in the first instance, in separating from her husband. 5 C 500 **C**

(b) But the act or acts constituting the offence must be of such a nature as to give the wife just reason to suppose that the husband is about to renew his former course of conduct and consequently to entertain well-founded apprehension for her personal safety. (*Ibid*). **D**

**(19) Co-habitation if amounts to condonation.**

Co-habitation is not sufficient to raise a presumption of condonation in the case of the wife, though it is so in the case of the husband. *Durant v. Durant*, 1 Hagg. 734, cited in argument in 5 C 500 (503). **E**

**(20) Conduct of husband disentitling him to a decree for restitution.**

Where the lower appellate Court found that there was no cruelty, but that the suit was brought by the husband as a counter-move to defeat the claim of the wife for separate maintenance and a considerable time after she had ceased to live in his house and because on the last occasion when she returned to live with him she left the house crying. *Held*, that these circumstances were not sufficient in law to justify the Court in refusing the husband's claim for restitution of conjugal rights 21 B 610 (611). **F**

**(21) Husband suffering from loathsome disease, a bar to suit**

To a suit brought by a Hindu husband against his wife for the restitution of conjugal rights, the fact that he is, at the time of such suit, suffering from a loathsome disease, such as leprosy, is a good defence. 5 B.H.C. 209. **G**

1.—“ *And that there is no legal ground why the application should not be granted* ”—(Continued).

A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—(Continued).

(22) Agreement to live separate—Effect of.

(a) An agreement, between husband and wife, to live separate bars a subsequent suit for restitution of conjugal rights. 2 Bom. L.R. 72. (*Spering v. Spering*, 32 L.J. Mat. 116, not followed, See also, 4, N.W.P. 109. H

(b) “ *Spering v. Spering* (32 L.J. Matrimonial, 126) was a case that proceeded on the special views of the old Ecclesiastical Courts in England and not on principles of justice, equity and good conscience, by which we are governed here. These principles, in my opinion, require us to hold that a separation agreement containing provisions, such as we have in this case, is a defence to a suit for restitution of conjugal rights, just as in the English Courts the like result has been obtained since the enactment of the Judicature Acts by which the Divorce Court is bound to consider such an agreement as an equitable defence.” *Per Curiam* in 2 Bom. L.R. 72 at p. 75. I

(c) A deed of separation is a good answer to a husband seeking by *habias corpus* to obtain the possession of his wife. *King v. Mean*, 1 Bur. 542, cited in 2 Bom. L.R. 72 (74). J

(d) A Court of Equity would, when a valid contract for separation has been entered into between the husband and wife, grant an injunction to restrain proceedings by either party for a restitution of conjugal rights. *Marshall v. Marshall*, 9 P.D. 19, *Hall v. Turner*, 1 Atk. 515, *Beasant v. Wood*, 12 Ch. D. 605. See also the cases collected under the leading case of *Stopilton v. Stopilton*. (White and Tudor Leading Cases, pp. 950-951) cited in 2 Bom. L.R. 72 (74). K

(e) Where a husband and wife (Hindoo) thirteen years previously had agreed to separate, the husband having treated his wife with cruelty and kept his sister-in-law as his mistress, and was still so keeping her at the date of the institution of the suit, and further, had not contributed to the maintenance of his wife during the period of the separation. Held that the husband was not entitled without his wife's consent, to have that agreement set aside or to insist upon restitution of conjugal rights. 4 N.W.P. 109. L

(f) A husband sued the wife for restitution of conjugal rights in 1903. The parties entered into a compromise in 1904 whereby they agreed to live thereafter together “according to the custom of the word.” But they never lived together at all thereafter. The husband again sued the wife in 1907 for restitution of conjugal rights. The Munsif decreed the claim but the District Court dismissed the suit on the ground that it was barred by limitation as more than two years had elapsed from the first demand and refusal on which the suit of 1903 was compromised and as no subsequent demand and refusal had been alleged or proved.

Held, that the law applicable to the parties, being Hindus, is the Hindu Law under which any agreement between the husband and wife to live apart is forbidden or, at any rate, is not valid, 8 Ind. Cas. 413.

1.—“And that there is no legal ground why the application should not be granted”—(Continued).

A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—(Continued).

That such an agreement is opposed to public policy and not enforceable. (*Meherally v. Sakherkhanoobai*, 7 Bom. L.R. 602, referred to and approved). **M**

Even under the English Law, agreements providing for future separation are invalid, though such as provide for present separation are valid. 8 Ind. Cas. 412=8 M.L.T. 314 (*Wilson v. Wilson*, 9 E.R. 870; *Marshall v. Marshall*, 5 P.D. 19, *Clarke v. Clarke*, 10 P.D. 188, *Besant v. Wood*, 12 Ch. D. 605, R.). **N**

It was held by the House of Lords in *Wilson v. Wilson*, 9 (E.R. 870), that an agreement for a present separation was enforceable. See 8 Ind. Cas. 412 (414). **O**

(g) The decisions in *Marshall v. Marshall*, 5 P.D. 19, 48 L.J.P. 49, 39 L.T. 640, 27 W.R. 399, *Clark v. Clark*, 10 P.D. 188, 54 L.J.P. 57, 52 L.T. 234; 33 W.R. 405; 49 J.P. 516, and *Besant v. Wood*, 12 Ch. D. 605, 40 L.T. 445, are not cases of agreement for a future separation like the present case. 8 Ind. Cas. 412 (414). **P**

(h) Even if we applied the English rule we should be quite prepared to hold that the agreement in this case being one for future separation would be invalid and constitute no answer to a suit for restitution of conjugal rights. 8 Ind. Cas. 412 (414). **Q**

(23) Liability of person wrongfully detaining wife.

Every person who receives a married woman into his house, and suffers her to continue thereafter she has received notice from the husband not to harbour her, is liable to an action for damages or injunction, unless the husband has, by his cruelty or misconduct, forfeited his marital rights, or has turned his wife out of doors, or has by some insult, or ill-treatment, compelled her to leave him. 1 B. 164. (See also Addison on Torts, p. 862, F.) **R**

(24) Restitution of conjugal rights, suit for—Valuation for purposes of jurisdiction.

In a suit for the restitution of conjugal rights the law leaves it to the plaintiff to put his own valuation on the plaint and accepts it for the purposes of jurisdiction unless it is vitiated by some improper motive, such as a deliberate design to give the Court a jurisdiction which it has not. 4 Ind. Cas. 836. **S**

(25) Suit for restitution of conjugal rights—Decree, form of.

The following is the form of a decree in a suit for restitution of conjugal rights.—“That the defendant (the wife) do within a certain time (fixed) from the receipt of this order, return to co-habitation with her husband and live with him as claimed. That the other defendants be ordered to abstain from harbouring the wife or otherwise interfering with the rights of the plaintiff as her husband. A.W.N. 1882, 243. **T**

(26) Decree requiring wife to return to husband.

A decree requiring a wife to return to her husband is not illegal, and is in conformity with what is asked in a suit for restitution of conjugal rights. 20 W.R. 50. **U**

**1.—“And that there is no legal ground why the application should not be granted”**—(Continued).

**A.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG HINDUS—(Concluded).**

**(27) Conditions not to be imposed.**

It is not competent to a Court, in passing a decree for restitution of conjugal rights, to impose certain conditions under which the restitution can be had. 4 Bom. L.R. 107. Y

**(28) Separate house and separate maintenance to wife cannot be ordered.**

In decreeing a suit for restitution of conjugal rights in favour of the husband, the Court cannot impose on him the duty of providing his wife with a separate house and separate maintenance 4 Bom. L.R. 820. W

**(29) Decree may enjoin defendant to abstain from obstructing return of wife to husband**

(a) Where a decree for the return of plaintiff's minor wife and certain jewellery from illegal possession, is upheld in appeal, the lower appellate Court can only enjoin defendant to abstain from putting any obstruction in the way of the wife returning to her husband 20 W.R. 92. X

(b) A decree for restitution of conjugal rights should be passed in the form that the husband is entitled to conjugal rights, that his wife do return to live with him, and that her parents do not interfere in any manner to prevent her from so doing 2 Agra 111; 8 W.R. 467. Y

**B.—PROVISIONS OF MUHAMMADAN LAW RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS.**

**(1) Suit for restitution of conjugal rights open to Muhammadans.**

A Muhammadan husband may institute a suit in the Civil Courts of India to enforce his marital rights by compelling his wife against her will to return to co-habitation with him 3 W.R. P.C. 3. Z

**(2) Law governing such suits.** •

Such suit must, under the imperative words of S. 15, Reg. IV of 1793, and the nature of the thing, be determined according to the principles of Muhammadan Law. 8 W. R. P. C. 3. A

**(3) Suit for restitution by excommunicated husband.**

(a) In a suit by the husband, who is excommunicated from his caste, for the restitution of conjugal rights against his wife, it is open to the latter to require that he should get himself re-admitted into the caste, to which the parties belonged at the time of the marriage, before she is compelled by the Court to go and live with him as his wife 9 Bom. L. R. 451=31 R. 366. B

(b) The Indian Courts in passing a decree for restitution of conjugal rights can and shall impose conditions so as to safeguard the interest of the wife. 9 Bom. L. R. 451 at 457. See also 11 M.I.A. 551 (615); 8 A. 78, 5 C. 500 (508), 28 C. 37, pp.46, 47, 58. C

(c) The following observations of Chandavarkar, J., may also be noted:—

“The effect of the excommunication is that he cannot have social intercourse with members of that community, in which he was born, to which both he and his wife have belonged, and as members of which they



5.—“*And that there is no legal ground why the application should not be granted*”—(Continued).

**B.—PROVISIONS OF MUHAMMADAN LAW RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS—(Continued).**

have married. Such social intercourse may be of no moment to him; but the wife pleads that it is of moment to her. At the time of marriage she was not only Mahomedan by faith but also a member of the Kharwa community. Occupying that *status*, she married the husband. Under these circumstances it was of the essence of the marriage contract that they married because they were members of that particular community and that they must be regarded as having entered into the marital relation on the basis of that *status*.

The learned District Judge further observes —“There is here no case of an immemorial usage at variance with the ordinary Mahomedan Law. It is not disputed that the marriage law prevailing among the Kharwas is the same as that followed by other Mahomedans.” The answer to that is that, though the marriage law is the same, it is subject to the *status* of the parties as members of the Kharwa community. That law is annexed to the *status*.

On these grounds, the decree of the District Court passed in appeal must be varied by adding the following words:

“Upon the plaintiff securing re-admission into the Kharwa community of Mahomedans of which he and defendant No. 1 were members at the time of marriage” *Per Chandavarkar, J*, in 9 Bom. L.R. 451 at pp. 461, 462 = 31 B. 366 **D**

**(4) Agreement contemplating future separation cannot be countenanced by Courts.**

(a) The principle upon which the law looks askance at agreements contemplating the future separation of husband and wife is a principle which, if not *quod semper, quod ubique, quod ab omnibus*, is at least a thoroughly fixed and intelligible principle having its foundations in the welfare of society and the permanence of the marriage tie, 7 Bom. L.R. 602. **E**

(b) It is, therefore a principle which a Judge may enforce with less diffidence than if he were dealing with a doctrine of public policy of an uncertain or fluctuating nature. (*Ibid*). **F**

(c) An agreement, between husband and wife, providing for an immediate reunion, coupled with a provision for subsequent separation is bad under English Law, and also Mahomedan Law. (*Ibid*). **G**

(d) An agreement for an immediate reunion, coupled with a provision for subsequent separation is clearly bad under English Law. *Westmeath v. Salisbury*, (1931), 5 Bli. N.S. 339, *Cartwright v. Cartwright*, (1853), Deg. M. & G. 982. Cited in 7 Bom. L.R. 602 at p. 606. **H**

(e) A deed of separation is no answer to a suit for restitution of conjugal rights. *Anquez v. Anquez*, (1866), 1 P.D. 176 cited in 7 Bom. L.R. 602 (606). **I**

(f) But under the English Law, since the Judicature Act, 1873, a covenant not to sue for restitution of conjugal rights may be pleaded in bar to a suit in the Divorce Division. *Marshall v. Marshall*, (1879), 5 P. D. 19, cited in 7 Bom. L.R. 602. (606). **J**

**1.—“And that there is no legal ground why the application should not be granted ”—(Continued).**

**B.—PROVISIONS OF MUHAMMADAN LAW RELATING TO SUITS FOR  
RESTITUTION OF CONJUGAL RIGHTS—(Continued)**

**(5) Agreement that wife might live with her parents.**

According to the Mahomedan Law, it is not competent to parties contracting a marriage to enter into a separation deed by which husband consented that his wife might live with her parents. 6 Bom. L R. 728 K

**(6) Non-payment of prompt dower, how far bars a suit for restitution of conjugal rights.**

(a) A suit against a Mahomedan wife for restitution of conjugal rights, even after the consummation of marriage, cannot be maintained where the wife's dower is prompt and has not been paid. 3 A L J. 482, (2 A 831, F.) L

(b) According to the Muhammeden Law, marriage is a civil contract, upon the completion of which by proposal and acceptance, all the rights and obligations which it creates, arise immediately and simultaneously. 8 A. 149 = 6 A.W N. 53. M

(c) There is no authority for the proposition that all or any of these rights and obligations are dependent upon any condition precedent as to the payment of dower by the husband to the wife. Dower can only be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. Although prompt dower may be demanded at any time after marriage, the wife is under no obligation to make such demand, at any specified time during coverture, and it is only upon such demand being made that it becomes payable. This claim may be used by her as a means of obtaining payment of the dower, and as a defence to a claim for cohabitation on the part of the husband without her consent, but, although she may plead non-payment, the husband's right to claim cohabitation is antecedent to the plea, and it cannot be said that until he has paid prompt dower his right to cohabitation does not accrue. (*Ibid*) N

(d) The sole object of the rule allowing the plea of non-payment of dower is to enable the wife to secure payment. (*Ibid*). O

(e) Her right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid, and her surrender to her husband resembles the delivery of the goods to the vendee. Her lien for unpaid dower ceases to exist after consummation, unless at such time she is a minor or insane or has been forced, in which case her father may refuse to surrender her until payment. (*Ibid*). P

(f) It cannot in any case be pleaded so as to defeat altogether the suit for restitution of conjugal rights, which is maintainable upon the refusal of either party to cohabit with the other; and it can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of so much of the dower as may be regarded as prompt, in accordance with the principles recognized by Courts of equity under the general category of compensation or lien, when pleaded by a defendant in resistance or modification of the plaintiff's claim. (*Ibid*). Q

**J.—“And that there is no legal ground why the application should not be granted ”—(Continued).**

**B.—PROVISIONS OF MUHAMMADAN LAW RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS—(Continued).**

- (g) And in a suit for restitution of conjugal rights by the husband against his wife, who also pleaded non-payment of her prompt dower in bar of the suit, he would be entitled to a decree for restitution conditional on payment of the dower. 6 Bom. L R. 728. **R**
- (h) After consummation of marriage, the non-payment of dower even though proved cannot be pleaded in defence of an action for restitution of conjugal rights. 7 Bom. L. R. 684=30 B. 122. See also 8 A. 149=11 M. 327, 17 C. 670, 6 Bom. L.R. 728. But see 6 N.W.P. 94. **S**
- (i) A Mahomedan wife cannot resist a suit for restitution of conjugal rights on the ground that her dower has not been paid. L.B R. (1900-1902), Vol I, p. 145. (8 A. 149 ; 11 M. 327, F). **T**
- (j) A suit will not lie by a Mahomedan to enforce the return of his wife to his house even after consummation with consent, until her dower has been paid. 6 N.W P. 94. **U**
- (7) Mahomedan Law—Restitution of conjugal rights—Prompt dower—Stipulation as to residence.**
- (a) In a suit by a Mahomedan husband for restitution of conjugal rights, the defendant, his wife, pleaded, *first*, that he had entered into a stipulation at the time of the marriage to reside with her in the house of her father, and that he had not done so, and *secondly*, that he had not paid the exigible portion of the dower due to her, the marriage having been consummated — *Held* as to the first point, that the stipulation relied upon was not a sufficient answer to the plaintiff's claim. 17 C. 670. **Y**
- (b) Held upon the authorities that the non-payment of prompt dower is not a sufficient plea in bar of such a suit. (*Ibid*). **W**
- (8) Cruelty of husband a defence to a suit for restitution of conjugal rights by husband.**
- (a) In a suit for restitution of conjugal rights by a mahomedan, a wife may defend the suit on other grounds than actual violence of such a character as to endanger personal health or safety. 29 A. 222=A.W. N. 1907. 27=4 A.L.J. 60. **X**
- (b) In a suit for restitution of conjugal rights brought by the husband the plaintiff's claim ought not to be decreed when it appears that there is imminent danger of the wife being subjected to bodily violence if compelled to return to her husband. A.W.N. 1892, 77. **Y**
- (c) If the wife raise a defence of cruelty, she must prove violence of such a character as to endanger, or a reasonable apprehension of danger, to her personal health or safety. 8 W R. P.C. 3. **Z**
- (d) Where the plaintiff in a suit for restitution heaps the vilest of insults upon his wife in the plaint and charges her with immorality and adultery and does not substantiate the charge, the charge if untrue is in itself legal cruelty which would justify the wife in refusing to live with her husband and the Court will be justified in dismissing the plaintiff's suit. 29 A. 222=A.W.N. 1907, 27=4 A.L.J. 60. **A**

**1.—“And that there is no legal ground why the application should not be granted ”—(Continued).**

**B.—PROVISIONS OF MUHAMMADAN LAW RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS—(Concluded).**

(e) In a suit for restitution of conjugal rights the Court will not be justified in refusing a decree to the husband unless there is reasonable apprehension of bodily hurt on the part of the wife at the hands of her husband. 2 A.L.J. 608.

(f) All the cases of cruelty justifying a wife in refusing to live with her husband refer to direct acts on the part of the husband against the wife (*Ibid*). **B**

**(9) Covenant to build a house for wife.**

Where a Mohammedan husband at the time of marriage with his wife contracted with her that if she could not agree with her mother-in law he would build her a separate house *Held*, that the building of a separate house, though it might be a condition precedent to the enforcement of the decree, was not a condition precedent to the cause of action for restitution of conjugal rights. L.B.R. (1893—1900) 655. **C**

**C.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG PARSEES.**

**(1) Suit for restitution of conjugal rights among Parsees.**

Where a Parsee husband shall have deserted or without lawful cause ceased to cohabit with his wife, or where a Parsee wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights, and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly

If such decree shall not be obeyed by the party against whom it is passed, he or she shall be liable to be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both. See S. 36 of Act XV of 1865 (Parsee Marriage and Divorce) **D**

**(2) No suit to enforce marriage or contract arising out of marriage when Parsee husband under 16, or Parsee wife under 14 years**

Notwithstanding anything hereinbefore contained, no suit shall be brought in any Court to enforce any marriage between Parsees, or any contract connected with or arising out of any such marriage, if, at the date of the institution of the suit, the husband shall not have completed the age of 16 years, or the wife shall not have completed the age of 14 years. See S. 37 of Act XV of 1865 (Parsee Marriage and Divorce). **E**

**(3) Grounds for refusal of husband to live with wife.**

(a) The question what constitutes a lawful ground among the community of the Parsee for the refusal of the husband to live with his wife or *vice versa*, is one the determination of which lies within the cognizance of the delegates. 2 Bom. L.R. 845. **F**

(b) The word “just” in S. 36 of the Parsee Marriage and Divorce Act, 1865, is not intended to have any difference in signification, from the word “lawful” in the same section. (*Ibid*) **G**

**J.—“And that there is no legal ground why the application should not be granted”**—(*Concluded*).

**C.—PROVISIONS RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS AMONG PARSEES—**(*Concluded*).

**(4) Court when can refuse decree of restitution.**

- (a) To justify a refusal for the restitution of conjugal rights, the causes must be grave and weighty and such as to show a moral impossibility that the duties of married life can be discharged 2 Bom. L.R. 845. **H**
- (b) Discretion when applied to a Court of justice means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but legal and regular. (*Ibid*). **I**

**(5) Decree for restitution, how enforceable.**

- (a) A decree for restitution of conjugal right under the Parsee Marriage and Divorce Act is enforceable only in the manner provided in S. 36 of the Act 9 B H.C. (A.C.J.) 290. **J**
- (b) Such provision is in substitution of, and not in addition to, the ordinary remedies provided by the Code of Civil Procedure (*Ibid*). **K**

**D.—PROVISIONS OF BUDDHIST LAW RELATING TO SUITS FOR RESTITUTION OF CONJUGAL RIGHTS.**

**Suit for restitution among Burman Buddhists.**

- (a) A Burman Buddhist is entitled to sue for restitution of conjugal rights. 4 Ind. Cas. 753 = U B R '1909, I, Buddhist Law, Marriage, p. 1. **L**
- (b) The rule of Buddhist Law which allows a divorce at the will of one party, on surrender of all the joint property and payment of all the joint debts, without any fault in the other party, does not bar a suit for restitution of conjugal rights and is not opposed to the observance of conjugal rights in a subsisting marriage. (*Ibid*). **M**
- (c) A mere desire for such a divorce is an insufficient defence in a suit for restitution of conjugal rights. (*Ibid*). **N**

**33. Nothing shall be pleaded in answer to a petition for restitution of conjugal rights <sup>1</sup> which would not be ground for a suit for judicial separation or for a decree of nullity of marriage.**

Answer to petition.

**(Notes).**

**General**

**(1) Right of petitioner to restitution, general rule as to.**

- (a) Every petitioner in a suit for restitution is entitled to a decree, unless a respondent can establish a legal defence to the petition. *Scott v. Scott*, 4 S. and T. 113, 34 L.J.P. 23; 12 L.T. 211. **O**
- (b) But a decree of restitution will not be granted in an undefended suit, upon mere proof of the marriage, evidence of the other facts of the case must be given. *Pearson v. Pearson*, 33 L.J.P. 156. **P**

**(4) Custody of wife—Conduct of husband—Discretion of Court.**

- (a) In suits for the custody of the person of a wife, the Court requires from the husband proof not merely that he is the husband of the woman but also that he has done nothing to forfeit his right to such special relief by failure in his own duty towards his wife. 95 P.R. 1898. **Q**

**General—(Concluded).**

(b) He has to show not only that he is not estopped from exercising a claim or privilege, but that he has done his duty in the matter towards his wife so as to entitle him to claim this extreme exercise of authority. *(Ibid)*. R

(c) When a husband does all he could to divest himself of connection with and responsibility for, his wife, the Court will not be justified in putting in force the discretionary power vested in it and giving plaintiff a decree for the custody of his wife. *(Ibid)* S

**(3) Ground for a petition for restitution**

The only ground for a petition for restitution is that one of the married persons has withdrawn from living with the other, without lawful cause  
Browne and Powles on Divorce, Seventh Edition, 1905, p 78. T

**(4) Object of petition for restitution**

Its primary—has always been assumed to be to obtain the return to cohabitation of the respondent. Browne and Powles on Divorce, 7th Ed, p 78. U

N.B.—But it was said by Sir James Hannen, that he had never known an instance in which it appeared that the suit was instituted for any other purpose than to enforce a money demand. *Marshall v. Marshall*, 5 P.D. 23, 48 L.J.P. 49, 39 L.T. 640. Y

**(5) Suit for restitution instituted pending suit by respondent for dissolution or nullity or judicial separation**

(a) In case of a—, the suit for restitution would be stayed pending the determination of the respondent's suit 10 B 122 W

(b) It does not make much difference whether the two suits are instituted in the same Courts or in different Courts *(Ibid)* X

(c) Perhaps, if the two suits are instituted in the same Court they can be consolidated and heard together. 12 C. 706. Y

N.B.—The above procedure as to consolidation can be adopted only if the pending suit be a suit for nullity or judicial separation. If, however, the pending suit be one for dissolution, such suit and the suit for restitution cannot be consolidated and heard together. *(Ibid)*. See also S. 15 *supra*. Z

**(6) Right to begin.**

The—in a suit for restitution is generally with the petitioner, although the important issue may be on the respondent *Burroughs v. Burroughs*, 2 Sw. & Tr 544, 31, L.J.P. & M. 56 A

**I.—“Answer to a petition for restitution of conjugal rights.”****A.—WHAT IS GOOD ANSWER TO A PETITION FOR RESTITUTION****(1) General rule as to what are good answers in suits for restitution.**

In a suit for restitution of conjugal rights, no facts would be sufficient to bar the proceeding, except such as would have been sufficient to have entitled the parties to a divorce *a mensa et thoro* to a decree of nullity. *Holmes v. Holmes*, 2 Lee. 116 (1755). See also *Burlee v. Burlee*, 1 Add. 305 (1822). B

**(2) Adultery.**

(a) A wife guilty of adultery cannot maintain a suit for restitution. *Hope v. Hope*, 1 S. & T. 94; 27 L.J.P. 43; 31 L.T.O.S. 138. C

**"1.—"Answer to a petition for restitution of conjugal rights"—(Continued).**

**A.—WHAT IS GOOD ANSWER TO A PETITION FOR RESTITUTION—(Contd.).**

(b) It was held in some old cases that a suit for restitution could not be sustained by a wife, who had committed adultery, although the husband had also committed adultery. *Hope v. Hope*, 1 S. & T. 94; 27 L.J.P. 43; 31 L.T., O.S. 138. See also *Blackmore v. Blackmore*, L.R. 1 P. & D. 563, 37 L.J.P. 73, 18 L.T. 450. **D**

(c) Relief can be granted in matrimonial causes only where the petitioner comes to the Court with clean hands. See *Otway v. Otway*, 13 P.D. 141. **E**

**(3) Husband taking a mistress to live with him.**

The fact that the husband takes a woman to live with him as his mistress is a sufficient reason for the wife to refuse to live with the husband. 14 Bom. L.R. 240 (242). **F**

**(4) Husband's taking mistress being caused by wife's refusal to live with him.**

This right of the wife is not in any way demolished by the fact that the husband was driven to concubinage by his wife's continued refusal to live with him. (*Ibid*). **G**

**(5) Offer by husband to give up his mistress.**

An offer made in the Court by the husband to give up his mistress does not deprive the wife of her right of refusal to live with her husband (*Ibid*). **H**

**(6) False charge.**

A false charge against a husband of an unnatural offence, though not cruelty, even if persisted in, will justify the Court in rejecting the wife's petition for restitution. *Russell v. Russell*, 1895, P. 315. **I**

**(7) False charge of having committed an unnatural offence.**

A false charge of having committed an unnatural offence, though not cruelty, may be a *reasonable cause* upon which to refuse restitution. (*Ibid*). **J**

**(8) Conduct falling short of a matrimonial offence.**

(a) Any conduct, which, in the opinion of the Court, may create a reasonable cause for refusing restitution, may be alleged in the answer, though it fall short of a matrimonial offence. (*Ibid*). **K**

(b) As remarked by Lord Herschell, C., in a recent Scotch case in the House of Lords, "it is certain that a spouse may, without having committed an offence which would justify a decree of separation, have so acted as to deserve the reprobation of all right-minded members of the community. Take the case of a husband who has heaped insults upon his wife, but as just stopped short at that which the law regards as *coercion* or cruelty; can he, when his own misconduct has led his wife to separate herself from him, come into Court, and, avowing his misdeeds, insist that it is bound to give him a decree of adherence?..... Might not the Court refuse its aid to one who has so acted and regard his conduct as a bar to his claim to relief?" *Mackenzie v. Mackenzie*, (1895), A.C. at p. 389. **L**

**(9) Facts which do not constitute a complete answer to the charge. effect of.**

In a suit for restitution, facts which apparently do not, by themselves, constitute a complete answer to the charge may be relevant and important to the issue, and the Court will not refuse to inquire into them. *Stace v. Stace*, 37 L.J.P., 51; 18 L.T. 740. See also *Woodley v. Woodley*, 31 L.T. 647. **M**

**1.—“Answer to a petition for restitution of conjugal rights”—(Continued).**

**A.—WHAT IS GOOD ANSWER TO A PETITION FOR RESTITUTION—(Contd.).**

- (10) **Whenever the result of such a decree would be to compel the Court to treat one of the parties as deserting the other.**

Court may also refuse a decree for restitution ..., without reasonable cause, contrary to the truth of the case. *Russell v. Russell*, 1895, P. 315. **N**

(11) **Drunkenness.**

Dangerous drunkenness is a just cause. *Beer v Beer*, 94 L.T. 704, and see *Russell v. Russell*, 73 L.T. 295, 1895, P. 315, and *Oldroyd v. Oldroyd*, 74 L.T. 281, 1896, P. 175. **O**

**N.B.**—But it may not entitle the husband to a judicial separation. (*Ibid*). **P**

(12) **Impotence.**

Impotence with a prayer for nullity is also an answer to a suit for restitution of conjugal rights. *Ricketts v. Ricketts*, L.J. 95, 92. **Q**

(13) **Insanity.**

(a) Insanity is no answer to a suit for restitution *Radford v. Radford*, 20 L.T. 279. **R**

(b) Except where it is of such a nature as to render future cohabitation dangerous *Radford v. Radford*, 20 L.T. 279, *Hayward v. Hayward*, 1 S. & T. 81 See also on the subject of insanity as a defence, *Hanbury v. Hanbury*. (1892), P. 222, 61 L.J.P. 115 **S**

(14) **The following have been held to be good answers to a petition for restitution of conjugal rights.**

(i) **ANTENUPTIAL INCONTINENCE OF WIFE.**

- Ante-nuptial incontinence of the wife, discovered by the husband subsequent to the marriage is a good defence. *Perrin v. Perrin*, 1 Add. 1 (1822) **T**

(ii) **CRUELTY**

Cruelty committed by the husband is a good defence to a respondent wife. *Dysart v. Dysart*, 1 Robert, 109 (1844). **U**

(15) **What answers have been allowed to the wife.**

In a suit for restitution by the wife, the following have been held to be good defence for the husband —

(i) Violent and uncontrolled temper. *D'Arcy v. D'Arcy*, 19 L.R., Ir. 369. **V**

(ii) Habitual intemperance of the wife (*Ibid*). **W**

(iii) Violent conduct in the presence of the husband's guests (*Ibid*). **X**

(iv) Assaults on the husband. (*Ibid*). **Y**

(v) Acts or threats of violence and offensive language (*Ibid*). **Z**

(vi) False and scandalous statements against her husband's daughters (*Ibid*). **A**

(vii) Acts of violence towards his servants. *D'Arcy v. D'Arcy*, 19 L.R., Ir. 369. **B**

(viii) Plea that the wife had systematically aggravated the husband in the hope that he would retaliate with some act of violence which would entitle her to a judicial separation. *Woodsey v. Woodsey*, 31 L.T. 647; cf. *Stace v. Stace*, 37 L.J. P. & M. 51. **C**

(ix) Plea that the wife had made his home uncomfortable (*Ibid*). **D**



**L.—“ Answer to a petition for restitution of conjugal rights ”—(Continued).**

**A.—WHAT IS GOOD ANSWER TO A PETITION FOR RESTITUTION—(Conclud ).**

**(16) What answers have been allowed to the wife.**

Where the wife pleaded in answer to her husband's suit for restitution that he had no fixed abode in this country, but that his residence was in Ireland, that she was in delicate health and confined to her house, and that she was, in the opinion of her medical attendants, incapable of removing to Ireland without imminent danger to her health, such allegations were admitted to proof. *Molony v. Molony*, 2 Add 249 (1824). **E**

**(17) Husband's connivance at wife's misconduct.**

Where a suit for separation on account of the wife's adultery had been dismissed on the ground of the husband's connivance at her incest with his brother, it was held that it did not necessarily follow that the wife would succeed in a suit for restitution of conjugal rights. *Dennis v Dennis*, 3 Hagg 353 (note) (1808) See also *Drew v Drew*, 1 No. of Cas 315 (1842). **F**

**(18) Poverty of husband suing for restitution.**

The—may be a bar to his prosecuting his suit, especially if the wife also is not possessed of property. *Meana v Meana*, 13 W.R (Eng ) 50. **G**

**(19) There must be attempt to induce deserting party to return—Want of such attempt may be a bar to decree.**

(a) The petition must be preceded by a reasonable effort to induce the party who has withdrawn from cohabitation to return. *Field v Field*, 14 P D 26. **H**

(b) The effort, when by letter, must be conciliatory, and not threatening proceedings if not complied with. *Smith v. Smith*, 15 P.D 14. **I**

**B—WHAT IS NOT GOOD ANSWER TO A PETITION FOR RESTITUTION.**

**(1) The following have been held to be no answer to a suit for restitution of conjugal rights.**

**(i) DELAY.**

Delay is no answer to this kind of suits. *Beaucherk v. B.*, 1895, P. 220 ; 71 L. T 376. **J**

**(ii) INSANITY.**

(a) Insanity is no answer. *Hayward v Hayward*, 1 Sw and Tr. 83. (1892), P. 222. **K**

(b) A husband is not entitled to turn a lunatic wife out of doors, but such insanity may be shown as will render cohabitation unsafe, though withdrawal from cohabitation is not the proper remedy for it. *Hayward v. Hayward*, 1 Sw and Tr. 83. *Radford v. Radford*, 20 L.T., N. S. 279. **L**

**(2) Gross impropriety of conduct**

Where in a suit for restitution brought by the wife the husband charged her with adultery, and proved gross impropriety of conduct, a separation was decreed. *Owen v. Owen*, 4 Hagg. 261 (1831). **M**

**(3) Impropriety, not amounting to a matrimonial offence.**

....—., is no bar *Rippingall v. Rippingall* and D., 24 W.R. 967, (Eng). **N**

## 1.—“Answer to a petition for restitution of conjugal rights”—(Continued).

B.—WHAT IS NOT GOOD ANSWER TO A PETITION FOR RESTITUTION  
—(Continued).

## (4) Refusal prior to the suit to permit conjugal intercourse

Nor is a refusal prior to the suit to permit conjugal intercourse a bar to such suit (*Ibid*). O

## (5) Ante-nuptial incontinence.

———A plea by the respondent of the petitioner's pregnancy resulting from seduction, and that he married her under her fraudulent misrepresentations is bad. *Green v Green*, 21 L T, N. S. 401. P

## (6) Agreement to stay proceedings

A wife who agrees, upon terms to stay proceedings in a suit instituted by her for restitution will be bound by such agreement. *Stanes v. Stanes*, 3 P D 42, 47 L J P. 19, 39 L T 46. See also *Rowley v. Rowley*, 34 L J. P. 97. Q

## (7) Fraudulent inducement of husband

It is no answer to a wife's suit for restitution of conjugal rights that the husband was induced to marry her on a false representation that she was pregnant by him. *Green v Green*, 21 L T 401. R

## (8) Conduct of petitioner conducing to misconduct of respondent—English law

(a) In cases where the conduct of the petitioner has led to desertion by the respondent, and has amounted to sufficient cause to disentitle the petitioner to maintain a suit for judicial separation on the ground of desertion, the Court is now empowered to refuse to pronounce a decree of restitution of conjugal rights, although such misconduct on the part of the petitioner may not be sufficiently grave to enable the respondent to obtain a judicial separation. See *Oldroyd v. Oldroyd*, (1896), P. 175, 65 L J P. 113, 74 L T. 281, Browne and Powles on Divorce, 7th Ed., 1905, p. 85 S

(b) But the Court would decline to receive evidence of ante-nuptial incontinence on the part of a petitioner, with the view of showing that her child born after marriage was not the respondent's, as such circumstance would be irrelevant to the issue *Mason v Mason*, (1889), 61 L.T. 304. T

(9) Restitution of conjugal rights—Plea of cruelty—Cruelty of petitioner when ground for *Sering profus etitio*.

(a) In a suit for restitution of conjugal rights brought by the husband the question for decision was whether such cruelty had been proved as constituted a legal ground why the application should not be granted. It appeared that the petitioner had entertained from the commencement of the co-habitation a suspicion regarding his wife's ante-nuptial conduct for which there was a merely fanciful and insufficient foundation, and which he abandoned before the Court hearing his petition, and that on one particular occasion the petitioner beat his wife, using a degree of violence which undoubtedly caused physical pain to her, and in consequence of which she lodged a criminal complaint against him and left him. It further appeared from the evidence that the petitioner handled his wife roughly on other occasions during

**I.—“Answer to a petition for restitution of conjugal rights”—(Continued).****B.—WHAT IS NOT GOOD ANSWER TO A PETITION FOR RESTITUTION**  
—(Concluded).

the short period of their co-habitation, viz., two months; that their co-habitation had resulted in the pregnancy of the respondent with a child of which the petitioner claimed the paternity without contradiction and after reasonable delay again sought the society of his wife by instituting the present proceedings. Held that under the above circumstances it could not be said that there was any such probability of a recurrence of ill treatment on the petitioner's part amounting to legal cruelty as would justify the Court in refusing him the relief he sought. 101 P.R. 1882. U

- (b) It cannot be affirmed generally that every act of personal violence, or that every combination of acts of personal violence, voluntarily inflicted and productive of hurt or alarm, constitutes legal cruelty. the extent of the injury, the causes conducing to the use of violence by the husband, the circumstances under which it occurred, the probability of the recurrence of similar or greater violence, are all matters requiring consideration. (*Ibid*). V

**C.—SEPARATION DEEDS.****(i) INDIAN LAW.****Covenant not to sue—Effect under the Indian Law.**

- (a) A covenant not to sue cannot be pleaded by the respondent in a suit under S. 32 of this Act, for restitution of conjugal rights. Because section 33 declares that nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage. And a covenant not to sue is not among the grounds stated as entitling a party to either judicial separation or a declaration of nullity. See Rattigan on Divorce, 1897, pp. 181, 182. W
- (b) “But although the respondent cannot plead such covenant as an answer to the suit, it may be that, when once such covenant is brought to the knowledge of the Court, it will, as a Court of Equity, refuse to permit a suit to proceed, which is brought in violation of a perfectly valid agreement not to sue.” See Rattigan on Divorce, 1897, p. 182. X
- (c) “It is in the highest degree desirable, for the preservation of the peace and reputation of families, that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a Court of Justice.” *Per Justice Hennen in Marshall v. Marshall*, 5 P.D. at p. 23. Y

**(ii) ENGLISH LAW.****(1) Separation deed containing a covenant not to sue for restitution of conjugal rights.**

- (a) A separation deed executed by a husband and wife, containing a covenant by trustees for the wife not to sue her husband for restitution of conjugal rights, is, generally, a bar to such a suit by the wife. *Clark v. Clark*, 10 P.D. 189, 54 L.J.P. 57; 52 L.T. 234. See also *Marshall v. Marshall*, 5 P.D. 10, 48 L.J.P. 49; 39 L.T. 640. Z

**1.—“Answer to a petition for restitution of conjugal rights ”—(Continued).•**

**C —SEPARATION DEEDS—(Continued).**

**(11) ENGLISH LAW—(Continued)**

(b) But it was held otherwise where a husband, who had entered into a covenant to pay his wife 200*l.* a year, which he had not fulfilled, did not appear in the suit. *Tress v. Tress*, 12 P.D. 128, 56 L.J.P. 93; 57 L.T. 501. **A**

**(2) Separation deeds, what are**

(a) Separation deeds are records of bargains *Hunt v. Hart*, 18 Ch. D. 670. **B**

(b) They include compromises in divorce suits, and cannot, usually, be repudiated. (*Ibid*). **C**

**(3) Effect of covenants in such deeds.**

Husband and wife, covenanting voluntarily together, are bound by these covenants while the deed is in force, and either party suing in contravention of them will fail if they are set up in answer. *Marshall v. Marshall*, 5 P.D. 19, *Aldridge v. Aldridge*, 13 P.D. 210, *Parkinson v. Parkinson*, L.R. 2 P.D. 25, *Buckmaster v. Buckmaster*, L.R. 1 P. & D. 713, *Gandy v. Gandy*, 7 P.D. 168, *Powell v. Powell*, and J. L.R. 3 P. & D. 186, *Webber v. Webber*, and P. 1 Sw. & Tr. 219, 38 L.J., Mat. 11, *Beauclerk v. Beauclerk*, 1895, P. 220. **D**

**(4) Such covenants if to be specifically pleaded.**

If a party fails to plead the covenant in the separation deed, the Court does not necessarily act upon it *Tress v. Tress*, 12 P.D. 128, But see also *Kennedy v. Kennedy*, P. 1907, 49. **E**

**(5) Court may of its own accord take notice of such covenants.**

A covenant in a deed of separation not to sue for restitution, though ignored by the respondent, will not be ignored by the Court. *Kennedy v. Kennedy*, P. 1907, 49 **F**

**(6) Failure on the part of the respondent to carry out his or her part of the agreement.**

(a) **A** —, would entitle the petitioner to sue for restitution notwithstanding a covenant not to sue contained in such agreement *Tress v. Tress*, 12 P.D. 128, But see *Parkinson v. Parkinson*, L.R. 2 P. 25 **G**

(b) Such failure must be either a total failure or a failure in important respects. (*Ibid*) *Desaut v. Wood* 14 Ch. D. 605 **H**

(c) Consequently mere trifling breaches of the covenant by the respondent will not entitle the petitioner to sue in spite of his or her covenant not to sue. (*Ibid*). **I**

(d) If upon investigation, there are breaches of it by the respondent, it is not allowed to tie the hands of the Court. *Kennedy v. Kennedy*, P. 1907, 49. **J**

**(7) Covenant not to sue never acted upon**

**A** — is no bar to a suit. *Cock v. Cock*, 1 Sw. & Tr. 513. **K**

**(8) Covenant not to sue obtained by improper means.**

**A** — is no bar to suit by the party who has entered into such a covenant. *Dagg v. Dagg and Speke*, 7 P.D. 17, 51 L.J. P. & M. 19. **L**

1.—“Answer to a petition for restitution of conjugal rights”—(Concluded).

C.—SEPARATION DEEDS—(Concluded).

(11) ENGLISH LAW—(Concluded).

(9) Covenant not to sue obtained without reasonable excuse.

Nor is a —a bar to such suit. (*Ibid*)

M

(10) Covenant not to sue in respect of previous misconduct.

A —is no bar to the covenantor relying upon such misconduct as a bar to relief in a suit subsequently instituted by the covenantee. *Gooch v. Gooch*, (1898). P. 99.

N

(11) Subsequent reconciliation of parties

A —, as evidenced by resumption of cohabitation completely puts an end to a deed of separation *Scholey v. Goodman*, 8 Moore, 350 ; *Nichol v. Nichol*, 31 Ch. D 524.

O

### VIII —Damages and Costs

34. Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition

Husband may claim damages from adulterer. <sup>1</sup>

to the District Court or the High Court limited to such object only, <sup>2</sup> claim damages from any person on the ground of his having committed adultery with the wife of such petitioner.

Such petition shall be served on the alleged adulterer and the wife unless the Court dispenses with such service, or directs some other service to be substituted.

The damages to be recovered on any such petition shall be ascertained by the said Court, although the respondents or either of them may not appear

After the decision has been given, the Court may direct in what manner such damages shall be paid or applied.

• (Notes).

General.

(1) Corresponding English Law.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85). S. 33, provides as follows. —“Any husband may, either in a petition for dissolution of marriage or for judicial separation or in a petition limited to such object only, claim damages from any person on the ground of having committed adultery with the wife of such petitioner, and such petition shall be served on the alleged adulterer and the wife, unless the Court shall dispense with such service or direct some other service to be substituted, and the claim made by every such petition shall be heard and tried on the same principles, in the same manner and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in Courts of Common Law, and all the enactments herein contained with reference to the

## General—(Concluded).

hearing and decision of petitions to the Court shall so far as may be necessary be deemed applicable to the hearing and decision of petitions presented under this enactment; and the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury, although the respondents or either of them may not appear, and after the verdict has been given, the Court shall have power to direct in what manner such damages shall be paid or applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife " P

## I—"Husband may claim damages from adulterer".

## A—DAMAGES—MEASURE OF DAMAGES

## (1) General rule as to assessment of damages.

- (a) In assessing damages the first question for the jury is, what damage the petitioner has sustained Browne and Powles on Divorce, Seventh Edition 1905, p. 123 Q
- (b) The measure of damages is what the petitioner has lost in his wife. *Stone v. Stone and Appleton* (1861), 3 Sw. and Tr 608. R
- (c) Proof of adultery does not necessarily entitle a petitioner to damages. It must also be shown that there are no circumstances which disentitle the petitioner to damages *Gibson v. Gibson and West*, (1906), 22 T. L.R. 361, but see *Pegler v. Pegler and Russell*, (1901), 85 L T. 649; *Spedding v. Spedding and Smith*, (1862), 31 L J. (P M & A) 96, Note. S

## Where case is proved some damages must be awarded.

- (d) Where the adultery is proved, and no facts are proved that would disentitle the petitioner to damages, the Court is bound to award some damages, however small it may be *Spedding v. Spedding and Smith*, (1862) 31 L J P. & M. 96 Note. T
- (e) The Court cannot dismiss the claim for damages simply on the ground that the petitioner has suffered no damage. (*Ibid*). U

## (2) Grounds for giving damages.

Although one main ground for damages is the breaking up of the matrimonial home, it is not the only ground Browne and Powles on Divorce, Seventh Edition, 1905, p 123 Y

N.B.—In *Keyse v. Keyse*, 11 P.D. 100, Sir James Hannen said to the jury. "First you must remember you are not here to punish at all...all the law permits a jury to give is compensation for the loss the husband has sustained." W

## (3) Means of co-respondent not material.

- (a) It is immaterial whether the co-respondent can pay that loss or not. *Cowing v. Cowing and Wollen*, (1863), 33 L J. (P.M. & A.) 149; *Bikker v. Bikker and Whitewood*, (1894), 67 L T 721. X
- (b) For if the co-respondent "cannot pay in purse he must pay in person." (*Ibid*). Y

## 1.—“Husband may claim damages from adulterer”—(Continued).

## A.—DAMAGES—MEASURE OF DAMAGES—(Continued).

(c) “The means of the co-respondent have nothing to do with the question. The only question is what damage the petitioner has sustained, and the damage that he has sustained is the same whether the co-respondent is a rich man or a poor man” *Keyse v. Keyse*, 11 P D 102, *Darbishire v Darbishire*, 62 L.T. 664; *Bikher v. Bikher and Whitehead*, 67 L.T. 141. Z

(d) The jury ought not to consider the means of the co-respondent, except in so far as they were of assistance to him in seducing the wife *Stone v. Stone and Appleton* (1861), 3 Sw. & Tr. 608. A

## (4) Conduct of the co-respondent not to be considered.

Juries have no right in a divorce case to take into consideration the conduct of the co-respondent. But as a matter of fact they nearly always do, however strongly the judge may direct them to the contrary. *Keyse v. Keyse*, 11 P D. 100 B

## (5) Conduct of the husband a material consideration

(a) The jury ought to take into consideration the conduct of the husband and inquire how far he may by his conduct or carelessness, have contributed to the wife's wrong doing *Keyse v. Keyse*, 11 P.D. 100, 55 L.J. P. 54. C

(b) Where a husband, by reason of his own conduct, is not entitled to a decree of dissolution or otherwise, no damages should be awarded *Cox v. Cox and Ward*, (1906), P. 267 (petition for damages only), *Story v. Story and O'Connor*, (1887), 12 P.D. 196 D

(c) To hold otherwise, would mean that he might continue to live with his wife and enjoy the damages *Hymn v. Hymn*, (1904) P. 403 (cohabitation resumed), *Ravenscroft v. Ravenscroft*, (1872), L.R., 2 P. & D. 376. E

## (6) Consideration for jury—Conduct of husband

(a) In assessing damages, according to Sir Crosswell Crosswell, “the first question is, how has the husband demeaned himself? Has he shown carelessness or want of caution, indicating a want of due value for his wife's chastity? The next question is, did they live happily together? Because if they lived unhappily, his loss in his wife is not so great. The next topic that is generally considered is the position of the defendant. How came he to be introduced? Under what circumstances did he become intimate with the family. Was there anything like treachery in his conduct? That is a legitimate consideration, not that you are to punish the man, but the conduct of the defendant, the mode in which he proceeds to obtain the affection of the lady, is important for your consideration. If a woman surrenders herself very readily to a man who takes no pains to obtain her affections, or if you have reason to suppose that she has made the first advances, you are to estimate, as far as you can form an estimate in money, the loss the husband has sustained.” *Comyn v. Comyn and Humphreys*, 32 L.J. P. & M. 210. F

(b) “If it is proved that a man has led a happy life with his wife, that she had taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife

## 1.—“Husband may claim damages from adulterer”—(Continued).

## A.—DAMAGES—MEASURE OF DAMAGES—(Continued)

away from her husband, then the jury will take these facts into consideration. But the question in this case, as in so many others, is whether or not these losses have been cast upon the petitioner by the act of the co-respondent. If he did not seduce her away from her husband, that makes a very material difference in considering the amount of damages to be given. In considering these questions, undoubtedly the conduct of the husband must be looked to. Here the husband and wife had been leading an unhappy life before they parted, and he knew that she had no means of living... What can any husband expect who has separated from his wife who he knows has no means? What will follow? Why, that in ordinary course of things she may yield to the temptation of securing support from some other man.” *Keyse v. Keyse*, 11 P.D. at pp. 101, 102. G

## (7) Condonation of wife's offence a bar to grant of damages.

(a) Once a husband has condoned his wife's adultery with a particular man, he cannot obtain damages from him, no matter what the wife's conduct, independently of that man, may be. *Bernstein v. Bernstein*, (1892), P. 375, *Bernstein v. Bernstein*, (1894), P. 292, C.A., overruling *Pomero v. Pomero*, (1841), 10 P.D. 174. H

(b) It was formerly held in the Divorce Court that condonation was no bar to a claim for damages. See *Pomero v. Pomero*, 10 P.D. 174, 51 L.J. P. 93, *Bernstein v. Bernstein*, (1892), P. 375, 62 L.J.P. 16; 67 L.T. 529. I

• **N.B.**—But the above decisions in favour of this view were overruled by the Court of Appeal in 1893. *Bernstein v. Bernstein* (1893), P. 292, 63 L.J.P. 3, 69 L.T. 513. J

## (8) Resumption of cohabitation is another bar.

Where cohabitation is resumed after adultery, no damages were awarded. *Hyman v. Hyman*, (1901), P. 403. K

## (9) Acquittal of respondent is no bar to grant of damages against co-respondent

(a) Where a husband is blameless, a co-respondent, if found guilty, may be cast in damages, although the respondent be found not guilty, having been forced. *Long v. Long and Johnson*, (1890), 15 P.D. 218. L

(b) In one case although the co-respondent did not appear, the respondent was acquitted, the jury assessed the damages at a farthing. *Stone v. Stone and Appleton*, (1861), 3 Sw. & Tr. 608. M

(c) In a suit for dissolution the respondent did not appear, and the jury found a verdict for 50 £. damages. The issue of the respondent's adultery being for the Court, it was found that the respondent had not committed adultery—the connection having been against her will but the Court gave judgment against the co-respondent for damages and costs. *Long v. Long*, 15 P.D. 218; 60 L.J.P. 27. N

## (10) Husband living apart from wife no bar to awarding damages.

The mere fact that the husband was living apart from his wife at the time of her seduction, is no answer to his claim for damages. *Evans v. Evans and Platts*, (1899), P. 195; 68 L.J.P. 70; 81 L.T. 60. O



**I.—“Husband may claim damages from adulterer” —(Continued).**

**A.—DAMAGES—MEASURE OF DAMAGES—(Concluded).**

**(11) Ignorance of co-respondent that respondent was married no bar to award of damages.**

(a) Damages may be recovered against a co-respondent even when he did not know the respondent was a married woman. *Lord v. Lord and Lambert*, (1900), P. 297; 69 L.J. P. 51 **P**

(b) The fact that the co-respondent did not know that the respondent was a married woman does not absolutely disentitle the husband to claim. *Watson v. Watson and Writts*, (1905), 21 T.L.R. 320. **Q**

(c) If the husband relies on such knowledge, he must prove it, for this question bears on the amount of damages. *Lord v. Lord*, (1900), P. 297; differing from *Darbishire v. Darbishire and Baird*, (1890), 62 L.T. 664, and from *Newby v. Newby and White*, (1897), 77 L.T. 142, *Calcraft v. Harborough*, (1831), 4 C. & P. 499. **R**

**(12) Petitioner being undischarged bankrupt no bar**

A petitioner who is an undischarged bankrupt may now claim damages, without being compelled to give security for the co-respondent's costs. *Blackett v. Blackett*, (1902), P. 170, 71 L.J.P. 69, 86 L.T. 669; overruling *Smith v. Smith and Palk*, 7 P.D. 227, 47 L.T. 355 **S**

**(13) Petitioner guilty of adultery, if bar to grant of damages to him.**

Where the petitioner admitted to an act of adultery which had been condoned by the wife, the Court held that his conduct disentitled him to a decree and therefore to damages. *Storey v. Storey*, 12 P.D. 196; 57 L.J.P. 15; 57 L.T. 596. **T**

**(14) Agreement of parties as to amount of damages not considered.**

(a) The Court cannot recognise any arrangement come to between the parties as to the amount of damages to be paid. *Callwell v. Callwell*, 3 S. & T. 259. **U**

(b) But where an order is made that the damages be paid to the petitioner in the suit, there is nothing to prevent him from accepting a less sum than that assessed. *Dale v. Dale*, 15 L.T. 595. **Y**

**(15) Decree nisi being rescinded—Effect on damages awarded**

Where a decree nisi is rescinded, it is re-cinded for all purposes, and any damages for which a verdict has been given will fall with it. *Hyman v. Hyman*, (1904), P. 403, 73 L.J.P. 106, 91 L.T. 361 **W**

**(16) Bankruptcy of Co-respondent.**

Damages obtained in the Divorce Court, which are subject to any order of the Court appropriating them to a particular purpose, are provable under the bankruptcy of the co-respondent. *O'Gorman. In re, Bala, Ex parte*, (1899), 2 Q.B. 62, 68 L.J. 2 B. 650; 20 L.T. 501. **X**

**(17) Husband being an uncertificated bankrupt.**

The — is good ground to order him to give security for the costs of the person against whom he claims damages. *Smith v. Smith*, 7 P.D. 227. **Y**

**(18) Power of High Court on a motion to confirm decree of dissolution by District Court.**

The — is very wide; and the High Court can deal with the case as justice may require. Such power extends also to dealing with the award of damages by the lower Court, even though the co-respondent has not appealed. See 20 B. 362; 35 P.R. 1897. **Z**

## 1.—“Husband may claim damages from adulterer”—(Continued).

## B—CIRCUMSTANCES WHICH TEND TO REDUCE THE DAMAGES.

## (1) The following circumstances tend to reduce the damages.

(i) If the wife was not virtuous before marriage *Darbishure v. Darbishure and Baird*, (1890), 62 L T 664. **A**

(ii) If the married life has been unhappy. (*Ibid*) **B**

(iii) That the woman was so degraded and abandoned that the husband lost nothing in her adultery *Rattigan on Divorce*, 1897, p. 190. **C**

(iv) That the respondent did not know or have reason to believe that the woman with whom he committed adultery was married at the time. See *Rattigan on Divorce*, 1897, pp 190, 191, *Lord v Lord*, (1900), p 297. **D**

**N.B**—In such a case, the co-respondent may be made to pay the costs of the petitioner (*Ibid*), See also S 35, *infra* **E**

(v) That the woman was reduced not by him, but, that the initiative came from the woman. See *Rattigan on Divorce*, (1897), p. 190 **F**

## (2) Separation deed, no ground to reduce damages

(a) Where a petitioner and his wife had entered into a separation deed in consequence of the respondent's intimacy with the co-respondent, and the wife committed adultery with the co-respondent subsequent to the date of the deed, the Court held that the husband was entitled to the same amount of damages as though no separation deed had been executed *Izard v Izard*, 14 P D 45, 58 L.J.P 83, 60 L T. 399. **G**

(b) “It must be obvious to any one that if a husband and wife have consented to live separately, and have, in fact, lived separately for a number of years, the injury to the husband would be compensated in the smallest amount of damages. But each case varies with the different circumstances of life, and I have no hesitation in telling you that if a man makes the acquaintance of another man's wife, engages her affections, and is the cause of her separation from her husband, and then, after such separation, commits adultery with her, the husband is entitled to the same amount of damages as he would have been entitled to if no separation deed had been executed between them, and that even if no adultery had been committed before the separation.” *Per Butt, J., Izard v. Izard*, 14 P D 45, 58 L.J P & M. 83. **H**

## (3) Husband and wife living apart under a deed of separation.

(a) It is not for the jury to punish; and where a husband and wife are living apart under a deed the damages may be reduced to a minimum, unless the co-respondent's conduct brought about the separation. *Izard v. Izard*, (1889), 14 P.D 45, *Laws of England*, Vol. XVI, pp. 409, 513. **I**

(b) And the extent to which this is the case must be considered. *Evans v. Evans*, (1899), p. 195. **J**

(c) If a husband and wife had been living apart, before the wife's adultery, that would be a good reason for assessing damages at a lower rate. *Browne and Powles on Divorce*, 7th Ed., (1905), p. 123 **K**

(d) But a husband is wronged by the seduction of his wife, far beyond the loss he sustains to the breaking up of his home. (*Ibid*). **L**

1 — "*Husband may claim damages from adulterer*" — (Continued).

## C.—CIRCUMSTANCES WHICH TEND TO ENHANCE THE DAMAGES.

## (1) The following circumstances tend to enhance the damages —

- (i) Where the wife has taken good care of the house and children *Keyse v. Keyse*, (1899), P. 195. M
- (ii) Where she assisted in the husband's business *Keyse v. Keyse*, (1886), 11 P.D. 100. N

## (2) The wife being earning member by which the petitioner was benefited.

In estimating the amount of damages, the fact that the wife was earning money, of a portion of which the petitioner had the benefit, may be taken into account. *Darbishire v. Darbishire*, 62 L.T. 664. O

## D.—ORDER AS TO THE PAYMENT AND DISPOSITION OF DAMAGES.

## (1) Principle as to award of damages.

"The right of the husband is not, as the law now is, to have damages for his own pocket" *Keats v. Keats and Montezuma*, 28 L.J. P. & M. at p. 61. P

## (2) Examples as to apportionment of damages

(a) Damages, assessed at 5,000 £, were apportioned as follows — 1,500 £, in addition to his surplus taxed costs, to be paid to the husband, 1,500 £, to be settled on the youngest child of the marriage, aged five, the only one remaining with the petitioner, the three other children, all of whom were of full age, having left their father and cast in their lot with their mother, the balance to be invested in an annuity for the respondent's life, to be paid to her as long as she lived chaste and did not become the wife of the co-respondent, and in the event of her breaking any of these conditions, to be paid to the petitioner *Meyern v. Meyern and Myers*, 2 P.D. 254, 46 L.J. P. & M. 5 Q

(b) In making this apportionment the learned Judge said "It appears that the co-respondent is a married man, and it is said that since her separation from the petitioner the respondent has been supported and visited by the co-respondent. Indeed, I am asked to come to the conclusion that their guilty intercourse has been carried on since the pronouncing of the decree in the suit. My object, then, in making the annuity payable to the respondent, so long as she lives a chaste life, is that she shall have the strongest possible motive to abstain from troubling the married life of the co-respondent and his wife. I do not impose as a condition that the respondent shall not marry again, that, perhaps, would be the best thing that could happen. But, in the event of the co-respondent's wife dying, and his marrying the respondent, then, as she would have to be supported by him, there would be no reason for her continuing to receive the annuity, and in that event it ought to go to the petitioner. I pass over the children, save the youngest, but not because I think they might not be entitled to some share in the damages by reason of their being of full age. I do not think that would be a sufficient reason for passing them over. There might be circumstances under which I should have allowed some portion of the damages to be paid to them, but two of these

1.—“*Husband may claim damages from adulterer*”—(Continued).

## D.—ORDER AS TO THE PAYMENT AND DISPOSITION OF DAMAGES

—(Concluded).

three children have cast in their lot with their mother, and in putting her in possession of this annuity I leave it to her to apply such portion of it to their maintenance as she may think fit, and also furnish another and additional motive for her observance of the conditions which I have named.” *Meyern v. Meyern and Myers*, 2 P.D. 254, 46 L.J.P. & M. 5. R.

**N.B.**—In the above case the petitioner was a banker's clerk with a yearly salary of between 400 £ and 500 £ and the respondent had no means of support or provision for her maintenance, and of the three children of the marriage who were of full age two were sons and one a daughter. See *Hattigan on Divorce*, (1897), pp 198, 199. S

(3) **Speedy payment, order as to.**

Where there is danger of the petitioner losing the damages by delay, the Court will make an order for speedy payment. *Bent v Bent*, 30 L.J.P. 189, 5 L.T. 120, *Pritchard v Pritchard*, L.R. 2 P. & D. 53; 39 L.J.P. 46, 22 L.T. 629, *Evans v Evans*, L.R. 1 P. & D. 36. T

(4) **Order as to disposition of damages, practice as to.**

(a) In making orders as to the disposition of damages the Court will be guided by the circumstances of each individual case. Sometimes the Court orders them to be paid over to the petitioner sometimes that a part be paid to the petitioner and the remainder settled for the benefit of the children of the marriage (if any), sometimes the whole is ordered to be settled for the benefit of the children, and sometimes the whole or a part is ordered to be settled for the benefit of the adulterous wife. But in every case it is usual to order that the petitioner's costs—over and above his taxed costs—shall be first paid out of such damages. See *Clark v Clark*, 2 S. & T. 520, 31 L.J.P. 61, 6 L.T. 639, *Taylor v Taylor*, 31 L.J.P. 23, 22 L.T. 140, *Billingay v. Billingay*, 35 L.J.P. 84. U

(b) In one case, the Court ordered the whole of the damages (150£) to be invested in the purchase of a Government annuity for the wife's benefit. *Latham v. Latham*, 30 L.J.P. 43. Y

(c) In one case where the damages were 2,500 £, the Court ordered that, after payment of the petitioner's extra costs, the residue should be settled on the respondent for life *dum casta viveret*—refusing to add the word *unrupta*—and after her death, or on breach of that condition, upon the issue of the marriage. *Narracott v Narracott*, 33 L.J.P. 192, 2 S. & T. 403, 10 L.T. 389. W

(d) Where the damages were 5,000 £, the Court ordered them to be applied as follows. 1,500 £, was settled on the youngest child of the marriage, aged five years, the only one remaining in the petitioner's custody; 1,500 £., was given to the petitioner, and also his costs of the suit in addition to those which had been taxed against the co-respondent; the balance was invested in the purchase of a life annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent, and, in the event of her breaking either of those conditions, to be paid to the petitioner. *Meyern v Meyern*, 2 P.D. 254, 46 L.J.P. & M. 5, 35 L.T. 909. X

1.—“*Husband may claim damages from adulterer*”—(Concluded).

## E.—PRACTICE IN CLAIMING DAMAGES.

## (1) In what cases claim for damages is made.

Claims for damages in petitions, other than for dissolution of marriage, hardly ever occur. Laws of England, Vol. XVI. p. 500; but see also *Mason v. Mason*, (1882), 7 P D. 233, *Jox v. Cox and Warde*, (1906), P. 267.

## (2) Amount claimed must be stated in the petition.

Y

Where damages are asked for the petition must specify the amount claimed. *Spedding v. Spedding*, 31 L.J.P. 96; *Pegler v. Pegler*, 85 L.T. 649 (1902).

Z

## (3) The petition must ask the Court to fix the amount and also direct its application.

The Court is prayed in the petition to ascertain what amount shall be paid and to direct how it shall be applied. Laws of England, Vol. XVI. p. 501.

A

## (4) A liberal claim is to be made as damages.

A liberal amount should be claimed as damages, because it is not permissible to inform the jury of the amount claimed and if they give a larger sum, the petition may have to be amended and reserved. *Beckett v. Beckett and Jones*, (1901), P. 85.

B

## (5) Amendment of petition as to claim for damages—Addition of co-respondent.

(a) A claim for damages may be added or abandoned by an amendment. *Bartlett v. Bartlett and Balmanno*, (1864), 31 L.J. (P.M. & A.) 64, *Symonds v. Symonds and Hannan*, (1870), 23 L. T. 568, *Henslow v. Henslow and Beardsley*, (1871), 40 L.J. (P & M.) 31.

C

(b) But the addition of a co-respondent will not be allowed unless *bona fide* *Codrington v. Codrington and Anderson*, (1864), 3 Sw. & Tr 368.

D

## (6) Assignment of damages awarded.

Where a petitioner has assigned his damages the assignee has no right to intervene in the suit. *Hunt v. Hunt*, (1894), P. 247, 63 L.J.P. 136.

E

2.—“*Limited to such object only.*”

## (1) Claim for damages without claiming dissolution or judicial separation.

(a) Under this section it is open to a husband to make a—But See *Ramsden v. Ramsden and Luck*, Times Law Rep. Vol. II, p. 867; *Rattigan on Divorce*, (1897), p. 189.

F

(b) But a petition by the husband limited to damages alone is of very rare occurrence. (*Ibid*)

G

(c) But condonation of the wife's guilt would be a bar to claim for damages. See *Bernstein v. Bernstein*, (1893), p. 292, 63 L.J. P. & M. 3; *Rattigan on Divorce*, (1897), pp 189, 190.

H

(d) And a claim merely for damages against the alleged adulterer without either dissolution or judicial separation being prayed for will lead to inference of condonation. (*Ibid.*)

I

**35.** Whenever in any petition presented by a husband the alleged adulterer has been made a co-respondent, and the adultery has been established, the Court may order the co-respondent to pay the whole or any part of the costs of the proceedings :

Provided that the co-respondent shall not be ordered to pay the petitioner's costs. •

(1) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute, or

(2) if the co-respondent had not at the time of the adultery reason to believe the respondent to be a married woman.

Whenever any application is made under section seventeen, the Court, if it thinks that the applicant had no grounds or no sufficient grounds for intervening, may order him to pay the whole or any part of the costs occasioned by the application.

Power to order  
adulterer to pay  
costs.  
  
litigious intervenor  
to pay costs.

**(Notes).**

**Corresponding English law.**

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), Secs. 34 and 51, respectively provide as follows —

“Whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent and the adultery shall have been established, it shall be lawful for the Court to order the adulterer to pay the whole or any part of the costs of the proceedings.” (Sect. 34).

“The Court on the hearing of any suit, proceeding, or petition under this Act, and the House of Lords on the hearing of any appeal under this Act, may make such order as to costs as to such Court or House respectively may seem just: Provided always, that there shall be no appeal on the subject of costs only.”

**N.B.**—FOR NOTES UNDER THIS SECTION, SEE APPENDIX—UNDER HEADING “COSTS.”

**IX.—Alimony.**

**36.** In any suit under this Act, whether it be instituted by a husband or a wife, and whether or not she has obtained an order of protection, the wife may present a petition for alimony pending the suit.

Alimony pendente  
lite<sup>1</sup>.

Such petition shall be served on the husband; and the Court, on being satisfied of the truth of the statements therein contained, may make such order on the husband for payment to the wife of alimony pending the suit as it may deem just :

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average nett income for the three years next preceding the date of the order, and shall continue, in case of a decree for dissolution of marriage or of nullity of marriage, until the decree is made absolute or is confirmed, as the case may be.

(Notes).

*I. — "Alimony pendente lite."*

A — GENERAL

(1) **Right of wife to apply for alimony, general rule as to**

The husband and wife being in litigation, the wife is entitled to apply for an order on him for support during the suit, and means for contesting it, and for permanent alimony or maintenance, if the Court think fit, after the suit is over. *Wilson v. Wilson*, 2 Hagg. C R 204, *Miles v. Chilton*, 1 Rob 700, M C A 1857, Ss. 24, 33, 1891, Ss. 2, 3; and *Theobalds v. Theobalds*, 15 P D, 26 J

(2) **It is not material whether she applies as petitioner or respondent.**

She may apply either as petitioner or respondent, unless the presumption that the husband has the means is rebutted by evidence, but he may apply for support when she has means and he has not. *Ibid*; Dixon on Divorce, 4th Ed., 1908, p. 214. K

(2-a) **Provision for wife who is a party to a suit Temporary or permanent**

(a) The provision which the Courts may make for a wife who is a party to a suit of a matrimonial nature is either temporary or permanent. *Browne and Powles on Divorce*, 7th Ed., 1905, 135 L

(b) The provision made to the wife in Matrimonial suits is of three kinds —

(i) *Alimony pendente lite*, from petition to final decree

(ii) Permanent alimony, continued after decree of judicial separation

(iii) Permanent maintenance, continued permanently after decree of divorce or nullity. *Wells v. Wells and H*, 3 Sw and Tr. 542, *Blackburne v. Blackburne*, 36 L J., Mat 86, Dixon on Divorce, 4th Ed., 1908, p. 214. M

(3) **Temporary provision, nature of**

(a) The temporary provision is made to enable her to live during the progress of the suit. *Browne and Powles on Divorce*, 7th Ed., 1905, 135, Dixon on Divorce, 4th Ed., 1908, p. 124 N

(b) Such provision is generally spoken of as "*alimony pendente lite*" or "*alimony pending suit*." (*Ibid*). O

(4) **Permanent provision, nature of.**

(a) The permanent provision is made for the wife after the final decree has been pronounced. (*Ibid*) P

(b) Such provision is spoken of as "*permanent maintenance*" or "*permanent alimony*." (*Ibid*). Q

(5) **"Permanent alimony"—"Maintenance"—Use of the above words.**

The word "maintenance" is generally used to indicate the permanent provision made for a wife after a decree of dissolution of marriage; the expression "permanent alimony" is used to indicate the permanent provision made for the wife in all other suits. (*Ibid*). R

1.—“*Allimony pendente lite*”—(Continued).

## A.—GENERAL—(Continued).

(6) *Allimony pendente lite* and *Alimony permanent*—Difference.

- (a) Generally there is an important distinction between permanent alimony and *alimony pendente lite*, the former being always larger in amount than the latter. *Kempe v. Kempe*, 1 Hagg. 532. S
- (b) Permanent alimony would generally be decreed from the date of the sentence. *Cooke v. Cooke*, 2 Phill 41, *Durant v. Durant*, 1 Hagg. 528 (1825). T
- (c) But this is not an invariable rule. *Taylor v. Taylor*, 'Arches Court, May, 14th, 1796), cited in *Cooke v. Cooke*, 2 Phill. 41. U
- (d) Even where an appeal is preferred from the decree, the alimony would still continue. *Lovelien v. Lovelien*, 1 Phill 208 (1810). See, also, *Brisco v. Brisco*, 3 Phill. 206. Y
- (e) *Alimony pendente lite* generally ceases upon a verdict finding the wife guilty of adultery. *Dunn v. Dunn*, 13 P. D. 91, 57 L.J.P. 58. W
- (f) But under special circumstances it may be otherwise ordered by the Court. *Dunn v. Dunn*, 13 P. D. 91, 57 L.J.P. 58. X

## (7) Object of alimony.

- (a) The object of alimony and maintenance is to support the party without means in the rank of life to which she or he has been accustomed, to enable such party to contest the suit, and to be supported afterwards, if necessary. *Edwards v. Edwards*, 17 L. T., N S 584; *Hooper v. Hooper*, 3 S.W. & Fr 256, *Wilson v. Wilson*, 2 Hagg C R 204. Y
- (b) This support applies alike to all proceedings. *Bird alias Bell and Bird*, 1 Lee, 209, *Portsmouth v. Portsmouth*, 3 Add. 63. Z
- (c) Alimony pending suit is obtainable in all suits. M C A, 1857, Ss. 22, 32, See, also, Divorce Rule, 81. A

## (8) Grant of alimony discretionary with Court.

Allotting alimony is discretionary upon the facts before the Court. *Ronalds v. Ronalds*, L R, 3 P. & D 259, *Bradley v. Bradley*, 3 P. D. 47, *Rees v. Rees*, 3 Phillim 387. B

(9) *Alimony pendente lite*—Jurisdiction—Application after decree *nisi*.

- (a) The Court has jurisdiction to grant *alimony pendente lite* in a suit by the husband for dissolution of marriage on an application made by the wife after a decree *nisi* has been pronounced. 23 C. 913; But see, also, 11 C. 351 (356). C
- (b) An order granting alimony may be made on the application of the wife after the decree *nisi*. *Foden v. Foden*, L.R. (1894), P. D. 307, cited in 23 C. 913 (915). D
- (c) Till the decree *nisi* is made absolute, the suit is a pending suit. *Per Lord Herschell*, & C in *Foden v. Foden*, L.R. (1894), P. D. 307 cited in 28 C. 913 (915). E

(10) *Alimony pendente lite*, from what time payable

- (a) *Alimony pendente lite*, is payable from the date of the service of the citation. *Nicholson v. Nicholson*, 81 L.J.P. 165; See, also, 23 C. 913 (915); See, also, *Holt v. Holt*, and D, 38 L.J. Mat. 33. F



1.—“*Alimony pendente lite*”—(Continued).

## A.—GENERAL—(Continued).

(b) *Alimony pendente lite* not paid, usually entitles the wife to a postponement till it is paid. *Curtis v. C.*, 19 L.T., N.S. 611. G

(11) *Alimony pendente lite*, until what time payable

(a) *Alimony pendente lite* is payable till decree absolute. *Laxton v. Laxton*, 30 L.J., Mat. 208. H

(b) The petitioner would be without any provision if alimony ceased on decree nisi. *Ellis v. Ellis*, 8 P.D. 188, *S. v. B.*, 8 P.D. 80. I

(12) *Alimony pendente lite*, when payable—Ecclesiastical Courts, practice of.

*Alimony pendente lite* was, according to the practice of the Ecclesiastical Courts, payable from the return of the citation. *Bain v. Bain*, 2 Add. 253, *Hamerton v. Hamerton*, 1 Hagg. 23 (1827), See, also, 23 C. 913 (1915). J

(13) Question of *alimony pendente lite*, disposed of at first hearing of the suit.

The question of *alimony pendente lite*, according to the practice of Ecclesiastical Courts, used to be disposed of at the first stage of the proceedings. *Brisco v. Brisco*, 2 Hagg. Conn. C. 199 (1816). K

(14) Facts to be established before *alimony pendente lite* can be granted—Practice of Ecclesiastical Courts

Before granting *alimony pendente lite* the Ecclesiastical Courts required the following —

## (i) MARRIAGE OF PARTIES IS TO BE PROVED.

(a) Before *alimony pendente lite* can be granted a marriage between the parties is to be established. *Smyth v. Smyth*, 2 Add. 254. L

(b) Until a marriage is established, an allotment will not be made. *Longworthy v. Longworthy*, 11 P.D. 85. M

(c) Nor if, in a nullity suit, the marriage is shown to be null on the pleadings. *Blackmore v. Miles*, 18 L.T., N.S. 586. But see, also, *Foden v. Foden* (1894), P. 307, C.A. N

(d) But a marriage *de facto* carries the right to alimony until it is declared void. *Forden v. Forden*, 1894, p. 307. O

(e) The marriage having been established alimony followed as a matter of course, except where the wife had a sufficient provision of her own. *Miles v. Chilton*, 1 Robert. 700 (1849). P

(f) Even where there has been no real marriage, an order may be made. *Foden v. Foden*, (1894), P. 307, C.A., disapproving *Blackmore v. Miles*, (1868), 18 L.T. 586. Q

## (ii) ADEQUATE MEANS MUST BE SHOWN.

(a) A wife who fails to show that her husband is entitled to any income or property in possession or reversion, will not obtain an order. *Beavan v. Beavan*, 2 Sw. & Tr. 652. R

(b) A husband had no income, and his only property was a small legacy, which was not payable for eleven months, and would, if well invested, produce £20 a year. No order was made. *Brown v. Brown*, and *S.*, 3 S.W. & Tr. 217. S

I.—“*Alimony pendente lite*”—(Continued).

A.—GENERAL—(Continued).

- (c) No order for alimony would be made against an insolvent-debtor, or an uncertificated bankrupt. *Bruere v. Bruere*, 1 Court. 566. **T**

(15) **Nature of suit not to affect wife's right to alimony *pendente lite*.**

- (a) The nature of the suit would not affect the wife's right to alimony *pendente lite*. *Miles v. Chilton*, 1 Robert 700 (1849). *Bird v. Bell*, 1 Lee, 209. **U**

- (b) She would be entitled to it as much in suits of nullity as in other suits. *Miles v. Chilton*, 1 Robert 700 (1849). *Bird v. Bell*, 1 Lee, 209. **Y**

(16) **Plea as to jurisdiction no bar to grant of alimony *pendente lite***

Even where there is a plea to the jurisdiction of the Court, the power of the Court to allot alimony *pendente lite* is not affected. *Ronalds v. Ronalds*, L.R., 3 P & D. 259. **W**

(17) **Decree *nisi* for dissolution, no bar to ordering alimony *pendente lite*.**

Alimony *pendente lite* may be ordered notwithstanding a decree *nisi* has been made for dissolution of marriage. *Ellis v. Ellis*, 8 P.D. 188; 52 L. J P. 99. **X**

(18) **Appeal, no bar to alimony *pendente lite*.**

- (a) Generally alimony is payable to the wife pending an appeal. *Jones v. Jones*, L.R., 2 P. & D. 333, 41 L. J P. 53. **Y**

- (b) But the Court may refuse alimony in the following cases.—

- (i) If it shall appear to the Court that such appeal is frivolous and vexatious.

- (ii) If it appears that the wife has been guilty of laches. *Jones v. Jones*, L.R., 2 P. & D. 333, 41 L. J P. 53, 4 S. & T. 144, 26 L.T. 106. **Z**

(19) **Wife's conviction for felony, no bar.**

A wife's conviction for felony is no bar to an order for alimony *pendente lite* being made in her favour. *Kelly v. Kelly*, 4 S. & T. 227; 32 L.J.P. 181. **A**

(20) **Felony and imprisonment if bar to an application for alimony.**

- (a) Felony and imprisonment of the applicant and forfeiture of all the felon's property to the Crown, have been held no ground for refusing an order. *Kelly v. Kelly*, 4 Sw. & Tr. 227. **B**

- (b) A wife in gaol would have no means of contesting a suit without alimony, and, as the learned Judge said when allotting it, the Crown might take it, if it chose. *Kelly v. Kelly*, 4 Sw. & Tr. 227. **C**

- (c) But these considerations not arising, then alimony usually follows as a matter of course, on the application for it, except when a wife has a provision of her own, sufficient for her condition in life and proportionate to the means of her husband. *Miles v. Chilton*, 1 Rob. 700, Judgment. **D**

(21) **Neglecting to apply promptly—Effect.**

Neglecting to apply promptly raises an inference of means. *Noblett v. Noblett and K.*, L.R. 1 P. & D. 651; Dixon on Divorce, 4th Ed., 1908, p. 217. **E**

I.—“*Alimony pendente lite*”—(Continued).

## A.—GENERAL—(Continued).

## (22) Suspicion of guilt no bar.

(a) A wife applying must be considered as innocent, and hence, though not answering a charge of adultery in time, she is still entitled to an order. *Smith v. Smith*, and *T.*, 4 Sw & Tr. 228. **F**

(b) Her failure to answer is not to be treated as an admission of the charge against her. *Smith v. Smith and T.*, 4 Sw. & Tr. 228. **G**

(c) Her supposed guilt is not taken into consideration at this stage. *Crampton v. Crampton*, and *Armstrong*, 32 L.J. Mat. 142. **H**

## (23) Proof of guilt—a bar.

(a) An application after adultery is proved will be refused *Noblett v. Noblett and K*, L R, 1 P & D 651. **I**

(b) On adultery found, the right to alimony ceases. *Dunn v. Dunn*, 13 P.D. 91, *Wells v. Wells and H.*, 3 Sw & Tr. 542; *Madan v. Madan and D.*, 19 L T, N S 612. **J**

(c) The Court may, however, in its discretion order payment to be continued even after proof of wife's guilt *Dunn v. Dunn*, 13 P.D. 91, *Wells v. Wells and H*, 3 Sw. & Tr., 542, *Madan v. Madan and D*, 19 L T., N.S 612. **K**

## (24) Case where proof of wife's guilt held to be no bar

(a) An allotment of alimony *pendente lite* may be made even after the wife has been found guilty of adultery *D'Oyley v D'Oyley and Balde* (1859), 4 Sw & Tr. 226, *Ellis v Ellis*, (1893), 8 P.D. 188, C A, **L** and compare *Phillips v Phillips*, and *Medlyn*, (1865), 4 Sw & Tr. 129.

(b) Or even if she has not put in an answer denying her adultery. *Smith v. Smith and Tremseaux*, (1863), 4 Sw & Tr. 228. **M**

## (25) Guilty wife must show necessity.

The guilty wife must show the necessity for alimony. *Noblett v Noblett*, (1869), L.R. 1 P & D. 651, but compare *Shewell v Shewell and Fox*, (1869), 20 L T. 404. **N**

## (26) General presumption as to wife's innocence

(a) A wife charged with adultery is entitled to have alimony *pendente lite* allotted to her, though she has filed no answer, became in allotting alimony *pendente lite*, a wife is to be considered innocent—*Smith v. Smith*, 4 S. & T. 228, cited in argument in 11 C. 354 (355). **O**

(b) Alimony *pendente lite* has been allotted after verdict of adultery against a wife, but before the case came on for final decree before a full Court, as she till then is to be considered innocent. *D'Oyley v. D'Oyley*, 4 S. & T. 226, *Crampton v Crampton*, 32 L.J.P.M. & A. 142; *Phillips v. Phillips*, 34 L.J. P.M. & A 107, cited in argument in 11 C. 354 (355). **P**

(c) As to cases in which alimony *pendente lite* has been held to cease on decrees on ground of wife's adultery. See *Latham v Latham*, 30 L J.P. M. & A 151=3 S. & T 542, *Wells v Wells*, 33 L.J. P.M. & A. 127 cited in argument in 11 C. 354 (355). **Q**

1.—“ *Alimony pendente lite* ”—(Continued).

A.—GENERAL—(Continued).

(27) Evidence of adultery.

- (a) Evidence of adultery, to deprive the wife of alimony, must be given at the trial or hearing in the regular way. *Phillips v. Phillips and M.*, 34 L.J. Mat. 107. R
- (b) Evidence, taken beforehand, will not be acted upon. *Phillips v. Phillips and M.*, 34 L.J., Mat. 107. S
- (c) Confessions of adultery stop alimony beyond the date of them. *Whitmore v. Whitmore.*, 1 R., 1 P. & D 96. T

(28) Applicant (wife) found guilty in first trial—Alimony in second trial.

- (a) If the wife's adultery was found in the first, she is not entitled to alimony on second trial *Holt v. Holt and F.*, 28 L.J., Mat. 12. U
- (b) On new trial alimony *pendente lite* is payable to an innocent wife without a fresh order. *Dunn v. Dunn*, 13 P.D. 91 V

(29) Guilty wife, alimony on appeal in the case of.

- (a) The continuation on appeal of alimony *pendente lite* is in the discretion of the Court of appeal in the case of a guilty wife. *Wells v. Wells and H.*, 3 Sw & Tr. 542, and see *Loveden v Loveden*, 1 Phillim, 208 W
- (b) The *onus* now lies upon her to disprove the justice of the verdict. *Jones v. Jones*, 1 P. & D. 333. X
- (c) The right continues in alimony appeals. *Jones v. Jones*, 2 P. & D. 333. Y
- (d) The right to alimony of a wife who is accused of adultery continues until there is a decision against her in the Court of first instance. *Wells v. Wells and Hudson*, (1864) 3 Sw. & Tr. 542. Z
- (e) The Judge (if, for instance, an appeal is intended) may continue it, if reasonable. *Jones v. Jones*, (1872) L.R., 2 P. & D. 333; *Dunn v. Dunn*, (1888), 13 P.D. 91, C. A. A
- (f) Where she is petitioner and succeeds, it is continued until final decree. *Ellis v. Ellis*, (1883) 8 P.D. 188, C.A., overruling *Latham v. Latham and Gethan*, (1861), 2 Sw & Tr. 299. B
- (g) Formerly when a suit for nullity succeeded, alimony was usually paid until the decree was made absolute, though the Court had a discretion in the matter, but not afterwards. *Childers v. Childers*, (1899) 34 L.J. (p) 90 (bigamy); *S. v. B.*, (1884), 9 P.D. 80. C
- (h) Now, however, the matter is on the same footing as in a suit for dissolution of marriage. Matrimonial Causes Act, 1907, (7 Edw. 7 c. 12), S. 1. D

(30) Suspension of payment of alimony.

In the case of a wife who is suspected of getting her case postponed to put off the time of her probable conviction of adultery, the Court may suspend the payment of the alimony *Rogers v Rogers*, (1865), 34 L.J. (P.M. & A). 87. E

(31) Protection order, no bar

A protection order is not a bar to the application for alimony *pendente lite* *Hakewill v. Hakewill*, 30 L J., Mat. 254 F

I.—“*Alimony pendente lite*”—(Continued).

## A.—GENERAL—(Continued).

## (32) Jurisdiction questioned, no bar.

(a) Nor a question of jurisdiction a bar to the application. *Ronalds v. Ronalds*, L.R., 3 P. & D. 259. G

(b) When the question of jurisdiction was a substantial one and entailed a delay of several months, the Court directed the allotment. *Ronalds v. Ronalds*, L.R., 3 P. & D. 259. H

## (33) Question of domicile being in dispute if a bar.

Where there is a substantial question of domicile to be decided, it is in the discretion of the Court to give or withhold alimony. *Ronalds v. Ronalds*, (1875), L.R. 3 P. & D. 259. I

## (34) Independent support of wife, a bar to grant of alimony.

Obtaining support independently of the husband will prevent an order for alimony while the support lasts. *Holt v. Holt and D.*, 38 L.J. Mat. 38, *Goodheim v. Goodheim and T.*, 30 L.J., Mat. 162. J

## (35) Reason of the above rule.

A wife who has maintained herself during a separation of years, and can still do so, will apply in vain, because alimony would improve her position, and so promote litigation. *Burrows v. Burrows*, *George v. Burrows*, L.R., 1 P. & D. 554. K

## (36) In the following cases alimony was not granted on the ground that the wife had sufficient separate estate of her own.—

(i) Where the wife's father had promised to allow her £100 a year. *Eaton v. Eaton*, (1870), L.R. 2 P. & D. 51. L

(ii) Where the wife was possessed of £70 capital, and the husband's income was only £60 a year. *Coombs v. Coombs*, (1866), L.R. 1 P. & D. 218. M

(iii) Where the wife was, for sometime, living apart in domestic service, and the husband's income was only £225 a year. *George v. George*, (1867), L.R. 1 P. & D. 553, 554. N

## (37) The husband's means being small, a bar to granting alimony.

(a) An order for alimony *pendente lite* is not made when the husband's means are too small. *Capstick v. Capstick and F.*, 33 L.J., Mat. 105; *Fletcher v. Fletcher*, 31 L.J., Mat. 82. O

(b) Where the husband's means are small, his wife's power to maintain herself will be taken into account. *Nicholls v. Nicholls*, 30 L.J., Mat. 163, note. P

## (38) Marriage null and void on the face of petition and answer—Effect.

Where it is found that the — alimony will not be granted. See *Blackmore v. Mills*, 18 L.T. 586. Q

## (39) Bigamous marriage—No alimony.

In the case of a clear bigamous marriage, the Court would relieve the petitioner from payment of alimony *pendente lite* as soon as it had pronounced a decree nisi. *Childers v. Childers* (otherwise *Burford*), 68 L.J.P. 90, (1899) See, also, *Bateman v. Bateman*, (otherwise *Harrison*), (1898), 78 L.T. 472. R

1. —“ *Alimony pendente lite* ”—(Continued)

A —GENERAL—(Concluded).

(40) No application would lie for a small sum pending petition for alimony.

The Court would not entertain an application by a wife-petitioner for a small sum of money, pending the hearing of her petition for alimony where the application was made on the ground that she was destitute. *Forde v Forde*, 16 L T 595. S

(41) Alimony is purely personal allowance to wife—No power of alienation.

(a) Monies ordered to be paid by a husband for the maintenance of his divorced wife, are a purely personal allowance. *Watkins v. Watkins*, (1896), p. 222, 65 L.J.P 75, 101 L.T. 158. T

(b) Hence so long as the order subsists such benefits can neither be alienated nor released. *Watkins v Watkins*, (1896), p. 222, 65 L.J.P. 75; 101 L.T. 158. U

(c) Alimony *pendente lite* is not assignable. *Re Robinson*, (1884), 27 Ch. D. 160 C A.; See *Vandergucht v. De Blaquiere*, (1839), 5 My & Cr. 229 Y

(42) Present distress no ground for urgency.

(a) An application by the wife for a small sum, pending the hearing of the petition for alimony, on the ground of present distress, was refused as likely to establish an inconvenient precedent. *Forde v. Forde*, 15 L T. 595. W

(b) She might, however, pledge her husband's credit for necessaries between citation and alimony order. (*Ibid*) X

(43) Recovery of money spent.

A wife, supporting herself during the litigation, may, if successful, recover the money she has spent in doing so in the order for permanent support. But, her case failing, her claim to recover fails with it. *Coombs v. Coombs*, L R., 1 P & D. 218. Y

(44) Service of petition.

The petition, which must set out the means of the husband, may be served on his solicitor, but when the husband has not entered an appearance, it must be served personally, unless substituted service is ordered. *Odevaine v Odevaine*, (1843), 58 L.T. 564 (by registered letter after substituted service of main petition), compare *Nuttall v. Nuttall*, (1862), 81 L.J. (P.M. & A ) 164 (service of order to pay). Z

(45) Guardian *ad litem*, not liable.

The guardian *ad litem* of an infant husband who has no property is not liable for alimony. *Beavan v. Beavan*, (1862), 2 Sw. & Tr. 652. A

(46) Application to make decree absolute—Arrears of alimony.

Where a husband who has obtained a decree nisi for the dissolution of his marriage with his wife applied to have such decree made absolute, it was held that such decree could not be made absolute until arrears of alimony *pendente lite* due to the wife had been paid up. 4 A. 295 (296). B

I.—“ *Allimony pendente lite* ”—(Continued).

## B.—AMOUNT TO BE AWARDED AS ALIMONY PENDENTE LITE.

(1) Fixing amount of allimony *pendente lite*—Practice of ecclesiastical Courts as to.

The Ecclesiastical Courts generally allotted as allimony *pendente lite* one-fifth of the husband's income. Brownes and Powles on Divorce, Seventh (Edition), 1905, 138. C

(2) General rule as to amount of allimony *pendente lite*—one-fifth of joint income.

(a) The amount of allimony *pendente lite* allotted is now invariably one-fifth of the joint income of the husband and wife. See *Edwards v. Edwards*, 17 L.T. 584. D

(b) Pending suit it is usually one-fifth of the husband's income, actual or estimated. *Brisco v. B.*, 2 Hagg., C. C. 199, *Hawkes v. Hawkes*, 1 Hagg. E.C. 526; *Hayward v. Hayward*, 28 L.J., Mat. 9; *Thompson v. Thompson*, L.R., 1 P. & D. 553 E

(c) The fact that he was temporarily out of employment would not prevent the order. (*Ibid.*); Dixon on Divorce, 4th Ed., (1908), pp. 219, 220. F

(d) This section merely prescribes the maximum that can be awarded. 14 M. 88 (90). G

(e) It does not say that the wife is entitled to the full one-fifth. 14 M. 88 (90). H

## (3) Grounds for variation.

Although the usual proportion is one-fifth, still many cases may arise where the court may think it desirable to vary this proportion as to one-fifth, The following are some of those circumstances:—

(i) Depreciation of his property. *Brisco v. Brisco*, 2 Hagg. C. C. 199. H-1

(ii) The wife's extravagance. *Brisco v. Brisco*, 2 Hagg. C. C. 199. H-2

(iii) No rank in society for her to support. *Butler v. Butler*, Milw. Ir. Rep. 629. H-3

(iv) A high rank and position for him to support. *Hawkes v. Hawkes*, 1 Hagg. E. C. 526. H-4

(v) A long married life without complaint. *Finlay v. Finlay*, Milw. Ir. Rep. 575; *Irwin v. Dowling*, (*ibid*) 629. H-5

(vi) The status of the parties is material. *Hooper v. Hooper*, 3 Sw. & Tr. 251.

(vii) The nature of the suit, e.g., vexatious or otherwise, is also a material point to be considered. *Hakewill v. Hakewill*, 30 L. J., Mat. 254. H 6

(viii) Marital delinquency does not affect the proportion. *Hooper v. Hooper*, on app. 3 Sw. & Tr. 251; *Crompton v. Crompton and A.*, 32 L. J., Mat. 142. I

## (4) Where husband's income is very large.

The above rule as to one-fifth may be varied under peculiar circumstances, as, for example, where the income of the husband is so great as to make one-fifth an unnecessarily large amount. See *Edwards v. Edwards*, 17 L.T. 584. J

## (5) Large means obviate minute inquiry.

On an income of £8,000, the wife obtained £1,000, a year pending suit. *Edwards v. Edwards*, 17 L.T., N.S. 584. K

I.—“*Alimony pendente lite*”—(Continued).

B.—AMOUNT TO BE AWARDED AS ALIMONY  
*PENDENTE LITE*—(Continued).

(6) Points to be considered in fixing the amount of *alimony pendente lite*.

The Courts may generally be guided by the following circumstances:—

- (i) The rank and condition of the husband. *Hawkes v. Hawkes*, 1 Hagg. 526 (1828). K-1
- (ii) Whether he had the children of the marriage to support. *Harris v. Harris*, 1 Hagg. 353. K-2
- (iii) Whether the wife had a separate income. *Smith v. Smith*, 2 Phill. 152.
- (iv) The amount allotted was reduced when it was shown that the husband was no longer able to *alimony* at the same rate. *Cox v. Cox*, Add. 276.L
- (v) The wife's original station in life was considered in allotting alimony. *Finlay v. Finlay*, Milw Ir Ece. Rep. 639. M

(7) Nature of complaint considered in fixing alimony.

The nature of the complaint may sometimes be taken into consideration in fixing the amount of *alimony pendente lite*. *Rees v. Rees*, 3 Phill. 389.N

(8) The wife's separate property.

- (a) The wife's separate property is taken into account pending suit and on divorce *Smith v. Smith*, 2 Phillim 152; *Blaquiere v. Blaquiere*, 3 Phillim 258, *Westmeath v. Westmeath*, 3 Knapp 42. O
- (b) And, where she has a large property, minute particulars of her husband's income are unnecessary. *Blackburn v. Blackburn*, 36 L.J. Mat. 88. P

(9) Wife's means, when to be stated.

The wife's means should be stated when they exceed those of the respondent. *Watts v. Watts*, 28 L. J., Mat. 125. Q

(10) Wife's power of maintaining herself.

- (a) In allotting *alimony pendente lite* the wife's earnings and power of maintaining herself must be taken into consideration. *Goodheim v. Goodheim*, 30 L. J. P. 162, 2 S. & T. 250; 4 L. T. 449. R
- (b) This is especially the case where the parties are very poor. *Nicholls v. Nicholls*, 30 L. J. P. 163 (n). S

(11) Allowance to the wife from her father

An allowance to the wife from her father is taken into account. *Bonsor v. Bonsor*, 1879, p. 77, *Eaton v. Eaton and C.*, L. R., 2 P. & D. 52. T

(12) Position of wife's father in life.

- (a) Her father's position has no weight with the Court. *Harris v. Harris*, 1 Hagg. E. C. 351. U
- (b) Evidence of it is inadmissible, because a father is not legally bound to support his daughter after marriage. *Harris v. Harris*, 1 Hagg. E. C. 351. V

(13) Wife's extravagance

A wife's extravagance would be taken into consideration by the Courts and that be a ground to reduce such alimony. *Brisco v. Brisco*, 2 Hagg. C. C. 201. W



I.—“*Alimony pendente lite*”—(Continued).B—AMOUNT TO BE AWARDED AS ALIMONY  
*PENDENTE LITE*—(Continued).(14) **Wife's means of support derived from co-respondent.**

Where the wife has sufficient means of support independent of the husband, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony. *Madan v. Madan*, 37 L.J.P. 10 18 L. T. 337 *Holt v. Holt*, L.R., 1 P. & D. 610. X

(15) **Respondent and co-respondent co-habiting—Effect on payment of alimony *pendente lite*.**

If the respondent cohabits with the co-respondent for some time after the commencement of proceedings, the Court would order that the alimony should run from the date at which such cohabitation ceases. *Holt v. Holt*, L. R., 1 P. & D. 610, 38 L.J.P. 33, 16 L. T. 662. Y

(16) **Wife guilty of adultery—Unreasonable delay.**

In a case where the wife was found guilty of adultery, and there had been no previous application, the Court refused to make any order for alimony *pendente lite* after decree nisi. *Noblett v. Noblett*, L.R., 1 P. & D. 651; 20 L. T. 716 Z

**N.B.**—See, also, as to the effect of unreasonable delay, *Twisleton v. Twisleton*, L. R., 2. P. & D. 339, 26 L.T. 265. A

(17) **Wife being found guilty on intervention by Queen's Proctor.**

(a) If a petitioner (wife) be found guilty of adultery on the intervention of the Queen's Proctor, the Court may grant her arrears of alimony up to the date when she was so found guilty. *Whitemore v. Whitemore*, L. R., 1 P. & D. 96, 35 L.J.P. 39. B

(b) Though the wife during the pendency of the suit must be presumed not to be guilty, yet she is not to live exactly in the same way as if she were exempt from any imputation, she is as it were under a cloud and should seek privacy and retirement. *Per Sir John Nicholl in Hawkes v. Hawkes*, 1 Hagg. Eccl. cited in 14 M. 88 (90). C

(c) The English cases say that the court may always make deductions for expenses of education, not *must*. *Per Collins, C.J.* in 14 M. 88 (92). D

(18) **Wife charged with prostitution.**

An order for alimony *pendente lite* will not be rescinded on a sworn allegation that the wife was a prostitute, the wife, in her affidavit denying the truth of the allegation. *Patch v. Patch*, 38 L.J.P. 27, 19 L.T. 662. E

(19) **Husband and wife living apart.**

Where the husband and wife have been living apart for many years and the wife has been supporting herself, and is still able to do so, alimony *pendente lite* will not be allotted, except under special circumstances. *Thompson v. Thompson*, L. R., 1 P. & D. 551, 37 L.J.P. 17. F

(20) **Deed of separation.**

In a case where a husband had, under a deed of separation, paid his wife a certain allowance until he obtained evidence of her adultery, the Court ordered alimony *pendente lite* at the same rate. *Weber v. Weber*, 1 S. & T. 219 See, also, *Powell v. Powell*, L.R., 3 P. & D. 186. G

I.—“*Alimony pendente lite*”—(Continued).B.—AMOUNT TO BE AWARDED AS ALIMONY  
*PENDENTE LITE*—(Continued).

## (21) Agreement in deed of separation not to molest—Subsequent suit for judicial separation.

By a deed of separation, a husband covenanted to make an allowance to the wife, determinable upon her molesting him, he subsequently withdrew it in consequence of her molestation, thereupon the wife commenced a suit for judicial separation, held that she was entitled to alimony at the same rate. *Wood v Wood*, 57 L.J., Ch. 1. H

## (22) Wife obtaining protection order.

The obtaining of a protection order by the wife does not deprive her of the right to alimony *pendente lite* in a subsequent suit. *Hakewill v. Hakewill*, 30 L.J.P. 254. I

## (23) Wife instituting vexatious suit against husband.

The institution of vexatious suits by the wife against the husband is a ground for allotting alimony *pendente lite* at a lower rate. *Hakewill v. Hakewill*, 30 L.J.P. 254 J

## (24) Income of husband.

The income of the husband, of which he cannot enforce payment is also taken into account. *Bonsor v. Bonsor*, P. (1897), 77, *Eaton v. Eaton and Co.*, L.R., 2 P. & D. 52. K

## (25) Increase of pay of husband.

An officer's increase of pay to meet a necessary increase in the cost of living is not calculated. *Louis v. Louis*, 35 L.J. Mat. 92. L

## (26) Reduction of the husband's income by unprofitable speculation.

The reduction of the husband's income by unprofitable speculation would be no ground for a proportionate reduction of permanent alimony. *Neul v. Neul*, 4 Hagg. 273 M

## (27) A fraudulent assignment by the husband of his property.

A fraudulent assignment by the husband of his property after the commencement of the suit would not be regarded by the Court in reducing permanent alimony. *Broune v Browne*, 2 Hagg 5. N

## (28) Reversionary interest of husband.

(a) In one case in setting out particulars of the husband's income, the wife was allowed to plead any reversionary interests he might be possessed of. *Stone v. Stone*, 3 Curt. 341. O

(b) The husband must include any considerable property, including any reversionary interest. *Stone v Stone*, (1843), 3 Curt 341, but see *Brown v. Brown*, and *Simpson*, (1863), 3 Sw. & Tr 217. P

N.B.—In the last case no order was made where there was a legacy of £500 payable in eleven months.

(c) He must include them even if they bring in no income *Crampton v Crampton*, and *Armstrong* (1863), 32 L.J. (P. M. & A.) 142. Q

## (29) Mere expectancy.

But she could not be allowed to plead a mere expectancy. *Stone v. Stone*, 3 Curt. 341. R

1.—“*Alimony pendente lite*”—(Continued)B.—AMOUNT TO BE AWARDED AS ALIMONY  
*PENDENTE LITE*—(Continued).

## (30) Voluntary allowance made to husband.

(a) In allotting alimony *pendente lite* a voluntary annual allowance made to the husband forms no part of his faculties. *Haviland v. Haviland*, 3 S. & T. 114; 32 L.J.P. 67; 7 L.T. 757. S

(b) The husband must include an income derived from a voluntary allowance. *Malo v. Malo*, (1786), 32 L.J. (P. M. & A.) 67 n. T

## (31) Income to which the husband has no strict legal right.

(a) But alimony is sometimes given to a wife out of income to which the husband has no strict legal right. *Clinton v. Clinton*, L.R., 1 P. & D. 215; 14 L.T. 257. U

(b) An example of the above may be seen in a case where the husband was in receipt of an allowance so long as he should remain out of the country. *Bonsor v. Bonsor*, (1897), P 77; 66 L.J.P. 85; 76 L.T. 168. Y

## (32) Property from which husband derives no income.

All the valuable property of the husband will be taken into account in allotting alimony *pendente lite* and in fixing its amount, although it may be that the husband derives no income from it at the moment. *Crampton v. Crampton*, 32 L.J.P. 142; *Wilson v. Wilson*, 26 L.T. 108. W

## (33) Tools and stock in trade of husband

The husband in his answer need not state the value of his tools, stock-in-trade, etc. *Hick v. Hick and Kitchen*, (1833), 12 W R 444, n. (Eng). X

(34) Husband having no means or only small means—No alimony *pendente lite* to be granted.

(a) The Court will not allot alimony *pendente lite* where the husband's means are little or nothing. *Gaynor v. Gaynor*, 31 L.J.P. 144; *Capstick v. Capstick*, 33 L.J.P. 105. Y

(b) But such alimony may sometimes be allotted on the average annual earnings of a husband although it may be that at the moment of the application he may be temporarily out of employment. *Thompson v. Thompson*, L.R., 1 P. & D. 553, 37 L.J.P. 33; 18 L.T. 212. Z

## (35) Instalments of debt, contract to pay:

(a) Where a husband has contracted to pay off a debt by instalments, they will be allowed for in estimating his income. *Patterson v. Patterson*, 33 L.J.P. 36. A

(b) Any arrangement that the husband may have made for liquidating his debts may be considered by the Court. 14 M. 88. B

## (36) Circumstance that the husband has to maintain several children, the issue of a former marriage.

(a) The circumstance that the husband has to maintain several children, the issue of a former marriage, has been held to be no reason for allotting less than one-fifth of the joint income. *Hill v. Hill*, 33 L.J.P. 104; see, also, *Grafton v. Grafton*, 27 L.T. 768. C

(b) The Court may consider in fixing the nett income of the husband the expenses he would be put to in maintaining his children. 14 M. 88. D

I.—“*Alimony pendente lite*”—(Continued).B.—AMOUNT TO BE AWARDED AS ALIMONY  
PENDENTE LITE—(Continued).

- (37) **Husband's liability for reasonable expenses of wife until decree for alimony is made.**

A husband is liable for any necessities supplied to his wife pending the suit, till an order for alimony is made, but the husband's liability for the necessities of the wife can extend only to a reasonable amount, *Hayward v. Hayward*, 13. & T. 85; 28 L.J.P. 9. E

- (38) **Application by husband to reduce alimony *pendente lite*.**

A husband applying for a reduction of the amount of alimony *pendente lite* on the ground of the reduction of his income since the date of the order, must explain such reduction. *Shirley v. Wardropp*, 1 S. & T. 317; 33 L.T., O.S. 198. F

- (39) **Change of circumstances of husband.**

It is not clear whether the Court has power to increase or diminish an allotment of alimony *pendente lite* on account of the changes in the circumstances of the husband. 14 M. 88 (95). G

- (40) **Bankruptcy.**

(a) Arrears of alimony which have accrued due after the date of a receiving order made against the husband and before proof are not provable in bankruptcy. *Hawkins, In re, Hawkins, Ex parte*, (1894), 1 Q.B. 25; 69 L.T. 769. H

(b) But they can be enforced by a committal order on proof of means. *Kerr v. Kerr*, (1897), 2 Q.B. 439, 65 L.J., Q.B. 838. 77 L.T. 29. I

- (41) **Cases where husband would be freed from liability.**

No alimony will be granted in the following cases:—

(i) Where the husband is a bankrupt

(ii) Where he has no property nor income

(iii) Where he has only a very small income *Briere v. Briere*, (1837), 1 Curt 566, *Fletcher v. Fletcher*, (1862), 2 Sw. & Tr. 494; *Capstick v. Capstick*, *Furness and Winder*, (1864), 33 L.J. (P. M. & A.) 105. J

- (42) **Husband's answer—Effect.**

In one case the husband's answer to a petition for alimony was regularly taken to be strongly against him. *Robinson v. Robinson*, 2 Lee, 593. K

- (43) **Amount may be fixed by agreement of parties.**

(a) The amount of alimony *pendente lite* may be agreed upon between the parties. *Laws of England*, Vol. XVI, p. 518. L

(b) The consent of the husband may be endorsed on the summons. (*Ibid.*) note M

(c) If the parties do not agree as to the amount, it is usual to allow to the wife one-fifth of the joint incomes *Blackburne v. Blackburne*, (1867), 36 L.J. (P. & M.) 88, *Hawkes v. Hawkes*, (1828), 1 Hagg. Ecc. 526, *Hill v. Hill*, (1864), 33 L.J. (P. M. & A.) 104. N

- (44) **Average income for three years taken.**

(a) An average of the income is taken, usually for three years in fixing the income of the husband for granting alimony. *Thompson v. Thompson*, (1867), L.R. 1 P. & D. 553, *Williams v. Williams*, (1867), L.R. 1 P. & D. 370. O

I.—“*Alimony pendente lite*”—(Continued).B.—AMOUNT TO BE AWARDED AS ALIMONY  
PENDENTE LITE—(Concluded).

- (b) And if the husband is under agreement to invest part of his income in his business, that affects the amount to be considered. *Wilson v. Wilson*, and *Howell*, (1872), 26 L. T. 107, and see *Hanbury v. Hanbury*, (1894), p. 102, 315, C. A., reversed (1895) A.O. 417 P
- (c) Or if he has disposed of his business for an annuity, that is taken to be the amount of his income from that source. *Moore v. Moore*, (1864), 3 Sw. and Tr. 606. Q

(45) Deductions that may be allowed from alimony *pendente lite*.

## (i) MONIES PAID BY HUSBAND ON ACCOUNT OF DEBTS OF THE WIFE.

The husband may deduct from the alimony *pendente lite* any sums paid by him on account of her debts. *Hamerton v. Hamerton*, 1 Hagg. 23 (1827). R

## (ii) INCOME TAX.

(a) He may also be allowed to deduct income tax. *Pemberton v. Pemberton*, 2 No. of Cas. 17. S

(b) If the allotment is calculated after the deduction of income tax, the tax must not be again deducted when the wife is paid. *Smith v. Smith*, (1813), 2 Phillim 152, *Frankfort (Viscount) v. Frankfort (Viscountess)* (1845), 4 Notes of Cases, 280. T

N.B.—But, in one case where the suit was compromised and the amount was fixed by an arbitrator, the husband was allowed to deduct the tax. *Re Barry's trusts, Barry v. Smart*, (1906), 2 Ch. 358 C.A. U

## (iii) REPAIRS.

Deductions may be made for repairs and other expenses in connection with real property. *Hayward v. Hayward*, (1853), 1 Sw. & Tr. 85; *Nokes v. Nokes*, (1863), 3 Sw. & Tr. 529. V

## (iv) PAYMENT OF DEBTS.

Deductions may be made on account of instalments of debts agreed to be paid. *Patterson v. Patterson*, *Curtis and Dore* (1863), 33 L.J. (P. M. & A.) 36. W

## (v) PAYMENT OF PREMIUMS

No deductions can be made in respect of premiums on life insurance policies. *Haris v. Haris*, (1828), 1 Hagg. Ecc. 351, *Patterson v. Patterson*, *Curtis and Dore*, 33 L.J. (P. M. & A.) 36. X

## (vi) PENSION AND ANNUITY FUNDS.

Fixing of nett income of husband deductions on account of pension and annuity funds. See 14 M. 88. Y

## C.—MODE OF DETERMINING HUSBAND'S MEANS.

## (1) Determination of husbands means, for grant of alimony.

- (a) In order to determine the means of the husband, out of which alimony can be granted, his income must be stated for the three years previous to date of application. *Williams v. Williams*, L R, 1 P. & D. 370. Z

I.—“*Allimony pendente lite*” —(Continued).

C.—MODE OF DETERMINING HUSBAND'S MEANS  
—(Continued).

(b) But he may state it for much longer if he wishes, and explain why it is larger in one year than another. *Williams v. Williams*, L.R., 1 P. & D. 370. A

(c) If the allotment exceeds the income for the time during which it is payable, the Court may be asked to reduce it. *Kelly v. Kelly*, 1 Ec. & Ad. 412. B

(2) “Net income” meaning.

The term “net income” in the Act has only the ordinary meaning that it ordinarily bears. 14 M. 88 (94). C

(3) Husband's capital employed in trade.

When in trade the husband must state his gross annual trade income, and the deductions to be made therefrom—not his nett annual income—and also the gross rental of his houses, with particulars of mortgages and other outgoings. *Nokes v. Nokes*, 3 Sw. & Tr. 529. D

(4) Husband being temporarily out of employment.

His average annual earnings will be chargeable, although at the moment when his answer is sworn he may be temporarily out of employment. *Thompson v. Thompson*, and *J*, L.R., 1 P. & D. 553. E

(5) Partnership accounts.

(a) Partnership accounts are now subject to inspection in the registry on pain of attachment *Cave v. Carew*, L.T., April 18, 1891. Notes of Decisions, p 449 F

(b) But not until there is evidence of reticence as to the income to be charged. *Tonge v. Tonge*, P.D. 1892, 51. G

(6) Loss in business.

Losses in a branch business, closed at the time of the application, may not be deducted. *Theobald v. Theobald*, 15 P.D. 26. H

N.B.—This was not an alimony case. But it is analogous case, and would be a guide in alimony cases. *Dixon on Divorce*, 4th Ed., 1908, p. 218, Note (S).

(7) Property producing no income

All the husband's property should be taken into account, although he may derive no income from it. *Crampton v. Crampton*, and *A.*, 32 L.J., Mat. 142 I

(8) Shares.

(a) Shares, though not available for income, must be calculated at market value. *Harris v. Harris*, 1 Hagg. E. C. 351. J

(b) Also shares on which no dividend is payable. *Crampton v. Crampton* and *A.*, 32 L.L. Mat. 142. K

(9) House property.

The annual value of house property occupied by the husband, or by others through him and rent-free must also be taken into account. *Crampton v. Crampton*, & *A.*, 32 L.L. Mat. 142. L

1.—“*Alimony pendente lite*”—(Continued).C.—MODE OF DETERMINING HUSBAND'S MEANS  
—(Continued).

## (10) Policies of Insurance.

(a) Policies of insurance, having a money value, so as to be convertible into money, must be calculated. *Harris v. Harris*, 1 Hagg. E.C. 351. **M**

(b) Premiums on policies for the benefit of the wife and children may be deducted. *Forster v. Forster and T*, 91 L.J., Mat. 84. **N**

(c) But not those payable for the husband's own benefit. *Harris v. Harris*, 1 Hagg. E.C. 351, *Patterson v. Patterson*, C. and D., 33 L.J., Mat. 36. **O**

## (11) Annuity.

An annuity must be taken as the amount of the annuity, and not percentage on its present value. *Moore v. Moore*, 34 L.J., Mat. 146. **P**

## (12) Reversionary interest.

A reversionary interest is chargeable as having a money value. *Stone v. Stone*, 3 Curt. 341. **Q**

## (13) Pensions.

Pensions also are chargeable being assignable and subject to attachment by sequestration. *Knight v. Bulkeley*, 5 Jur. N.S. 817, *Dent v. Dent*, L.R. 1 P. & D. 366, *McCarthy v. Gould*, 1 Ball & Beatty, 387. **R**

## (14) Half pay.

Half-pay is not assignable, and therefore is not chargeable. *Stone v. Ludderdale*, 2 Inst. 533 (2nd ed), *Wells v. Foster*, 8 Mee. & W. 149. **S**

## (15) Money locked up in business.

Money and profits locked up in business are chargeable. *Wilson v. Wilson and H.*, 26 L.T. N.S. 108. **T**

## (16) Voluntary allowance.

A voluntary allowance is not chargeable. *Haviland v. Haviland*, 3 Sw. & Tr. 115. **U**

## (17) Debts of husband.

(a) Instalments of debt still due under agreement, made before proceedings commenced, may be deducted. *Patterson v. Patterson*, C. and D., 33 L.J. Mat. 36 Cited in 14 M. 88 (89). **Y**

(b) But payments made to maintain policies of insurance cannot be deducted in fixing a person's "net income." *Harris v. Harris*, 1 Hagg. Ecol. 351 & *Patterson v. Patterson*, 33 L.J. P. & M. (N.S.) 36, cited in 14 M. 88 (89). **W**

(c) Debts, &c., during adulterous intercourse and arising in consequence may not be deducted from income. *Rees v. Rees*, 3 Phillim, 391. **X**

(d) But the interest of a debt contracted before the suit may be deducted. *Rees v. Rees*, 3 Phillim, 391. **Y**

## (18) Income tax.

Income tax may be deducted from the husband's income. *Pemberton v. Pemberton*, 2 N.C. 17; see, also, 14 M. 88 (94). **Z**

I.—“*Alimony pendente lite*”—(Continued).C.—MODE OF DETERMINING HUSBAND'S MEANS  
—(Concluded).(19) **Fraudulent assignment.**

A fraudulent assignment, after suit commenced, in order to defeat the wife's claim to alimony, will not be considered *Brown v. Brown*, 2 Hagg. E.C. 5. A

(20) **Deductions from salary of official.**

Ordinarily with an official drawing a fixed salary and having no other means, that expression would mean the amount of his salary, minus deductions on account of income tax, charges for a pension fund, and the like. 14 M. 88 (94). B

(21) **Education and maintenance of children.**

In fixing the net income the court may take into consideration the circumstance that the husband has children to educate and maintain. *Harris v. Harris*, 1 Hagg. Eccl. 351, *Otway v. Otway*, 1 Hagg. Eccl. 526; *Hawkes v. Hawkes*, 2 Phill. 109, cited in 14 M. 88 (89). C

(22) **Husband being liable to pay costs on both sides.**

The circumstance that the husband will have to pay the expenses of the suits on both sides must also be considered in deciding the question as to the amount of alimony. 14 M. 88 (90) D

D.—ENFORCING ORDER FOR ALIMONY *PENDENTE LITE*. E(1) **Alimony from what funds recoverable.**

(a) An Alimony due is recoverable from any funds of the opposite party in the country. *Stafford v. Stafford*, L.T., June 6, 1891, Notes of Decisions, col. 6. E

(b) But, if there is a balance afterwards, he can remove it before another payment is due. *Stafford v. Stafford*, L.T., June 6, 1891, Notes of Decisions, col. 6 F

(2) **Nullity suit—Alimony payable until decree absolute**

In a suit of nullity, alimony *pendente lite* is to be paid even after the decree nisi until the decree is made absolute *S. v. B.*, 9 P.D. 80, 63 L.J., P. 63. G

(3) **Alimony *pendente lite* can be ordered at any time before decree absolute.**

The Court has jurisdiction to make an order for alimony *pendente lite* at any time before decree absolute. *Foden v. Foden*, (1894), p. 307; 63 L.J., P. 168. H

(4) **Appeal, effect of, on enforcement of arrears of alimony.**

In this case a decree nisi in favour of the wife was rescinded and her petition was dismissed, and the wife appealed. Meanwhile the husband had ceased to pay alimony. Held that the arrears of alimony cannot be enforced against the husband, but that the order for alimony might be renewed until further notice. *Butler v. Butler*, 15 P.D. 13; 59 L.J.P. 11; 62 L.T. 123. I



*1.—“Alimony pendente lite”*—(Continued).

**D.—ENFORCING ORDER FOR ALIMONY PENDENTE LITE—(Concluded).**

**(5) Enforcement of arrears of alimony beyond one year—Practice of Ecclesiastical Courts as to.**

(a) The Ecclesiastical Courts allotted alimony for the maintenance of the wife *from year to year*. *Wilson v. Wilson*, 3 Hagg. 329 (Notes); *Robinson v. Robinson*, 2 Lee, 593. J

(b) Therefore they did not enforce arrears beyond one year, except under special circumstances. *Wilson v. Wilson*, 3 Hagg. 329 (Notes); *Robinson v. Robinson*, 2 Lee, 593. K

**(6) Payments that may be credited as part payments of alimony.**

The following payments made to the wife since the citation will be credited as part-payment of alimony allotted —

(i) Payments made to the wife personally.

(ii) Payments on account of her debts, or

(iii) Any other payment to her benefit since the service of the citation. *Crampton v. Crampton*, 32 L.J.P. 142. L

**(7) Alimony pendente lite from what time payable.**

(a) Alimony *pendente lite* is payable from the date of the service (not the return) of the citation. *Nicholson v. Nicholson and Ratchiff*, (1862), 31 L. J. P. & M. 165. M

(b) And the Court may order it to be paid to the wife or to such trustees on her behalf, from time to time, and on such terms, as it deems expedient. Divorce Rule 94, Matrimonial Causes Act, 1857, (20 & 21 Vict. c. 85), S. 24. N

**(8) Solicitor's lien on alimony**

(a) If the wife voluntarily allows her alimony to come into the hands of her solicitor, the ordinary rule as to his lien may apply. *Ex parte Bremner* (Sarah), (1866), L. R., 1 P. & D. 254. O

(b) It is otherwise if it comes into his hands without his acquainting her of her rights. *Leete v. Leete*, (1879), 48 L. J. P & M. 61. P

(c) For the Court will not countenance money paid for alimony being so diverted. *Cross v. Cross*, (1880), 43 L. T. 533. Q

**(9) Postponement of suit at wife's instance—Effect on payment of alimony.**

Where the hearing of a suit by the wife for judicial separation was postponed at the wife's instance, the Court directed the payment of alimony *pendente lite* to be suspended from the date of the postponement until the hearing. *Rogers v. Rogers*, 34 L.J.P. 87. R

**E.—PRACTICE AND PROCEDURE.**

**(1) The husband's means, cross-examination as to.**

(a) If a further and fuller answer be required as to the means of the husband he is usually ordered to attend for cross-examination. Divorce Rules 86, 189; and *Clark v. C.*, 31 L.J. Mat. 32; *Hooper v. H.*, 28 L.J. Mat. 26; D.R. 89. S

I.—“*Alimony pendente lite*”—(Continued).

## E.—PRACTICE AND PROCEDURE—(Continued).

(b) The wife is not entitled, as a matter of course, to have her husband cross-examined as to his income, though her petition and his answer differ widely as to the amount. *Sykes v. Sykes*, P. (1897), 306 T

(c) The order for cross-examination is entirely in the Registrar's discretion, and the Court will not interfere unless satisfied that he has acted on a wrong principle, or has exercised his discretion wrongly. (*Ibid*). U

(d) When there is no great discrepancy between the two amounts, the Court does not usually order cross examination of the husband. *Sykes v. Sykes*, P. (1897), 306. Y

## (2) Husband may be asked to furnish particulars of income.

Particulars of mortgages, etc., may be ordered to be furnished by the husband. *Crampton v. Crampton, and A.*, 32 L.J., Mat. 142. W

## (3) Means disputed.

A husband may be ordered to submit his books for inspection where—  
*Newton v. Newton and A.*, 27 L.T. N.S. 768, *Hayward v. Hayward*, 28 L.J. Mat. 9. X

## (4) Cost of commission to prove means.

The cost of a commission to prove means is usually not allowed *Wilson v. Wilson and H.*, 26 L.T. N.S. 107. Y

## (5) Application for alimony to be made without delay

Alimony should be applied for soon, if possible, to prevent claims for the wife's debts. *Brisco v. Brisco*, 2 Hag. C. C. 199 Z

(6) Suit in *forma pauperis*—Wife in prison

• (a) Alimony may be allotted in a suit in *forma pauperis*, or if the wife be in prison. *Kelly v. Kelly*, (1863), 4 Sw. & Tr. 227, but see also *Lestie v. Lestie*, (1907), 24 T.L.R. 148. A

(b) The whole of the circumstances of the case should be considered. *L. v. L.*, (1911) 27 T.L.R. 316 B

## (7) Husband to file answer to wife's petition—Effect of not doing so

(a) A husband must enter an appearance in the suit before he can file an answer to the petition for alimony Divorce Rule 85, 99. C

(b) The husband should in his answer state what his income has been during the three years prior to the commencement of the suit. But he may state any facts, from which the Court may draw conclusions as to his present income *Williams v. Williams*, L.R. 1 P. & D. 370; 36 L.J. P. 39, 15 L.T. 249, See, also, *Nokes v. Nokes*, 3 S. & T. 529, 33 L.J. P. 24, *Crampton v. Crampton*, 32 L.J. P. 142 D

(c) If a husband fails to answer, he cannot cross-examine the wife's witness, or call evidence to contradict them *Constable v. Constable*, L.R. 2 P. & D. 17, 39 L.J.P. 17. E

## (8) Wife's reply to husband's answer.

Where the husband alleges in his answer that the wife has sufficient separate estate, including income under a separation deed, or that she is being supported by the co-respondent, she may file a reply. *Goodheim v. Goodheim and Frankins*, (1861), 2 Sw. & Tr. 250. *Coombs v. Coombs*, (1866), L.R. 1 P. & D. 218. F

I.—“*Alimony pendente lite*”—(Continued).

## E.—PRACTICE AND PROCEDURE—(Continued).

## (9) Rejoinder by husband.

- (a) To such a reply the husband may file a rejoinder. *Laws of England*, Vol. XVI, p. 517 G
- (b) The rejoinder by the husband can only be filed on leave of the Court. (*Ibid.*) H
- (c) Both the reply and the rejoinder must be filed on oath. (*Ibid.*) I

## (10) Affidavits.

- (a) Affidavits, as the Registrar requires, may be used by either side at the hearing. *Divorce Rule 90.* J
- (b) A *prima facie* case, against alimony, on affidavit in answer, may be met by affidavit in reply, on leave given. *Holt v. Holt and D*, 38 L. J., Mat 38. K
- (c) But the truth of an answer must be proved by witnesses, not affidavits. *Parker v Parker*, 26 L T. N. S., 108. L
- (d) The answer, if insufficient, must be made fuller. *Parker v. Parker*, 26 L.T., N.S., 108. M

## (11) Consent to the amount.

If — be endorsed on the wife's summons, the order follows. *Practice in the Registry. Dixon on Divorce*, 4th Ed, 1908, p. 227. N

## (12) Effect of agreement between parties embodied in deed.

- (a) If the parties agree as to the amount in a deed, alimony may be granted at the same rate *Weher v. Weher, and Lyne* (1858), 1 Sw. & Tr 219 O
- (b) Even though husband's means had increased since date of deed. *Powell v. Powell*, (1874), L R. 3 P. & D. 186. P
- (c) But the deed would not prevent wife applying for a provision for children. *Barry v. Barry*, (1901), p. 87, C.A. Q

## (13) To whom payment of alimony is made.

- (a) Payment is made to the wife or her nominees in writing approved of by the Court. *Margetson v. Margetson*, 35 L J., Mat. 80; *Divorce Rule 91.* R
- (b) The nomination must be filed before payment. *Brown v. Brown*, 34 L.J., Mat. 33. S
- (c) And the Court may make such alteration concerning the trustees as it shall deem expedient. See *M.C.A. 1857*, S 24. T

## (14) No charge for wife's solicitor receiving alimony.

The wife's solicitor, if nominated to receive the alimony may not charge for receiving. *Margetson v Margetson*, 35 L.J., Mat 80. U

## (15) Applications for increase or reduction of alimony.

- (a) Applications for increase or reduction, follow the rules applying to the original application. *Moore v. Moore*, 34 L.J., Mat. 146, D R. 92; and see *Darnes v. Davies*, 32 L J., Mat. 152. Y
- (b) The grounds for increasing reduction must be strong. See *Shirley v. Wardrop*, 1 Sw. & Tr. 317, as to permanent alimony. *Cox v. Cox*, 3 Add 276, as to alimony *pendente lite*. W

I.—“ *Alimony pendente lite* ”—(Concluded).

E.—PRACTICE AND PROCEDURE—(Concluded).

(16) **Non-payment of alimony *pendente lite*, effect of.**

Where a husband petitioned for divorce, the Court stayed the suit on his non-payment to the wife of alimony *pendente lite* ordered in a current suit for judicial separation brought by her. *P. v. P. and T.*, (1910) 26 T.L.R. 607. X

(17) **Partnership accounts—Inspection of husband's ledger.**

(a) A registrar may order inspection of a ledger relating to partnership accounts of respondent (husband) *Carew v Carew*, (1891) P. 360, 61 L.J.P. 24, 65 L.T. 167. Y

(b) A respondent admitted an income of £3,000, a year, but objected to produce his books on the ground that they would disclose private matters relating to the partnership. *Held*, that the answer was insufficient, and he must file a further and better answer, but that until such further answer had been filed, he ought not to be compelled to disclose the partnership accounts, or to be cross-examined on them. *Tonge v. Tonge*, (1892) P. 51, 61 L.J.P. 87, 67 L.T. 390. Z

(18) **Wife presumed to be innocent.**

(a) A wife is always considered innocent in estimating the amount to be allotted to her for alimony *pendente lite* *Smith v Smith*, 4 S. & T. 228 32 L.J.P. 91 *Crampton v Crampton*, 32 L.J.P. 142 *Phillips v Phillips*, 34 L.J.P. 107 *D'Oyley v. D'Oyley*, 4 S. & T. 226; 29 L.J.P. 165. A

(b) It ceases upon a verdict finding the wife guilty of adultery unless otherwise ordered. *Dunn v. Dunn*, (1887) 13 P.D. 91, 57 L.J.P. 58, 59 L.T. 385. See as to payment pending appeal *Butler v Butler*, (1890) 15 P.D. 13, 59 L.J.P. 11, 62 L.T. 123 B

37. The High Court may, if it think fit, on <sup>1</sup> any decree absolute declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

Power to order permanent alimony.

and the District Judge may, if he thinks fit, on the confirmation of any decree of his, declaring a marriage to be dissolved, or on any decree of judicial separation obtained by the wife,

order that the husband shall, to the satisfaction of the Court, secure to the wife <sup>2</sup> such gross sum of money or such annual sum <sup>3</sup> of money for any term not exceeding her own life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

In every such case the Court may make an order on the husband for payment to the wife of such monthly or weekly sums for her maintenance and support as the Court may think reasonable:

Power to order  
monthly or weekly  
payments.

Provided that if the husband afterwards from any cause becomes unable to make such payments, it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid, and again to revive the same order wholly or in part, as to the Court seems fit.

(Notes).

General.

(1) **Corresponding English Law.**

The following are the provisions of English Law corresponding to the above section —

(a) By S. 17 of the Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), the Court may, upon an application for restitution of conjugal rights or for judicial separation decree such restitution of conjugal rights or judicial separation, "and where the application is by the wife, may make any order for alimony which shall be deemed just." **C**

(b) S. 32 of the above Act provides that "The Court may, if it shall think fit, on any such decree, order that the husband shall to the satisfaction of the Court secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life as, having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it shall deem reasonable, and for that purpose may refer it to any one of the conveying counsel of the Court of Chancery to settle and approve of a proper deed or instrument to be executed by all necessary parties, and the said Court may, in such case, if it shall see fit, suspend the pronouncing of its decree until such deed shall have been duly executed, and upon any petition for dissolution of marriage the Court shall have the same power to make interim orders for payment of money, by way of alimony or otherwise, to the wife, as it would have in a suit instituted for judicial separation." **D**

(c) The Matrimonial Causes Act, 1866 (29 & 30 Vict., c. 32), preamble and S. 1, provide as follows — "And whereas it sometimes happens that a decree for a dissolution of marriage is obtained against a husband who has no property on which the payment of any such gross or annual sum can be secured, but nevertheless he would be able to make a monthly or weekly payment to the wife during their joint lives :\*\*\* **E**

"1. In every such case it shall be lawful for the Court to make an order on the husband for payment to the wife during their joint lives of such monthly or weekly sums for her maintenance and support as the Court may think reasonable. Provided always, that if the husband shall afterwards from any cause become unable to make such payments it shall be lawful for the Court to discharge or modify the order, or temporarily to suspend same as to the whole or any part of the money so ordered to be paid, and again to revive the same order, wholly or in part, as the Court may seem fit." **F**

## General—(Continued).

## (2) Provision for wife before husband can be granted a decree of judicial separation—Practice of Courts in England.

Courts in England, will, as a general rule, refuse to grant a decree of judicial separation to the husband, unless he makes a suitable provision for the wife. *Prichard v. Prichard*, 3 Sw & Tr 523; 33 L. J. P. & M. 158; *Forth v. Forth*, 36 L. J. P. & M. 122. G

## (3) Decree of Judicial separation—Effect.

(a) The effect of a—13 is to give a legal warranty to the parties to live apart. *Forth v. Forth*, 36 L. J. P. & M. 122. H

(b) In spite of such a decree they remain husband and wife; consequently the husband's obligation to maintain the wife also remains (*Ibid.*). I

## (4) Power of Court to order permanent alimony after decree absolute.

(a) The current of modern decisions in England is to the effect, that the Court has power to make an order for permanent alimony even after a decree absolute has been pronounced. See *Bradley v. Bradley*, 3 P. D. 47; 47 L. J. P. & M. 53. J

(b) The following remarks of Hennen, P. are worthy of being noted:—

Though the order for permanent alimony may be embodied in the judgment pronouncing the decree of dissolution, "there is nothing in the Act which requires it to be so, and it is, in fact, more regular for the Court to pronounce a separate decree for maintenance, after it has made absolute the decree  *nisi* for dissolution. If I had not the decision of the House of Lords to guide me, I should arrive at the same conclusion. The word 'on' is an elastic expression, which, so far from excluding the idea of its meaning 'after' is more consistent with that signification than any other. In some cases the expression 'on' may undoubtedly mean contemporaneously or immediately after, and the question now before the Court is, whether there is anything from which it can be seen that the legislature used the word in the thirty-second section in this restricted sense." In some instances, as in questions of costs, it may be inferred that the legislature intended the Court to act at the time, that is, on the occasion of the facts being brought to its knowledge, and while these facts are fresh in its recollection, but no such reasons apply to the order for maintenance. That is to be the result of a separate investigation of facts, not necessarily before it when the decree of dissolution is pronounced. The investigation of the husband's means may be protracted, he may throw difficulties in the way of the Court obtaining the materials upon which to pronounce a just decision, or ordering a proper deed for the security of the wife being prepared. Where the husband is the petitioner, the decree which he asks may be suspended until he does what is right, but where the wife is the petitioner, to suspend the decree until the husband does something would delay the wife in obtaining redress as to the main object of the suit, because the respondent refuses to give her the means of obtaining a decision on a totally distinct and incidental question." *Per Hennen, J*, in *Bradley v. Bradley*, 3 P. D. 47; 47 L. J. P. & M. 53. K

**General—(Concluded).**

- (c) "Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year ..... 'On,' if not confined to the time of making the decree, must mean shortly after."  
*Per Jessel, M R, Robertson v Robertson*, 8 P.D. at p. 96. **L**

**(5) Permanent alimony before decree absolute.**

Permanent alimony cannot be given before the decree absolute. See *Bradley v. Bradley*, L.R. 3 P.D. 47, cited in argument in 11 C. 354 (355). **M**

**(6) Permanent alimony, District Judge when can make order for.**

Under this section, an order for permanent alimony cannot be made by a District Judge, until his decree in the suit has been confirmed by the High Court. 13 P.R. 1891. **N**

**(7) Alimony not assignable**

Alimony is not assignable *Re Robinson*, (1884) 27 Ch. D. 160 C.A. **O**

**(8) Period from which permanent alimony commences**

As a rule, permanent alimony begins from the final decree of the Judge or of the Court of Appeal, as the case may be Divorce Rule 93. **P**

**(9) Where wife undergoes sentence of penal servitude.**

Where a wife is undergoing a sentence of penal servitude, her application for alimony may be ordered to stand over till shortly before her release.  
*Leslie v. Leslie*, (1908) 1 P. 99 **Q**

**(10) Proof of marriage**

(a) In an application for alimony it is sufficient to set out the fact of the marriage in the petition. An affidavit to that effect is unnecessary.  
 3 B.L.R. (O.C.J.) 101. **R**

(b) In making the application, it is sufficient to show the Court that there has been a ceremony, which might be a valid marriage and so, where the petitioner was shown to be the respondent's deceased wife's sister, alimony was granted. 3 B.L.R. (O.C.J.) 101. **S**

**(11) Wife living with co-respondent or apart from her husband**

(a) In a suit by the husband for a divorce on the ground of his wife's adultery, where it is found that wife is at the time of presenting the petition living with the co-respondent, or living apart from the husband, under such circumstances that she does not pledge his credit, an application by the wife for alimony *pendente lite* will be refused. 3 B.L.R. App. 13. **T**

(b) The wife's costs, however, will be allowed. 3 B.L.R. App. 13. **U**

(c) The Courts have no power to grant permanent alimony until an application is made to make the decree  *nisi* absolute 11 C. 354 (356). **V**

**(12) Alimony—Costs.**

The Court has power under this section to order permanent alimony to the wife when the husband obtains a divorce on the ground of her adultery 5 B.L.R. 71. **W**

**(13) Conditions on wife in granting permanent alimony.**

As to imposing conditions on wife, in granting permanent alimony. See *Keats v. Keats*, 1 S. & T. 335, cited in argument in 11 C. 354 (355). **X**

## 1.—“On.”

**Meaning of the word “On.”**

As to ———, see *Bradley v. Bradley*, 3 P.D. 47; and *Robertson v. Robertson*, 8 P.D. at p. 96 noted *supra*. Y

**2—Secure to the wife.****(1) “Secure”—Meaning of.**

“The word ‘secure’ appears to be used in a particular way. It is contrasted with payment ..... Therefore, I think that the intention of the legislature was that the gross or annual sum should not be ordered at once to be paid over to the wife, but should be secured, and being secured should be paid to her from time to time, that would give a meaning to the word ‘secure’ as contrasted with ‘pay’ ” *Jessel, M.R., Medley v. Medley*, 7 P.D. 122, *Rattigan on Divorce*, 1897, pp. 218, 219. Z

**(2) Usual method by which a gross or annual sum is secured to the wife.**

The ——— is by the personal bond of the husband, with or without sureties, or by deed of settlement. *Keats v. Keats and Montezuma*, 28 L.J., P. and M. 57, *Bent v. Bent and Footman*, 30 L.J., P. and M. 175; *Lister v. Lister*, 15 P.D. 4. A

**(3) Charge on husband's property.**

(a) Generally the property of the husband will not be specifically charged with the payment of permanent alimony. See *Rattigan on Divorce*, 1897, p. 219. B

(b) The order passed by the Ecclesiastical Courts in such cases was to the following effect —“that the husband, regard being had to his circumstances at the time of making the order, should make his wife a certain allowance. Those Courts dealt with the question as if the husband and wife were living together, and they considered what proportion of the income would fall to the lot of the wife. If the husband's property was afterwards increased, the Court exercised the power of increasing alimony, and if it was diminished, of diminishing the alimony, so that the fortunes of the wife followed those of the husband. If this Court directly or indirectly charged the fortune of the husband with the payment of the alimony, it would tie his hands and prevent him from entering into trade or using it in any way for the improvement of his income, and such an order would have a totally different effect from any of the orders made by the Ecclesiastical Courts” *Hyde v. Hyde*, 34 L.J., P. & M. 63; 4 S. & T. 80; followed in *Fowle v. Fowle*, 1 L.R., 4 C. 260, *Carter v. Carter*, (1896), P. 35, 65 L.J. P. & M. 48. C

(c) But, the Court has power, if under the circumstances of any particular cases it deems fit, to create such a charge on the husband's property. See *Fisher v. Fisher*, 31 L.J., P. & M. 1., 2 Sw. & Tr. 414. See also 5 B.L.R. App. 34. D

**3.—“Such gross sum .... annual sum.”****(1) Four ways in which distinct sums of money may be secured to the wife—Practice of English Courts.**

“Under the procedure in the Divorce Court there are four distinct sums of money which may be ordered to be paid, and which are very different the one from the other in some of their qualities. First, there is the well-known



### 3.—“Such gross sum . . . annual sum” —(Continued).

alimony *pendente lite*. There is, secondly, alimony of a permanent character, which is directed to be paid upon a judicial separation being pronounced. Thirdly, there is the gross or annual sum which, upon the dissolution of the marriage, the Court is authorized by the Act of 1857, if it thinks fit, to direct to be paid by the husband to the wife, and, lastly, there are the monthly or weekly payments, which, under the Act of 1866, the Court may order upon a dissolution of the marriage, in the event of its not finding the husband to be capable of paying either the gross sum or the annual sum under the statute of 1857.” *Fry, L.J., Harrison v. Harrison*, 13 P.D. 180. **E**

## (2) Permanent allowance after decree of judicial separation and dissolution of marriage—Difference in English Law.

### (i) PERMANENT ALIMONY AFTER DECREE OF JUDICIAL SEPARATION IS NOT ALIENABLE.

(a) “The wife cannot by assignment or otherwise deprive herself of her right to it so long as she and her husband lived separate and apart from each other.” *Per Lindley, L.J., in Watkins v. Watkins*, (1896), P. 222, 65 L.J. P. & M. 175. See, also, in *In re Robinson*, 27 Ch. D. 160. **F**

(b) “The same doctrine applies to the permanent allowance ordered to be paid to a divorced wife under S 1 of the Act of 1866, which is personal to herself and cannot be assigned or released by her without the sanction of the Court.” *Rattigan on Divorce*, 1897, P. 221. **G**

(c) “A divorced wife need not enforce an order for her own maintenance unless she pleases, and she may release and perhaps assign her right to arrears. But it does not follow that she can bind herself not to enforce payment in future, nor that she can assign her right to future payments. I do not say that an order under S 1 of the Act of 1866, for permanent maintenance cannot be discharged by the Court with the consent of the divorced husband and wife, even if the man is able to pay it, but until such an order is discharged the divorced wife cannot, in my opinion, prospectively deprive herself or be deprived of the benefit of the maintenance which the Court has ordered to be paid to her.” *Lindley, L.J., Watkins v. Watkins*, (1896), P. 222. **H**

### (ii) GROSS OR ANNUAL SUM SECURED TO WIFE ON DISSOLUTION OF MARRIAGE IS ALIENABLE.

(a) A—by her. *Harrison v. Harrison*, 13 P. D. 186. **H-1**

(b) Though it becomes, as it were, the wife's permanent property, yet it is subject to any conditions which may be imposed upon it by the deed executed under the orders of the Court. (*Ibid.*) **I**

(c) Generally such deeds contain a provision against alienation or anticipation by the wife (*Ibid.*) **J**

## (3) Permanent allowance after decree of judicial separation and dissolution of marriage—Difference in Indian Law.

### DIFFERENCE BETWEEN ALIMONY GRANTED AFTER JUDICIAL SEPARATION OR AFTER DIVORCE.

(a) The Indian Divorce Act makes no distinction between the kinds of permanent provision which may be made for a wife upon judicial separation and upon dissolution of marriage; in either case the Court may order

### 3.—“Such gross sum .... annual sum ”—(Continued).

a gross or annual sum to be secured to her, or it may direct payment to her of monthly or weekly sums of money. *Rattigan on Divorce*, 1897, P. 222. **K**

- (b) “There is a substantial difference between permanent alimony which is ordered after a judicial separation, and maintenance which is ordered after a divorce. There is, too, a substantial difference between the position of a wife who is judicially separated from her husband and a wife who is divorced. In the former case the relations of husband and wife continue and cohabitation may at any time be resumed. In the latter case the woman is no longer the wife. She cannot again become the wife unless, after the decree is made absolute, she re-marries her former husband. She may marry again. He is not bound to support her. She cannot pledge her husband's credit, even for necessities. In point of fact, she becomes in every respect in the eye of the law a *feme sole* with all the liabilities and the privileges of a *feme sole*” (*Per Lopes, L.J., Watkins v. Watkins*, (1896), P. 222, 65 L.J., P & M 175. **L**

- (c) And, for similar reasons, a permanent provision in the form of monthly or weekly payments of money is alienable by the wife. For “the Court keeps its hands upon the maintenance, because if the husband is unable to make the payments the Court can discharge or modify the order or temporarily suspend the same as to the whole or any part of the money ordered to be paid, and again revive the same order wholly or in part. Why should the Court reserve to itself a power to revive a modified or suspended order if the wife might have alienated her interest? The Court would not be concerned to restore an order made in favour of a wife to assist an assignee who could have no claim on the husband nor do I think that the Court would be justified in enforcing an order for maintenance against the husband on the application of the assignee” (*Per Lopes, L.J., Watkins v. Watkins*, (1896), P. 222. **M**

- (d) “Although, therefore, no distinction of the kind referred to above is made in the Indian Divorce Act between permanent alimony after judicial separation and permanent maintenance after dissolution of marriage, the principle enunciated in the decisions cited would still apply and, consequently, here, as in England, the only alienable or assignable permanent provision would be the gross or annual sum secured to a wife upon the dissolution of marriage.” *Rattigan on Divorce*, 1896, pp. 222, 223. **N**

#### (4) Bankruptcy of the husband

The—does not discharge him from his liability to pay his wife the alimony ordered by the Court. See *In re Hawkins*, (1894) 1 Q.B. D. 25, *Linton v. Linton*, 15 Q.B.D. 239. **O**

### A.—POINTS TO BE CONSIDERED BY THE COURT IN GRANTING ALIMONY PERMANENT.

#### (1) Courts generally follow the practice of Ecclesiastical Courts.

- (a) It is now settled that, in granting permanent maintenance after a dissolution of marriage, the Court “will not deal with the subject in any more niggard spirit than that in which the Ecclesiastical Court regarded the question of permanent alimony” *Sidney v. Sidney*, 84 L.J., P & M. 122. **P**

3.—“*Such gross sum ... annual sum*”—(Continued).

## A.—POINTS TO BE CONSIDERED BY THE COURT IN GRANTING ALIMONY PERMANENT—(Continued)

(b) In this case the learned Judge, referring to *Fisher v. Fisher*, gave his reasons for refusing to follow that case. “If a man, before the Divorce Act, treated his wife with cruelty and was also guilty of adultery, she could only obtain a divorce *a mensa et thoro*, and an allowance, called permanent alimony, was made to her, which was generally calculated at the rate of one-third of the husband's income. Since the Divorce Act the same conduct on the part of the husband entitles the wife to a dissolution of her marriage; but it is hard to say that she was intended by the legislature to purchase that remedy by a surrender to which she would otherwise have been entitled. The needs of the wife and the wrongs of the husband are the same in both cases. In both cases the husband has of his own wrong and wickedness thrust forth his wife from the position of participator in his station and means. Obligated in both cases to withdraw from his home, she is, without any fault of her own, deprived of her fair and reasonable share of such necessities and comforts as lay at his command. Why should not the husband's purse be called upon to meet both cases alike? It has been said that in one case she remains a wife, and in the other she does not. This remark would carry great weight with it, if the provision were intended to continue in the event of her second marriage. But it can hardly affect the rate of an allowance made and continued so long only as the wife remains chaste and unmarried. Again, it has been said that it is not desirable that the wife should have a pecuniary interest in preferring divorce to judicial separation. But it should be borne in mind that it is still less desirable that an adulterous husband should have a pecuniary interest in adding cruelty or desertion to his adultery, and thus evading the permanent alimony allowed on judicial separation. And this he would have if the amount of the maintenance to be accorded varied, not with his misconduct, but with the form of her remedy... To such a man the Court may surely say with propriety, ‘According to your ability you must still support the woman you have first chosen and then discarded. If you are relieved from your matrimonial vows, it is for the protection of the woman you have injured and not for your own sake, and so much of the duty of the husband as consists in the maintenance of his wife may be justly kept alive and enforced upon you in favour of her whom you have driven to relinquish your name and home.’ If this be to give the wife a pecuniary interest in obtaining a divorce, it is also to hold a pecuniary penalty over the head of the husband for the observance of married duty, and if it be wise to repress divorce, it is wiser still to go a step higher and repress that conduct which makes divorce possible. It is the foremost duty of this Court in dispensing the remedy of divorce to uphold the institution of marriage.”

Q

N B.—In this case the income of the husband was estimated at £715 net, from his property, and £400 from his profession, while that of the wife was estimated at £155, making a total joint income of £1,270.

3.—“*Such gross sum . . . annual sum*”—(Continued).

## A.—POINTS TO BE CONSIDERED BY THE COURT IN GRANTING ALIMONY PERMANENT—(Concluded).

Out of this the Court allotted the wife 400 £, being the 155£, of her own and 245 £ to be paid to her by her husband. See *Rattigan on Divorce*, 1897, pp. 226, 227

Q-1

## (2) Points to be considered in fixing alimony permanent.

(a) In a recent case the Court of Appeal stated that, in estimating what would be a reasonable amount for the wife's maintenance and support during the joint lives of the husband and wife, the circumstances which should be taken into account are—

(i) The conduct of the parties.

(ii) Their position in life.

(iii) Their ages and respective means.

(iv) The amount of the provision actually made.

(v) The existence or non-existence of children, and who is to have the care and custody of them

(vi) Any other circumstances which may be important in any particular case. See *Wood v Wood*, (1891), P 272, *Rattigan on Divorce*, 1897, pp 227, 228.

R

(b) the following observations of Lord Justice Lindley may also be noted

“As regards the conduct of the parties, the wife here was the petitioner, and nothing is, or can be, said against her. The misconduct of her husband drove her to seek a divorce. This is very material in considering whether the words *dum casta* should be inserted, for although, on the one hand, as forcibly pointed out by Jeune, J., it is unjust to make an allowance cease on marriage, and not on illicit intercourse, yet, on the other hand, it is an insult to any woman of spotless character to provide against the contingency of her sinking so low as to render such a provision necessary. This view of the question is quite as important as the other. As regards the position of the parties and their respective means, much must turn on these matters. The least that a man ought to do for the maintenance and support of his wife, when he so disregards his own duties to his wife as to drive her from her home by a divorce, is to do what he can, consistently with his means, to maintain her in reasonable comfort, having regard to her age, health and position in society. Both the amount he ought to allow her, and the duration of such allowance ought to be fixed with reference to this consideration. The amount of her property, if any, ought obviously to be taken into consideration. If, as in this case, the husband's means are such that he can only allow his wife a bare subsistence, and she has nothing, it seems to us unjust to her that even this subsistence money should cease merely because she may marry again. The continuance of the allowance may conduce very materially to her marrying, and to her future comfort and happiness. On the other hand, justice to him does not, in our opinion, require the cessation of so small an allowance on her marrying again.” *Wood v Wood*, (1891), P 272

S

As a matter of practice, the Courts are not in the habit of ordering a husband, who has obtained a decree of dissolution to secure to the wife a gross or annual sum unless proof of the husband's ability to pay is also given. See *Ratcliffe v. Ratcliffe and Andersson*, 29 L.J., P. & M. 171. T

3.—“*Such gross sum . . . annual sum*”—(Continued).

## B.—AMOUNT OF PERMANENT ALIMONY.

## (1) No fixed rule as to amount of permanent alimony.

- (a) There is no fixed rule as to what proportion of the joint incomes of the husband and wife should be allowed to the innocent wife as permanent alimony. *Otway v. Otway*, (1813), 2 Phillim. 109; *L. v. L.* (1911), 27 T.L.R. 316. **U**
- (b) As to the amount of alimony to be allowed to the wife. See 5 B.L.R. App. 34 cited, in argument in 4 C. 260 (265). **Y**
- (c) In *Ord v. Ord*, 5 B.L.R. App. 34, the wife's alimony was made the first charge in the husband's property, 5 B.L.R. App. 34. **W**

## (2) Generally left to discretion of Court.

- “The amount of the alimony is in the discretion of the Court,” *Per Evans, P.* in *L. v. L.* (1911), 27 T.L.R. 316 at p. 317. **X**

## (3) General rule as to one-third.

- (a) The usual proportion of permanent alimony is a third of the joint income of the husband and wife *Haugh v. Haugh*, 38 L.J. Mat. 37 **Y**
- (b) In the absence of special circumstances the Court will generally order the husband to secure about one-third of the joint income as permanent maintenance to a wife whose marriage has been dissolved on her own petition. *Sidney v. Sidney*, 4 S. & T. 178, 34 L.J.P. 122, 12 L.T. 826 **Z**

## (4) But liable to variation

- (a) It has usually been one-third, sometimes less, and occasionally as much as one-half *Wilcocks v. Wilcocks*, (1859), 32 L.J. (P. & M.) 205, *Taylor v. Taylor*, (1791) (Unreported); *Cooke v. Cooke*, (1812), 2 Phillim. 40 **A**
- (b) In a case where the husband's income was 150£ a year, the Court ordered him to pay to the wife 1£, per week, together with 30£ a year for the maintenance and education of two children who were in her custody. *Prescott v. Prescott*, 18 L.T. 35. **B**
- (c) Except for this difference of proportion, the allotment is made in practically the same way as in the case of alimony *pendente lite*. *Laws of England*, Vol. XVI, pp. 518, 519, 564. **C**

## (5) Circumstances where permanent alimony has been fixed at less than one-third.

## (i) WHERE HUSBAND'S INCOME IS LARGE.

- (a) The rule that one-third of the joint income of the husband and wife should be allotted as permanent maintenance does not apply where such income is very large. *Browne and Powles on Divorce*, Seventh Edition, 1905, 147; *Sykes v. Sykes*, (1897), P. 306; 66 L.J.P. 162; 77 L.T. 150, *Wilcocks v. Wilcocks*, (1859), 32 L.J. P & M. 205. **D**
- (b) In such cases a fair test is what would be considered an adequate jointure for the wife (as widow) in case of her husband's death. *Sykes v. Sykes*, (1897), P. 306, 66 L.J.P. 162; 77 L.T. 150. **E**

## (ii) WHERE HUSBAND HAD TO INCUR HEAVY EXPENSES.

- In cases——the proportion would be reduced. *Louis v. Louis*, (1866), L.R. P & 1D. 280. **F.**

## 3.—“Such gross sum....annual sum”—(Continued).

## B.—AMOUNT OF PERMANENT ALIMONY—(Continued).

## (6) Permanent alimony not to exceed one half of joint income.

The Court is bound by the practice of the Ecclesiastical Courts, and cannot at any time, therefore, allot a larger proportion than half the joint income, although the greater part of the fortune may have come from the wife. See *Haigh v. Haigh*, 38 L J. Mat. 37 **G**

(7) Permanent alimony larger in amount than alimony *pendente lite*

(a) Permanent alimony is larger in proportion than alimony pending suit, but it depends upon the condition of the parties *Cooke v. Cooke*, 2 Phillim, 44. **H**

(b) At times it is a half of the total means. *Cooke v. Cooke*, 2 Phillim, 44. **I**

## (8) Children to maintain.

(a) Children to maintain is a matter to be taken account of. *Hawkes v. Hawkes*, 1 Hagg. E C. 526, *Harris v. Harris*, 1 Hagg. F C 351. **J**

(b) But not that of children by a former marriage *Hill v. Hill*, 33 L.J. Mat 104 **K**

(c) But if they are many they may perhaps be taken into account. *Grafton v. Grafton*, 27 L T N S 768. **L**

(d) An agreement between husband and wife for a stipulated sum on separation, to include the maintenance and education of the children, does not disentitle the Court, on proceedings for divorce, to make provision for the children, nor enable the husband to escape discovery of his means. *Barry v. Barry*, (1901), 87 **M**

(e) Sometimes in awarding alimony *lite*, provision may also be made for the children in the custody of the wife *Wheldon v. Wheldon*, 2 S. & T 338, 30 L J P 174, 5 L T 139 **N**

(f) Where the wife had the custody of three children, and the husband's income was estimated at 400£, a year, the Court awarded 100£ for herself as permanent alimony and 20 £ for each of the children *Wheldon v. Wheldon*, 2 S. & T. 388, 30 L. J. P. 174, 5 L T 138 **O**

## (9) Permanent alimony in case of judicial separation.

(a) The usual allotment of permanent alimony on judicial separation is one-third of the whole income *Otway v. Otway*, Phillim, 109. **P**

(b) The Court follows the Ecclesiastical practice *M. C. A* 1857, S 23. **Q**

(c) The Court cannot in any case allow more than a moiety of the joint income to the wife, although she may have brought more than a moiety of the property into settlement. *Haigh v. Haigh*, L.R., 1 P. & D. 709, and see *Cooke v. Cooke*, 2 Phillim, 40 **R**

## (10) Limit of amount of alimony after decree of judicial separation

(a) In suits for judicial separation Courts are bound by the practice of the Ecclesiastical Courts *Haigh v. Haigh*, L. R., 1 P. & D 709; 38 L. J. P. 37; 20 L T 281 **S**

(b) Hence the Courts cannot in such suit allot more than one moiety of the joint income to the wife by way of permanent alimony, although she may have brought more than one moiety of the property into settlement *Haigh v. Haigh*, L R. 1 P. & D. 709, 38 L J.P. 37, 20 L T 281. **T**

## 3.—“Such gross sum...annual sum”—(Continued).

## B.—AMOUNT OF PERMANENT ALIMONY—(Continued).

- (c) Nor can the Courts make such an order as would have the effect of charging the husband's property with payment of permanent alimony, whatever alteration might take place in his circumstances at any future time. *Hyde v. Hyde*, 4 S. & T. 80, 34 L.J.P. 63, 12 L.T. 235. **U**
- (d) In extreme cases one half of the husband's income may be awarded as alimony. *Avila v. Avila*, 31 L.J.P. 176. **Y**
- (e) Thus where the only income of the husband was 60*l*. a year, and he had turned his wife out, and his mistress was living with him, the Court awarded a moiety of his income as permanent alimony. *Avila v. Avila*, 31 L.J.P. 176. **W**

(11) Permanent alimony in suit for *dissolution of marriage*—Adultery and desertion—Delay in bringing suit—Permanent alimony.

A suit for dissolution of marriage was brought by the wife on the ground of her husband's adultery and desertion.

It appeared that the desertion took place twenty-four years before the suit was brought, and ever since the husband had made his wife an allowance. Latterly his circumstances had considerably improved. *Held*,

- (i) that a decree for dissolution should be given,
- (ii) that in determining the suitable amount of permanent alimony, the circumstances of the husband at the time of the desertion ought to be taken into consideration,
- (iii) and that the wife should be given the full advantage of the present improved circumstances of the husband. 5 B.L.R. App. 153 **X**

## (12) Alimony permanent, amount of—Estimation of husband's income.

- (a) Both parties are, as a rule, bound by the amount at which the husband's income was estimated for the purpose of allotting alimony *pendente lite*. Browne and Powles on Divorce, Seventh Edition, 1905, p. 152 **X-1**

In the absence of proof that the husband's income has altered, permanent alimony will be awarded upon the income upon which alimony *pendente lite* was allotted. *Franks v. Franks*, 31 L.J. P. & M. 25; *Bonsor v. Bonsor*, (1897), p. 77, 66 L.J.P. 35, 76 L.T. 168. As to mode of showing that husband's income has diminished, see *Fisk v. Fisk*, 31 L.J.P. 60, *Davies v. Davies*, 32 L.J.P. 152. **Y**

- (c) In this case a post-nuptial deed was produced in which it was covenanted that the wife should have an allowance of £100 a year if her husband should afterwards be guilty of cruelty or adultery, the Court, notwithstanding such deed, gave the wife £200 a year after she had obtained a decree dissolving her marriage. *Wilkinson v. Wilkinson*, 69 L.T. 457. **Z**

- (d) The inquiry into the husband's means *pendente lite*, if full, suffices for this allotment. *Bonsor v. Bonsor*, 1897, p. 77 **A**

## (13) Deductions from husband's income.

The same deductions allowed in estimating the amount of the husband's income for awarding alimony *pendente lite* may also be made for the purposes of awarding permanent alimony or maintenance. Browne and Powles on Divorce, Seventh Edition, 1905, 147. **B**

3.—“*Such gross sum....annual sum*”—(Continued).

## B.—AMOUNT OF PERMANENT ALIMONY—(Continued).

(14) **Incomes may be charged.**

Incomes may be charged, though the interest under the settlement would cease if alienated or encumbered *Swift v. Swift*, 15 P D 118, and see M.C.A. 1884, S 3. C

(15) **Profits of partnership.**

(a) Where a husband's income is only a portion of the profits of a business, the remainder being kept in the business by the terms of the partnership, he must pay maintenance proportionately on the sum only which he is allowed to draw out, and not on all the profits. *Hanbury v. Hanbury*, 1894, P 315. D

(b) If the order be otherwise, his partner might dissolve and so put an end to his income. *Hanbury v. Hanbury*, 1894, P. 315. E

(16) **Reversionary interest.**

Reversionary interests are not interfered with in fixing permanent maintenance, except under special circumstances, as where it could not be secured otherwise. *Harrison v. Harrison*, 12 P.D. 130. F

(17) **Money in Savings bank.**

The Court cannot order that a sum of money standing in the names of the husband and wife in a savings bank should be paid to the wife. *Robotham v. Robotham*, 1 S & T. 190, 27 L.J P 61. G

(18) **Alimony pendente lite—Absence of means—Reference to Registrar—Practice.**

On an application by a Respondent, a wife, for alimony *pendente lite*, the Court, instead of referring the matter to the Registrar to inquire and report as to the amount that ought to be allowed directed that the husband should attend Court for examination as to his means, although in his affidavit he had admitted that he was possessed of means. 6 C W.N. 614. H

(19) **Injunction to restrain husband from making away with property.**

(a) The Court has power to grant an injunction to prevent a husband from making away with his property, or putting it out of his power, so as to avoid payment of alimony. See *Hawes v. Hawes*, 57 L.T. 374; *Noakes v Noakes*, 1 P D 60, 47 L.J P. 20, 37 L.T. 47; *Watts v. Watts*, 24 W R 623 See also *Sidney v Sidney*, 17 L.T 9. I

(b) But it cannot do so until some order has been made for alimony, or in some way for the payment of money. *Newton v. Newton*, 11 P D 11, 55, L.J.P and M. 13. J

(20) **Injunction to restrain husband from receiving legacy.**

(a) In one case where an order has been made on the respondent (husband) in a divorce suit to pay and secure a sum certain for his wife's costs, the Court granted an injunction to restrain him from receiving a legacy to which he was entitled until he had complied with the order. *Gillett v. Gillett*, 14 P D 158, 58 L J P 84, 61 L T 401. K

(b) But in such a case it refused to make any order to enforce an allowance which had been granted to the wife in proceedings for judicial separation before a magistrate. *Gillett v Gillett*, 14 P D. 158, 58 L J P 84, 61 L T 401. L



### 3.—“Such gross sum....annual sum” —(Continued).

#### B.—AMOUNT OF PERMANENT ALIMONY—(Concluded).

##### (21) Injunction to restrain husband from dealing with property.

Where an order has been made on the husband to receive a certain sum of money for the permanent maintenance of his wife, the Court granted an injunction restraining the husband from dealing with certain specified portions of the property until such order had been complied with. *Newton v. Newton*, (1896), P. 36, 65 L.J.P. 15. **M**

##### (22) Injunction refused in judicial separation.

The Court would refuse to grant an injunction where an order for alimony *pendente lite* had been made in a suit for judicial separation. *Carter v. Carter*, (1896), P. 35: 65 L.J.P. 48. **N**

##### (23) Grant of alimony—Court's power—Indian Law

The Court ought not, even if it had the power, to tie up the property of the husband, and convert alimony into an absolute interest in, and charge upon his estate. 4 C 260=3 C L R. 484. **O**

##### (24) Suit for restitution—Question as to amount not considered before decree.

In suits for restitution the Court will refuse at the hearing to consider any question as to what allowance the respondent should be ordered to pay his wife in the event of a decree being pronounced and of his refusing to comply therewith. *Mason v. Mason*, 61 L.T. 304. **P**

#### C —PERMANENT ALIMONY FOR A GUILTY WIFE.

##### I —English Law.

##### (1) Discretion of Court to make provision for a guilty wife

(a) The Court has absolute discretion to order a successful husband to support his guilty wife, and exercises that discretion in all cases. *M C A.* 1857, S 32 **Q**

(b) Thus, a guilty wife, unable to earn her own living through ill-health, will be provided for. *Ashcroft v. Ashcroft and R.*, (1902) P. 270. **R**

(c) The Court withholds its decree, at times, until the successful husband has secured a provision for his wife. *Squire v. Squire and C.*, (1905) P. 4 92 L.T. 472. **S**

(d) Special circumstances will influence the Court. *Robertson v. Robertson and F.*, 8 P.D. 94, *Fisher v. Fisher*, 31 L.J., Mat. 1. **T**

##### (2) Permanent provision for a wife found guilty.

(a) “In a case which came before the Court of Appeal in 1883 it was contended on behalf of the husband, who had obtained a decree *non* for dissolution of the marriage, that up to that time permanent alimony for a guilty wife had not been ordered except with the consent of the husband, or under special circumstances.” *Rattigan on Divorce*, 1897, P. 231 **U**

(b) The following remarks of Jessel, M.R., may also be noted —

“I am sorry to hear it. I am not giving a final opinion, but it appears to me that S 32 was intended to give the Court a discretion which was to be exercised according to the circumstances of each case, and that it was not intended that a guilty wife should be turned out into the streets to starve.” Per Jessel, M.R., *Robertson v. Robertson*, 8 P.D. 94. **V**

## 3.—“Such gross sum....annual sum”—(Continued).

## C.—PERMANENT ALIMONY FOR A GUILTY WIFE—(Continued).

## I.—English Law—(Continued).

(c) The following observations of Jessel, M.R. also throw light on the above point:—

“Now, under the thirty-second section, the practice seems to have grown up of not allowing maintenance to the guilty wife unless a special case is shown. I am not prepared to say on the present occasion that this is the correct rule. I am not going to lay it down that it is not. I should require further consideration and argument before doing so, but it appears to me that the thirty-second section of the Act has left an absolute discretion in the Court. I think that there was a good reason for doing so. When a divorce could only be obtained by Act of Parliament, it was in practice only obtained by wealthy persons, because it was very expensive, and it might well be considered right that where a wealthy man obtained a divorce from a wife who had no means of subsistence, he should, as a condition of his being granted that divorce, be compelled to make some provision for her, so that she should not be allowed to starve. But the Divorce Act was meant to apply not only to wealthy people but to all people, and, indeed, one of the strong grounds for passing it was that under the then system the wealthy alone could obtain a divorce. It was thought that this was not a right state of things, and consequently the remedy was made less expensive, so that all classes might be able to resort to it. Now in the case of people of small means very different considerations arise. When a working man who has married a washer-woman obtains a divorce, she can very well go washing again. That is quite a different case from that of a gentleman of large means who obtains a special privilege by Act of Parliament. I should be inclined to say that where a wealthy gentleman obtains a divorce, the Court, in acting under S. 32, ought to act on a rule somewhat similar to that established in the House of Lords under the old practice, for the reason of the thing appears to be the same, but we are not to be considered as finally deciding the point, or as laying down any rule for the guidance of the Divorce Court. I am only stating my present impression that the Court, under S. 32, has full discretion, and is under no obligation to require special circumstances to be shown to entitle the guilty wife to some provision.” Jessel, M.R., *Robertson v. Robertson*, 8 P.D. 94. W

(d) Generally speaking, the Court, will make an order on the husband for some provision to the guilty wife, if it be found that she has no means of her own and that she is not in a position to earn her own living and support herself. See Rattigan on Divorce, 1897, pp. 232 and 233 and the cases cited therein. X

## (3) Amount of permanent alimony ordered to a guilty wife.

(a) The provision ordered to a guilty wife is usually a sufficient maintenance, but it may be a liberal one, on grounds shown. *Morris v. Morris*, 31 L. J. Mat. 33. Y

(b) The rule of a fourth is not always followed when adequate provision can be made without doing so. *Kettlewell v. Kettlewell*, (1898), P. 138. Z

3.—“ *Such gross sum . . . annual sum* ”—(Continued).

## C.—PERMANENT ALIMONY FOR A GUILTY WIFE—(Concluded).

## I.—English Law—(Concluded).

(c) Where the husband was the guilty party, and the wife's means very small, the Court apportioned to her a third of the joint incomes, and set aside a third of her husband's capital to secure it. *Shurthouse v. Shurthouse*, 29 L. T. 366. **A**

(4) **Compassionate allowance to guilty wife.**

The Court has an absolute discretion to order a husband to provide even for a guilty wife, if it should be of opinion that the circumstances of the case require that such provision is to be made. *Ashcroft v. Ashcroft*, (1902), P. 270, 71 L. J. P. 125, 87 L. T. 229. See further as to allowance to guilty wife. *Kents v. Feats*, 1 S. & T. 334, 28 L. J. P. 57, *Ratcliffe v. Ratcliffe*, 1 S. and T. 467. Browne and Powles on Divorce, Seventh Edition, 1905, P. 119. **B**

(5) **Judicial separation on ground of wife's cruelty.**

As a general rule, a judicial separation on the ground of the wife's cruelty will not now be decreed, except on the condition that the husband makes some reasonable provision for her maintenance. *Forth v. Forth*, 36 L. J. P. 122, 16 L. T. 574. See also *Pickard v. Pickard*, 33 L. J. P. 158, and nom. *Pritchard v. Pritchard*, 3 S. & T. 523, 10 L. T. 789. Browne and Powles on Divorce, Seventh Edition, 1905, p. 149. **C**

(6) **Permanent alimony to guilty wife—Suits for judicial separation.**

The Court can in certain cases order permanent alimony to be paid to a guilty wife in suits for judicial separation. *Goodden v. Goodden*, (1892), P. 1, 65 L. T. 542. **D**

## II.—Indian Law

**Permanent alimony to guilty wife—Indian Law**

A Court has no power under S. 37 of Act IV of 1869, to order permanent alimony to the wife, when the husband obtains a divorce on the ground of her adultery. 5 B. L. R. 71. **E**

## D.—ENFORCING PAYMENT OF PERMANENT ALIMONY.

(1) **Permanent alimony when payable.**

Permanent alimony is payable at the date of the decree, or, if appealed against but confirmed, on the decision of the Court of Appeal. Divorce Rule 93, App. B, and see *Cooke v. Cooke*, 2 Phillim. 47. **F**

(2) **Mode of enforcing payment of permanent alimony.**

Payment is enforced in a similar manner to that of alimony *pendente lite*, and applications for injunctions are similarly dealt with. Laws of England, Vol. XVI, pp. 564, 591. **G**

(3) **Security from husband for payment of permanent alimony.**

A husband cannot be ordered to give security for payment of alimony. *Hyde v. Hyde*, (1865), 4 Sw. & Tr. 80. **H**

(4) **Payment of lump sum ordered.**

In certain cases the Court ordered the husband to secure to his wife the payment of certain sum absolutely. *Morris v. Morris*, 31 L. J. P. 33; *Stanley v. Stanley*, (1899), P. 227, 68 L. J. P. 7. **I**

## 3.—“Such gross sum . . . annual sum”—(Continued).

## II.—Indian Law—(Continued).

## D.—ENFORCING PAYMENT OF PERMANENT ALIMONY—(Concluded).

## (5) No power to order gross sum to be paid to wife absolutely—English Law

But in 1903, Sir Francis Jeune—after considering and commenting on the last two cases—held, that the Court has no power either to order a lump sum to be paid over to a wife for her permanent maintenance, or to order such lump sum to be secured to her or to the issue of the marriage by settlement, for a longer period than her own life. *Twentyman v. Twentyman*, (1903), P. 82; 72 L J P. 36, 88 L T. 571. J

## (6) Order by consent.

The Court may make any order it pleases with the consent of all parties. *Kirk v. Kirk*, (1902), P. 115, 71 L J P. 78, 87 L T. 148 K

## (7) Partnership business, basis of calculation of husband's income out of

In cases where the husband is in business the proper basis of calculation of the sum to be secured for a wife's maintenance is the amount he can draw out of his business without his partner's consent and not his share of profits. *Hanbury v. Hanbury*, (1894), P. 315, 63 L J P. 105, 70 L T. 569, (1895), A C 417, 72 L T. 480 L

## (8) Arrears of alimony, promise to release

(a) Where a wife has obtained an order for an annual sum to be secured to her, it is open to her to release or alienate it. *MacLurcan v. MacLurcan*, (1897), 77 L T. 174 M

(b) But it has been held that a promise to release arrears and future payments of alimony is not supported by a consideration of a sum less than the arrears. *Underwood v. Underwood*, (1894), P. 204, 64 L J P. 109, 70 L T. 390. See also *De Lossy v. De Lossy*, 15 P.D. 115, 62 L T. 704. N

## (9) Wife entitled to separate estate, husband's income small—No permanent maintenance.

In this case the husband's yearly income was “00£”, the wife had an income of 12£ a year, and was entitled in reversion on the death of a person aged eighty to an annual income of 70£, under such circumstances the Court declined to order permanent maintenance. *Rawlins v. Rawlins*, 34 L J P.M. 147, 4 S. and T. 158, 13 L T. 212. O

## E.—VARYING ORDERS.

## (1) Varying order as to permanent alimony.

The Court may vary its order as it pleases. Mat. C. Act, 1857, S. 4. P

## (2) When subsequent circumstances will afford ground for altering amount of permanent alimony.

(a) The Court will not entertain an application to reduce permanent alimony granted eight years before if there be no evidence before it of the circumstances of the husband at the time the order was made. *Saunders v. Saunders*, 1 S. and T. 72 Q

(b) On the other hand, if the husband receives a larger salary by reason of the increased expenses of his position, the wife will not be entitled to the usual proportion of such income. *Louis v. Louis*, L.R., 1 P. & D. 230, 35 L J P. 92, 14 L T. 770. R

## 3.—“Such gross sum. . annual sum”—(Concluded).

## II.—Indian Law—(Concluded).

## F.—VARYING ORDERS—(Concluded).

- (c) In this case permanent alimony was allotted to a wife on her obtaining a decree of judicial separation. The husband afterwards obtained a decree *non* for dissolution of marriage on the ground of her adultery. *Held*, that before the decree is made absolute, the order for payment of alimony cannot be discharged *Stoate v Stoate*, 30 L.J.P. 180 **S**
- (d) Where a petitioner has accepted an allowance from the respondent under a deed of separation, and subsequently obtains a dissolution of her marriage, or a judicial separation, she is not precluded from applying for an increased provision out of the income of the respondent. See *Benyon v. Benyon*, 1 P.D. 447, 45 L.J.P. 93, *Bishop v. Bishop*, (1897), p. 138, 66 L.J.P. 69; 76 L.T. 409, *Judkins v. Judkins*, (1897), p. 138, 66 L.J.P. 76, 76 L.T. 409. *Browne and Powles' on Divorce*, Seventh Edition, 1905, p. 152 **T**

## (3) Application for reduction

If the husband's income fails, he can apply for a reduction of alimony. *Moore v. Moore*, 3 S. and T. 606, 34 L.J.P. 146, 11 L.T. 459 **U**

## F.—DEEDS OF SEPARATION, EFFECT OF

## (1) Effect of separation deed

- (a) A deed is not necessarily a bar to the allotment of increased alimony, but the sum paid under it is usually a reliable guide *Powell v. Powell and J.*, 1 L.R. 3 P. & D. 55, and on appeal, 186, *Weber v Weber and P.*, 1 Sw. & Tr. 219. **V**
- (b) On decree of judicial separation a sum already fixed by deed still existing, cannot be varied in the wife's favour, unless the husband has lost the benefit of the deed by misconduct. *Gandy v. Gandy*, 7 P.D., 168 **W**

## (2) Covenant as to alimony.

- (a) Where a wife enters into a deed covenanting not to ask for further alimony, and her husband afterwards is found guilty of adultery, she may be held to be estopped from obtaining more, unless the Court finds that the position of the parties provided for by the deed is altered by its order *Ross v. Ross*, (1909), 2 I.R. 339, *Bishop v. Bishop, Judkins v. Judkins*, (1897), p. 138, 140, C.A. explaining *Gandy v. Gandy*, (1882), 7 P.D. 77, 168 C.A. **X**
- (b) The parties cannot covenant so as to affect the powers of the Court as to the maintenance, etc., of their children *Bishop v. Bishop, Judkins v. Judkins*, (1897), p. 138, 140 C.A. **V**

## (3) Varying marriage settlements.

The Court has no power to vary marriage settlements on decree of judicial separation *Gandy v. Gandy*, 7 P.D., 168 **Z**

## (4) Covenant in separation deed to pay annuity.

As to the husband's liability at common law under a covenant in a separation deed to pay an annuity to his wife after she has committed adultery, the *dum casta* clause not having been inserted in such deed See *Fearon v. Aylesford*, 14 Q.B.D. 792, 54 L.J., Q.B.D. 33, 52 L.T. 954. **A**

**38.** In all cases in which the Court makes any decree or order, for alimony, it may direct the same to be paid either to the wife herself, or to any trustee on her behalf to be approved by the Court, and may impose any terms or restrictions which to the Court seem expedient, and may from time to time appoint a new trustee, if it appears to the Court expedient so to do

Court may direct payment of alimony to wife or to her trustee.

**(Notes).**

**General.**

**(1) Order to pay to solicitor.**

(a) The Court may order payment of the alimony to be made to the wife's solicitor for the sake of convenience. *Browne and Powles on Divorce*, Seventh Edition, 1905, P. 150 **B**

(b) But this procedure can only be adopted on the written application of the wife herself *Browne and Powles on Divorce*, Seventh Edition, 1905, P. 150, *Margeson v. Margeson* 34 L J P. 80 **C**

(c) The solicitor will not be entitled to charge for so receiving it. *Margeson v. Margeson*, 34 L J P. 80 See also to payment to wife's solicitor, *Parr v. Parr*, 32 L J P. 90, *Ladmore v. Ladmore*, 32 L J P. 157 **D**

**(2) Varying the order.**

Varying the order as to the mode of payment takes place when desirable. *M. C. A. 1866*, *Jardine v. Jardine*, 6 P. D. 213 **E**

**(3) Settling maintenance by deed.**

The Court may require the husband and all necessary parties to execute a deed settled by counsel to secure the wife's maintenance, and may suspend the decree in the suit until the deed has been executed. If the husband fails to execute the deed, the registrar is empowered to execute it so as to bind him. *Howarth v. Howarth*, 11 P. D. 69, J. A. 1884, C. 61, S. 11. **F**

**(4) Permanent maintenance not alienable**

Permanent maintenance is not alienable, and may not be assigned. *M. C. A. 1867*, S. 32; *Watkins v. Watkins*, Times L. R., June 6, 1896, P. 456 **G**

**(5) Separation deeds.**

(a) A decree of dissolution puts an end to a deed of separation. *Morrall v. Morrall*, 6 P. D. 98. **H**

(b) The wife, therefore, will not be stopped on application for permanent maintenance by the deed *Morrall v. Morrall*, 6 P. D. 98. **I**

**X.—Settlements.**

**39.** Whenever the Court pronounces a decree of dissolution of marriage or judicial separation for adultery of the wife, if it is made to appear to the Court that the wife is entitled to any property, the Court may, if it think fit, order such settlement as it thinks reasonable to be made of such property or or any part thereof, for the benefit of the husband, or of the children of the marriage, or of both <sup>1</sup>.

Power to order settlement of wife's property for benefit of husband and children.

Any instrument executed pursuant to any order of the Court at the time of or after the pronouncing of a decree of dissolution of marriage or judicial separation shall be deemed valid notwithstanding the existence of the disability of coverture at the time of the execution thereof.

The Court may direct that the whole or any part of the damages recovered under section thirty-four shall be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife.

Settlement of damages<sup>2</sup>.

### (Notes)

#### General

#### (1) Scope of section.

It is only when the decree of judicial separation is made on the ground of the wife's *adultery* that the Court can make an order under this section. (See Rutigan on Divorce, 1897, P. 243) J

#### (2) What property of wife can be dealt with under this section.

In a case where, in addition to property which she is restrained from anticipating, the wife is entitled to property over which she has absolute powers of disposition, the Court, while refraining from dealing with the property subject to the restraint, will compel her to re-settle property which is at her absolute disposal. *Michell v. Michell*, (1891), P. 208 explaining *Swift v. Swift*, 15 P.D. 118, (1891), P. 129. K

#### (3) *Spes Successionis*.

(a) A mere *spes successionis* is not "property" within the meaning of this section. *Stone v. Stone and Brownigg*, 33 L.J.P. and M. 95 L

(b) Thus, where the wife, under the marriage settlement of her father, was entitled to a sum of money after his death in the event of his not otherwise disposing of it, *held* that this possibility of succeeding to her father was not "property" within the meaning of this section. *Stone v. Stone and Brownigg*, 33 L.J.P. and M. 95, *cf.* *Parsons, In re, Stockley v. Parsons*, 45 Ch. D. 51, 59 L.J., Ch. 666. M

#### (4) Procedure under the section.

In proceedings under this section Courts will not enter into debtor and creditor account between husband and wife. *Swift v. Swift*, (1891), P. 129, 5 P.D. 118, 60 L.J.P. and M. 14, See also *Michell v. Michell*, (1891), P. 208, in which *Swift v. Swift*, 5 P.D. 118 is explained. N

#### (5) Costs of wife to be considered.

Courts, in ordering a settlement under this section, will take into consideration the costs with which the wife will be burdened in defending the suit, for which her husband is not strictly liable. *Bacon v. Bacon and Bacon*, 2L.J., P. and M. 12. O

**1.—“For the benefit of the husband, or of the children of the marriage, or of both.”**

**Persons for whose benefit order under this section is to be made.**

The power conferred on courts by this section can be exercised for the benefit of the husband or of the children of the marriage, or of both, but the courts cannot order any part of the property of a guilty wife to be settled on her. Courts may, however, refuse to make any order as to such property, thus leaving it in her possession. *Bacon v. Bacon* and *Bacon* 29 L.J.P. & M. 125, 2 S. & T. 86. **P**

**2.—“Settlement of damages.”**

**(1) Direction by the Court.**

After the amount of damages has been ascertained, the Court has power to direct in what manner such damages shall be applied, and can order that the whole or any part thereof shall be settled for the benefit of any children of the marriage, or as a provision for the maintenance of the wife. Matrimonial Causes Act, 1857 (20 and 21 Vict., c. 85), S. 33. Laws of England, Vol. XVI, P. 579. **Q**

**(2) Practice as to settlement of damages.**

In making orders as to the disposition of damages the Court will be guided by the circumstances of each individual case. Sometimes the Court orders them to be paid over to the petitioner, sometimes that a part be paid to the petitioner and the remainder settled for the benefit of the children of the marriage (if any), sometimes the whole is ordered to be settled for the benefit of the children, and sometimes the whole or a part is ordered to be settled for the benefit of the adulterous wife. But in every case it is usual to order that the petitioner's costs—over and above his taxed costs—shall be first paid out of such damages. See *Clark v. Clark*, 2 S. and T. 520, 31 L.J.P. 61, 6 L.T. 639, *Taylor v. Taylor*, 39 L.J.P. 23, 22 L.T. 140, *Billingay v. Billingay*, 35 L.J. P. 84. **R**

**(3) Procedure.**

Application for this purpose is usually made to the judge by summons, and may be made after decrees absolute. *Billingay v. Billingay* and *Thomas* (1866), L.R. 1 P. and D. 168. Laws of England, Vol. XVI, P. 579. **S**

**(4) Variation of order**

After an apportionment has been made it may, in special circumstances, be varied. *Forster v. Forster* and *Bernidge*, (1865), 4 Sw. and Tr. 131, Laws of England, Vol. XVI, P. 579. **T**

**(5) General principles as to apportionment of damages**

**(i) No Intervention by assignee of damages permitted.**

An assignee of damages cannot intervene in the suit. *Hunt v. Hunt* and *Cooper*, (1894) P. 247. Laws of England, Vol. XVI, P. 579. **U**

**(ii) Covenant to pay damages.**

**(a)** A Covenant to pay damages to a petitioner is void. *Gipps v. Gipps*, (1864), 11 H. L. Cas. 1, per Lord Wensleydale, at p. 24, Laws of England, Vol. XVI, P. 579. **V**

**(b)** And the Court will not recognise any arrangement as to damages, unless made with its sanction. *Callwell v. Callwell* and *Kennedy*, (1860), 3 Sw. & Tr. 269, Laws of England, Vol. XVI, P. 579. **W**



2.—“*Settlement of damages*”—(Concluded).

(c) Each case must depend on its own facts. *Laws of England*, Vol. XVI, P. 579. X

(iii) *Costs of petitioner.*

Damages may be apportioned to pay the extra costs of the petitioner above the taxed amount. *Taylor v Taylor and Wolters*, (1870), 39 L J. (P. & M) 23, *Laws of England*, Vol. XVI, P 580 Y

(iv) *Purchase of annuity*

(a) An annuity may be purchased for a child. *Forster v. Forster and Berridge* (1863), 3 Sw. & Tr. 158, *Laws of England*, Vol. XVI, P. 580. Z

(b) In one case the Court ordered the whole of the damages (£150) to be invested in the purchase of a Government annuity for the wife's benefit. *Latham v. Latham*, 30 L J P. 43 See also *Narracott v. Narracott*, 33 L J.P. 132, 2 S. & T 408. A

(c) Where the damages were £5,000 the Court ordered them to be applied as follows. £1,500 was settled on the youngest child of the marriage, aged five years, the only one remaining in petitioner's custody; £1,500 was given to the petitioner, and also his costs of the suit in addition to those which had been taxed against the co respondent; the balance was invested in the purchase of a life annuity for the respondent, to be paid to her as long as she lived chastely and did not become the wife of the co-respondent, and, in the event of her breaking either of those conditions, to be paid to the petitioner. *Meyern v. Meyern*, 2 P.D. 254; 46 L J.P. 5, 35 L T. 909 B

Inquiry into existence of ante-nuptial or post-nuptial settlements.

40 The High Court, after a decree absolute for dissolution of marriage, or a decree of nullity<sup>1</sup> of marriage,

and the District Court, after its decree for dissolution of marriage or of nullity of marriage has been confirmed,

may inquire into the existence of ante-nuptial or post-nuptial settlements<sup>2</sup> made on the parties whose marriage is the subject of the decree, and may make such orders, with reference to the application of the whole or a portion of the property settled<sup>3</sup>, whether for the benefit of the husband or the wife, or of the children (if any) of the marriage, or of both children and parents, as to the Court seems fit<sup>4</sup>:

Provided that the Court shall not make any order for the benefit of the present or either of them at the expense of the children<sup>5</sup>.

(Notes).

## General.

(1) *Corresponding English law.*

The following are the provisions of the corresponding Statute Law in England.—“The Court after a final decree of nullity of marriage or dissolution of marriage may inquire into the existence of *ante-nuptial* or *post-nuptial* settlements made on the parties whose marriage is

**General—(Continued).**

the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit." See S. 5 of 22 and 23 Vic , c 61. **C**

**(2) History of English as to variation of settlement**

"The Divorce Act of 1857 enabled the Court, on decree of divorce or judicial separation for adultery of the wife, to order a reasonable settlement of her property, if any, in possession or reversion, or of any part of it, "for the benefit of the innocent party and of the children of the marriage, or either or any of them " Experience proved that further powers were needed, and in 1859 the Court was enabled, after final decree of nullity or divorce, to vary *ante-nuptial* or *post-nuptial* settlements as to all or part of the property settled, "for the benefit of the children or their respective parents " as seemed fit. **D**

And now, under this Act, and M.C.A. 1878, S 3, the Court may vary the settlements in all nullity suits, after decree **E**

In 1860, and after, marriage settlements executed under the original Act of 1857, whether at or after the final decree, were not invalidated by the wife's coverture at the time of execution In 1878, the powers of the Court were extended to cases where there were no children of the marriage. Under the Act of 1859 it could make an order for the benefit of the children and their parents, *i e* , of child or parent or both Now, therefore, it has power under all the above enactments to deal with marriage settlements and deeds of separation, *ante-nuptial* or *post-nuptial*, in any way which it may deem expedient. The interval after final decree within which it will do so depends upon the circumstances of the case. The longer the interval, the greater the difficulty of explaining the delay." See Dixon on Divorce, 4th Ed., 1908, pp. 235, 236. **F**

**(3) Object of section.**

(a) The object of the provisions regarding variation of settlements is to divert money settled on a guilty party for the benefit of the innocent one and of the children. *Sykes v Sykes* and S , L.R., 2 P. & D. 163 , *Midwinter v. Midwinter*, 1902, P. 28 , *Hartopp v. Hartopp* and A. 1898, P. 65. **G**

(b) The chief object is to place the parties, as far as possible, in the position they would have occupied, if the marriage had not been dissolved through the fault of one of them *Hodgson Roberts v. Hodgson Roberts* and W.P. (1906), P. 142 , 94 L.T. P. 621. **H**

**(4) Section applicable to living persons only**

The Court has no power to order an executor of a deceased husband to be made a party, for the purpose of continuing proceedings to vary a settlement, where there are no children, and the variation is not for the benefit of the wife *Thomson v. Thomson*, (1896), P 263. Browne and Powles on Divorce, 7th Ed., 1905, P. 161. **I**

## General--(Continued).

## (5) Who can apply for an order of variation.

(i) *Petitioner.*

Generally it is the petitioner in the suit who alone can apply, after the final decree, for an order under this section. *Rattigan on Divorce*, 1897, P. 249. **J**

(ii) *Respondent to suit for dissolution.*

It seems that a petition can be brought by the respondent to a suit for dissolution *Wootton-Isaacson v Wootton-Isaacson*, (1902), P. 146, *Compare G. v. G. (falsely called K.)* (1908), 25 T L.R. 328, C.A. **K**

(iii) *Respondent to nullity suit*

A petition was successfully brought by a respondent to a nullity suit, the petitioner consenting *Surat v. Surat*, 1910, P. 246. **L**

(iv) *Guilty party also may ask for variation.*

(a) Variation may be at the instance of the guilty party. *Wootton-Isaacson v Wootton-Isaacson*, 1902, P. 146. **M**

(b) There may be circumstances under which the Court would consider a petition for variation filed by the guilty party to a suit. *Wootton-Isaacson v. Wootton-Isaacson*, (1902), P. 146. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 174 **N**

(v) *Guardian of petitioner's children*

(a) The application for variation is not limited to a husband or wife only *Soc Matrimonial Causes Act*, 1859 (22 and 23 Vict., c. 61), S. 5 **O**

(b) Provided the suit has not abated, a guardian of the petitioner's children may be allowed to apply after the death of a petitioner. *Ling v. Ling and Croker* (1865), 4 Sw. and Tr. 99. *Laws of England*, Vol. XVI, P. 575 **P**

(c) If the petitioner dies after the final decree, leaving children of the marriage which has been dissolved or annulled, an application can be made by the guardian of the children on their behalf, for an alteration of the terms of the settlement. *Ling v. Ling and Croker*, 1 S. and T. 99, 34 L. J., P. and M. 52) **Q**

(d) "But if the petitioner has died before the decree ~~was~~ has been made absolute or confirmed, as the case may be, the suit abates, and the guardian of the children cannot apply to have the decree made absolute or confirmed, so as to enable him to subsequently apply for an order under this section" *Grant v. Grant*, 31 L.J. P. and M. 174, *Stanhope v. Stanhope*, 11 P.D. 103. **R**

(e) The guardian of a minor is the proper person to petition for variation, if petitioner be dead. The executor cannot do so unless he is also the guardian. *Smithe v. Smithe*, L.R., 1 P. and D. 587, *Ling v. Ling*, 4 S and T. 99; 34 L.J.P. 52, 13 L.T. 251. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 452. **S**

(vi) *Petitioner's executor.*

(a) The petitioner's executor, as such, has no interest, and therefore cannot intervene in the matter *Smithe v. Smithe*, *supra*, *Thompson v Thompson*, (1896), P. 263, C.A., *Laws of England*, Vol XVI, P. 575. **T**

## General—(Continued).

- (b) This section is intended for the benefit of living persons, and not for the benefit of the estate of a deceased petitioner. *Rattigan on Divorce*, 1897, P. 249; See also *Thompson v. Thompson*, (1896), P. 263. **U**
- (c) The Court has no power to order the executor of a deceased petitioner (the husband) to be made a party for the purpose of continuing proceedings to vary a settlement where the petitioner is dead, there are no children, and the proposed variation would not be for the benefit of the wife. The section is applicable for the benefit of living persons only. *Thomson v. Thomson*, 65 L. J., P. 80, (1896), P. 263, 74 L. T. 801. **Y**
- (vii) *Persons entitled to a benefit in remainder*
- If, "in a marriage settlement, there is an interest in remainder in default of issue, after the death of the parties to the marriage, the persons representing that interest cannot upon the death of the petitioner, seek to benefit at the expense of the guilty party by applying for an order under this section." *Thompson v. Thompson*, (1896), P. 263, 65 L. J., P. & M. 65. **W**
- (viii) *Settlor*
- (a) The settlor is not entitled to apply for variation, after the death of the petitioner and in the absence or after the death of any issue of the marriage. He cannot apply in such a case to be relieved from the covenants of the settlement. *Sykes v. Sykes and Smith*, L. R. 2 P. 163, 39 L. J. P. & M. 52. **X**
- (b) Under this section the Court can alter the settlement only for the benefit of the husband or wife or of the children, or of both. If the petitioner and the children of the marriage, die, the power of the Court is at an end. The settlor must fulfil such covenants as he has entered into for the benefit of the respondent. *Sykes v. Sykes and Smith*, L. R. 2 P. 163, 39 L. J. P. & M. 52. **Y**
- (ix) *Guilty wife.*
- (a) This section should be read in connection with S. 39. See *Thompson v. Thompson*, 32 L. J. P. & M. 39. **Z**
- (b) "It would be a gross perversion of the meaning of the legislature if, at the prayer of an adulterous wife the Court should deprive an innocent husband of any interest he takes under a settlement, even though it be for the benefit of the children of the marriage." *Thompson v. Thompson*, 32 L. J., P. and M. 39. **A**
- (x) *Guilty husband.*
- The Court will not, at the prayer of a guilty husband, deprive an innocent wife of her interest under a settlement. *Rattigan on Divorce*, 1897, P. 250. **B**
- (xi) *Trustee, when heard*
- (a) The trustee of a marriage settlement cannot be heard on a petition to vary, but he can be heard in opposition. *Corrance v. Corrance*, 1 R. 1 P. and D. 495, 37 L. J. P. 11, 18 L. T. 535. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 452. **C**
- (b) The trustee is not entitled to apply for an order to vary the settlement, nor can he be heard in support of an application to vary it. *Corrance v. Corrance*, L. R., 1 P. 495, 45 L. J. P. & M. 14. **D**

## General—(Continued).

## (6) Death of innocent party pending suit.

- (a) The children's interests remain in abeyance until the decree absolute. The Court may then vary the marriage settlements in favour of the children, even though the petitioner is dead. *Long v. Long* and C. 84 L. J. Mat. 52, *Grant v. Grant*, B, and P, 2 Sw and Tr. 522. E
- (b) But where there are no children, the petition abates, and the deceased's legal personal representative cannot continue the proceedings. *Thompson v. Thompson*, 1896, P. 263. F

## (7) Death of guilty party.

Death of guilty party will not deter the Court, it is generally the assumed basis of the variation. *Mille v. Mille* and F, L R., 2 P. & D. 295 G

## (8) General principles as to variation of settlements—Examples of the same.

## (i) Generally left to discretion of Court.

The Judge has an absolute judicial discretion as to the provisions to be made for the parties respectively out of settled property *Wigney v. Wigney*, 7 P D 177, *Browne and Powles on Divorce*, 7th Ed., 1905, P. 173 H

## (ii) Interference by Court of Appeal

And the Court of Appeal will not interfere with that discretion unless there has been a clear miscarriage in its exercise. *Wigney v. Wigney*, 7 P D 177. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 173. I

## (iii) Finances of family to be made to remain statu quo ante

The Court in varying settlements, without seeking to punish the offender takes care that as far as possible the finances of the family shall remain in statu quo ante *Maudslay v. Maudslay*, (1877), 2 P D. 256. *Laws of England*, Vol. XVI, P. 572. J

## (iv) Innocent party and children not to be adversely affected.

It also sees that the innocent party and children shall not be adversely affected by the breaking up of the marriage *Noel v. Noel*, (1885), 10 P D. 179, *Farrington v. Farrington*, (1886), 11 P.D. 84. *Laws of England*, Vol. XVI, P. 573 K

## EXAMPLES

## (i) Where there were no children.

In a case where there were no children the incomes were equalised. *Farrington v. Farrington*, (1886), 1 P.D. 84. L

## (ii) Where husband squandered unsettled property.

In a case where the husband squandered unsettled property, the wife was given more than one third (to be increased to more than one half) *dum sola*. *Bashall v. Bashall* (1897), 76 L T. 165. M

## (iii) Children compensated for lost annuity.

In another case compensation was given to children for lost annuity. *Beauchamp v. Beauchamp and W.*, (1904), 20 T.L.R. 273 C.A. N

## (iv) Sum settled on wife for life

If a sum be settled on a wife for life, out of which she is to keep up the joint establishment, and she divorce her husband, it seems she may keep the whole. *Wootton Isaacson v. Wootton-Isaacson*, (1902), P. 146. *Laws of England*, Vol. XVI, P. 573 O

**General—(Continued).****(v) Husband accepting allowance from wife whilst separated.**

If a husband has accepted an allowance from his wife whilst they have been separated, this does not prevent the Court from so varying the settlement as to increase that allowance. *Benyon v Benyon*, (1876), 1 P.D. 447. **P**

**(vi) Respondent not to be deprived of means of subsistence.**

Courts will not strip the respondent of reasonable means of subsistence. *Smithe v. Smithe*, (1868), L.R. 1 P. & D 587. **Q.**

**(vii) Extinguishing interest of guilty husband**

For a case where the guilty husband's interest was extinguished, see, *Johnson v. Johnson*, 31 L J.P. 29. **R**

**(viii) Extinguishing guilty wife's interest**

For a case where the wife's interest was extinguished, *Pearce v. Pearce*, 30 L.J P 182 **S**

**(ix) Innocent wife provided for.**

For a case where a gross sum was applied for by an innocent wife, see *Sowden v. Sowden*, 15 W.R, 90 (Eng ) **T**

**(x) Guilty wife's jewels**

For a case where the Court refused to order a guilty wife's jewels to be delivered up, see *Thomas v Thomas*, 13 L T 412 **U**

**(xi) Settlement of guilty wife's property on children**

For a case where two-thirds of the guilty wife's property was settled immediately on her children, and the remaining one-third on her death or re-marriage. See *Bacon v. Bacon*, 2 S & T 86. **Y**

**(xii) Provision for children at expense of the wife.**

For a case where the husband had covenanted for an annuity to be paid to the wife in case of her surviving him, and the Court ordered it to be paid to the children *Callwell v Callwell*, 3 S & T 259 **W**

**(xiii) Reversionary interests, how interfered with**

"The Court in allotting permanent maintenance will not interfere with reversionary interests, except under special circumstances, as, for instance, where there are no other means of ensuring a provision for the wife." *Harrison v. Harrison*, 12 P. D. 130. **X**

**(xiv) Acceleration of children's interest.**

For a case where a child's interest in a settlement was accelerated, in spite of the fact that it might thereby incur considerable subsequent loss. See *C'reagh v. C'reagh*, 74 L.T. 430 (1896), *Browne and Powles on Divorce*, 7th Ed 1905, P 175, Note. **Y**

**(9) Power under this section must be exercised once for all.**

The power conferred upon the Court by this section must be exercised once for all. *Browne and Powles on Divorce*, 7th Ed , 1905, P. 162. **Z**

**(10) Variation of order made under the section**

(a) An order made under it is not liable to be varied by reason of circumstances arising after the date of the order. *Beneyon v. Beneyon*, 15 P.D. 29, 54. **A**

## General—(Continued).

- (b) But such an order, made by consent of all the parties, may be amended in the interests of infant children of the marriage. *Arkwright v. Arkwright*, 73 L.T. 287. Browne and Powles on Divorce, 7th Ed., 1905, P. 162 **B**

(11) Dissolution of marriage does not *per se* create forfeiture.

The mere fact that a marriage has been dissolved does not *per se* create a forfeiture of the interests even of the guilty party under a marriage settlement of the other's property. *Fitzgerald v. Chapman*, 1 Ch. D. 563, 45 L.J. Ch. 23, *Burton v. Sturgeon*, 2 Ch. D. 318, 45 L.J. Ch. 633. **C**

## (12) Innocent party, how affected.

(a) An innocent party will not necessarily recover back the whole of her property brought into the settlement, in all cases of variation. *Wigney v. Wigney*, 7 P.D. 177 **D**

(b) But, where the property is small, and the fault wholly that of the guilty party, and he has brought nothing into settlement, he will usually be deprived of all interest under it. *Boynston v. Boynston*, 2 Sw. & Tr. 275 **E**

(c) A blameless innocent party, bringing nothing into settlement, can apply for a provision, by variation, on decree, innocent parties are protected from pecuniary loss on decree, if possible. *Maudslayi v. Maudslayi*, 2 P. D. 256, *Wigney v. Wigney*, 7 P.D. 177, *Noel v. Noel*, 10 P.D. 179, *Ponsonby v. Ponsonby*, 9 P.D. 58, 122 **F**

## (13) Guilty party, how affected.

(a) The guilty party is not usually deprived of the means of a reasonable subsistence. *Smith v. Smith and G.*, L.R. 12 P.D. 102. **G**

(b) Especially when other means of living, or the ability to obtain them, are wanting (*Ibid*). **H**

(c) The guilty party will appeal in vain from a decision depriving him largely, and at times wholly, of benefit under a settlement, which is varied through his misconduct unless he is disabled, by age or other infirmity from maintaining himself. *Wigney v. Wigney*, 7 P.D. 177. **I**

(d) The Court may vary a marriage settlement, though the issue of the marriage have a vested interest in the settled property, *Blood v. Blood* P. 1902, 78 and 190. **J**

## (14) Reversionary interest of guilty party

(a) The interests of guilty parties, in funds in settlement, and reverting after the death of the innocent parties, have been left uninterfered with on variation under ordinary circumstances. *Johnson v. Johnson*, 31 L.J. Mat. 29. **K**

(b) But not under special circumstances, as where there are no means of insuring provision for the innocent party. *Harrison v. Harrison*, 12 P.D. 130. **L**

(c) A guilty wife's property in reversion is liable to be charged. *Savary v. Savary*, 79 L.T.N.S. 607. **M**

## General—(Continued).

(15) **Interests of third parties.**(i) *General rule.*

(a) Interests of third parties, created under marriage settlements before proceedings for variation, may be respected or disregarded, on variation, as the Court thinks fit. *Wigney v Wigney*, 7 P.D. 228. **N**

(b) Generally Courts are bound to respect the rights of third parties created before the petition for variation of settlements is presented. *Rattigan on Divorce*, 1897, P. 255 **Q**

(ii) *Interests of mortgagees*

The interests of mortgagees, and others which are not inequitable are usually respected, but such as are unfair to the innocent party will usually be set aside. *Wigney v Wigney*, 7 P.D. 228 **P**

(iii) *Interests of solicitors.*

The Court will not deprive solicitors of a security for their reasonable costs given by the guilty party in the exercise of the legal right of which he was possessed when he gave it. (*Ibid*) **Q**

(iv) *Exceptions—Cases where the interests of third parties were affected.*

There are some exceptionable cases where the Court has refused to respect the interests acquired by a third party before the filing of a petition for variation. *Rattigan on Divorce*, 1897, P. 256. **R**

## EXAMPLES

(a) In a case where, before a petition for variation had been filed by the petitioner, who had obtained a decree absolute for dissolution of marriage, the respondent and co-respondent intermarried, the Court varied the settlement notwithstanding that the co-respondent had acquired an interest in the property. See *Benyon v Benyon and O. Callaghan*, 1 P.D. 117. **S**

(b) "It was held in the above case that if the marriage had been with a stranger ignorant of the facts of the case, the Court might, under such circumstances, have been induced to hold its hand when asked to vary the respondent's interests under the settlement. But inasmuch as in this case the marriage was with the co-respondent, who was cognizant of the facts and knew that he was contracting marriage with a person liable to be affected by an order of the Court varying her settlement, the mere fact that by such marriage the co-respondent had acquired an interest in the respondent's settlement before the petition was filed was no reason for refusing to vary such settlement at the prayer of the petitioner." *Benyon v. Benyon and O'Callaghan*, 1 P.D. 117. See, also, *Rattigan on Divorce*, 1897, pp. 256, 257. **T**

(16) **Points to be considered by the Court in varying settlements.**(i) *Guiding principle of cases.*

"The guiding principle of the cases is, that where the breaking up of the home is due to the conduct of the respondent, the Court ought to place the petitioner and the children, as nearly as possible, in the same position as if the family life had not been interrupted." *Hartopp v. Hartopp*, (1893), P. 65. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 165. **U**



**General—(Continued).****(ii) Conduct and means of parties.**

(a) The proceedings under this section the conduct and means of the parties are both material circumstances for the Court. *Chetwynd v. Chetwynd*, L. R., 1 P. & D. 39. **Y**

(b) Particularly the conduct of the guilty party, *Cooke v. Cooke*, 2 Phillim, 40, *Paul v. Paul and F.*, L. R., 2, P. & D. 93, *Bosvile v. Bosvile and C.*, L. R., 13 P. D. 76. **W**

(c) All the orders of the Court are, if possible, at or her expense. *Pocock v. Pocock and B.*, 18 L. T. N. S. 338. **X**

(d) "Though the power given to the Court of varying settlements is not given for the purpose of punishing the guilty party, but of making due provision for the parties, their conduct is to be taken into consideration in determining what provisions ought to be made for them respectively." *Browne and Powles on Divorce*, 7th Ed., 1905, P. 173. **X-1**

(e) It is not the rule that the conduct of the respondent only is to be considered *Rattigan on Divorce*, 1897, P. 254 **Y**

(f) Regard must also be had to that of the petitioner

(g) For it may happen that, though "the break-up of the married life was caused immediately by the misconduct of the respondent, its stability "may have been" undermined by the withdrawal of the petitioner's affections." (*Ibid*) *Chetwynd v. Chetwynd*, 35 L. J. P. and M. 21. **Z**

**(iii) Future available means of respondent**

Court, will also consider the future of the respondent and the available means which would be left to him or her. *Chetwynd v. Chetwynd*, 35 L.J. P. & M. 21. **A**

**(iv) Interests of public morality.**

(a) The conduct of both parties and the interests of public morality are also to be considered. *Dixon on Divorce*, 4th Ed., 1903, P. 236 **B**

(b) Unexplained misconduct by the petitioner, and the interests of public morality prevent variation in his favour. *Constantinidis v. Constantinidis*, 1905, P. 253, 93 L. T. 651. **C**

**(v) Pecuniary condition of the parties to be considered—Innocent party protected.**

(a) In making orders to vary marriage settlements, the Court will take into consideration the conduct of both parties as well as their pecuniary position See *Chetwynd v. Chetwynd*, L.R., 1 P. & D. 39. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 165. **D**

(b) The Court will do its best to vary the settlement in such a way that the innocent party may suffer as little as possible from the act of the guilty party. *March v. March*, L.R. 1 P. & D. 440. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 165. **E**

**(17) Cases where wife was found guilty.****(i) Property in reversion.**

(a) In ordering a settlement, the Court may take account of property to which a guilty wife is entitled in reversion. *March v. March*, L.R. 1 P. & D. 440 *Browne and Powles on Divorce*, 7th Ed., 1905, P. 165. **F.**

## General—(Continued).

- (b) "Where a petitioner's father had covenanted to pay the respondent, after the petitioner's death, an annuity of £100 during the joint lives, an order was made that after the petitioner's death the annuity should be applied for the benefit of the only child of the marriage, but the Court held that it had no power to deprive the respondent of the annuity in the event of her surviving the child." *Sykes v. Sykes*, L R , 2 P. & D. 163. Browne and Powles on Divorce, 7th Ed., 1905, P. 166. **G**
- (ii) *Wife's interest extinguished.*  
 "Where the only property brought into settlement was £150 settled by the wife's father on his daughter for life, then on her husband for life, and after the death of the survivor to the children of the marriage. The Court extinguished the wife's life interest, and ordered the whole income of the settled property to be applied, during the joint lives, for the benefit of the children, leaving the husband's life interest unaffected" *St. Paul v. St. Paul*, L R , 2 P. & D. 93. Browne and Powles on Divorce, 7th Ed., 1905, P. 166. **H**
- (iii) *Order to dispose of income as though wife were dead.*  
 In one case an order was made to trustees to dispose of income as though the wife were dead. *Bullock v. Bullock*, L R , 2 P. & D. 389. **I**  
**N.B.**—For other cases on this point. See Browne and Powles on Divorce, 7th Ed., 1905, pp. 165 to 170. **J**
- (iv) *Court refused to order wife's jewellery to be sold.*  
 "A husband who had obtained a divorce petitioned that certain jewellery belonging to his wife might be sold, and a settlement made of the proceeds, giving her a life interest in the income arising therefrom, with remainder to himself. His income was substantial, that of his wife only 72£ a year. The Court refused to order any settlement." *Schofield v. Schofield*, 61 L T. 838. **K**
- (v) *Court refused to make allowance variable so as to meet altered circumstances of husband.*  
 "On a husband's petition for settlement of property to which the guilty wife was entitled, the Court refused to make the allowance variable to meet a possible fall in the income, or to limit the husband's receipt of this allowance to such time as he should be unmarried, or to limit the allowance to children to such time as they should be under sixteen years of age." *Mulwinter v. Mulwinter*, (1893), P. 93. **L**
- (vi) *Guilty wife—Property brought into settlement by wife.*  
 (a) The Court can provide to an innocent husband from property brought into settlement solely by the guilty wife. *March v. March and Plaumbo* L.R.I.P. 440. **M**  
 (b) For, although the property brought into settlement was the absolute property of the wife, it is but just [that when the marriage is dissolved by reason of the wife's misconduct, that the husband should not, "in addition to the grievous wrong done by the (wife's) breach of the marriage vow, be wholly deprived of means to the scale of which he may have learned to accommodate his mode of life. Nor, in viewing the matter on the other side, does it seem just or equitable that funds which were intended, at the time of the marriage, for the use of both, should

## General—(Continued).

be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. It would be of evil example if this Court were to decide that the entire fortune of a wealthy married woman was to be reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman." *March v. March and Plaumbo*, L.R., 1 P. 410, 36 L.J., P. & M. 28. **N**

(vi) *Innocent husband not to be adversely affected even if it would benefit children.*

The innocent husband will not be deprived of his interest under the settlement, though to do so might be for the benefit of the children of the marriage. *Thompson v. Thompson and Barras*, 2 S. & T. 649, 32 L.J., P. & M. 39. **O**

(viii) *Dum casta clause.*

(a) "A husband and wife separated under a deed by which he agreed to allow her 200£ a year without any *Dum casta* clause. Subsequently he obtained a divorce from her, and on his petition to vary this deed, the Court ordered the allowance to be reduced to 100£ a year, to be payable to the wife only *dum sela et casta ruerit*." *Saunders v. Saunders*, 69 L.T. 498. **P**

(b) "Where a marriage had been dissolved (there being no issue), and the rights of children of a future marriage were the sole limitation to the husband's absolute right to the settled property the Court ordered the trustees to reconvey the property to the husband for his own use." *Meredyth v. Meredith*, (1895), P. 92. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 170. **Q**

(18) *Cases where husband was found guilty*(i) *Husband's income ordered to be paid to wife and to child after her death.*

"Where, under a post-nuptial settlement, a guilty husband was immediately entitled to one third of his wife's property, the Court directed that until further orders the husband's portion of the income of the settled property should be paid to the wife, and in the event of her death in his lifetime, the whole of the income until further order should be applied to the benefit of the child." *Boynston v. Boynston*, 2 S. & T. 275. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 171. **R**

(ii) *Husband not necessarily deprived of all interest in property settled by wife.*

(a) Even in case the whole of the settled property came from the wife, the guilty husband will not necessarily be deprived of all interest therein under the settlement. *Wigney v. Wigney*, 7 P.D. 177. **S**

(b) "Suppose a guilty husband is incapacitated by physical infirmity from earning a livelihood, and has no means of his own. I do not say that no provision can in any case be made for him out of the wife's property." *Wigney v. Wigney*, 7 P.D. 177, 31 L.J., P. & M. 60, (Per Jessel, M.R.). **T**

(c) A wife obtained a divorce, and the joint income of the husband and wife amounted to 1,500 £ a year. Both were entitled to considerable property in reversion. Under such circumstances, the Court ordered the guilty husband to secure to the wife the sum of 700 £ a year for her life. *Warren v. Warren*, 63 L.T. 264. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 173. **U**

**General—(Continued).**

- (iii) *Generally guilty husband is deprived of benefit in settled fund that came from wife or her family.*

The general rule is that when the marriage has been dissolved on account of the husband's misconduct, he will be deprived of all his interest under the settlement in such portion of the settled fund as came from the wife or the wife's family. *Boynton v. Boynton*, 30 L.J., P. & M. 156. **Y**

- (iv) *Guilty husband squandering wife's property*

"Where a guilty husband had squandered his wife's property, the Court gave the wife more than one-third of the income arising from the property brought by him into settlement, during his life time, and after his death, one-half, of such income *dum sola viverit*." *Bashall v. Bashall*, (1897), 76 L.T. 165. **W**

- (v) *Guilty husband's interest extinguished though all property brought into settlement by him*

In one case, the Court extinguished the whole of a guilty husband's interest where the whole of the property had been brought into settlement by him and where the income was 45 £ a year, and there was one child of the marriage who had not attained a vested interest. *Kaye v. Kaye*, (1902), 86 L.T. 638. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 174. **X**

**(19) Form of order under the section.**

It is competent to the Court to make its original order in such a form that the allowance granted shall vary according to circumstances. *Benyon v. Benyon*, 15 P.D. 51. **Y**

**(20) Finality of order.**

(a) But once an order has been made, in whatever form it has been made it is final. (*Ibid*). **Z**

(b) All matters raised, and likely to come up between the parties should be settled finally, if possible. *Attwood v. Attwood*, 1903, P. 7. **A**

**(21) Order cannot be varied on ground of change of circumstances.**

And an order made under this section is not liable to be varied on the ground of a change of circumstances since the date of the order. *Benyon v. Benyon*, 59 L.J. P. 39, 15 P.D. 51, 62 L.T. 381—C A **B**

**(22) Review of order made under this section.**

(a) Under special circumstances, the Court will review its own order. *Cavendish v. Cavendish*, 38 L.J. P. & M. 13. **C**

(b) Thus, if the order as drawn up does not correctly express the intention of the Court, the order can be reviewed (*Ibid*). **D**

**(23) Revision of order.**

The Court has power to revise its own order in respect of matters arising before the making of the order, as where a mistake, common to all parties, was made in drawing up the order. *Gladstone v. Gladstone*, (1876), 1 P.D. 442. *Laws of England*, Vol. 16, P. 576. **E**

## General—(Continued).

(24) *Dum casta* clause.

In varying a marriage settlement, the Court will not impose the *dum sola et casta* clause on a wife who is the successful party in the suit. *Gladstone v. Gladstone*, 1 P.D. 444. Browne and Powles, 7th Ed., (1905), P. 164. F

## (25) Power under this section not to be exercised for collateral purposes.

The power conferred upon the Court by this section is not to be exercised by it for any collateral purpose. *Symonds v. Symonds and Harrison*, L.R. 2 P. 447. G

## (26) Thus, questions of legitimacy are not decided in proceedings for variation.

(a) The court will not, in proceedings for variation, decide a question of legitimacy. *Pryor v. Pryor*, (1887), 12 P.D. 165. H

(b) But the Court may direct the official solicitor to petition on behalf of the child for a declaration of legitimacy, as it is for the child's benefit, the variation proceedings meanwhile standing over *Douglas v. Douglas and Trevor*, (1897), 78 L.T. 88, *Re Chaplan's Petition*, (1867), L.R. 1 P. & D. 328. Laws of England, Vol. XVI, P. 575. I

## (27) Injunction restraining wife from dealing with property.

"Where a husband petitioner, who had obtained a decree nisi for dissolution, had given his solicitor instructions to file, at the proper time, a petition for variation of a settlement, the Court, on being satisfied that the wife was about to sell a house, which she claimed under such settlement, granted an injunction restraining her from doing so, and ordering her, in the event of the house being sold, to bring the proceeds of the sale into the registry." *Noakes v. Noakes*, 4 P.D. 444, Browne and Powles, on Divorce, 7th Ed., 1905, P. 164. J

## (28) Property already vested in children of marriage.

The Court has power under this section to make an order dealing with property settled for the benefit of a petitioner, even though it may affect property which, under the settlement, has vested in the children of the marriage. *Blood v. Blood*, (1902), P. 190. Browne and Powles on Divorce, 7th Ed., 1905, P. 162. K

## (29) The Court's power when at an end.

When the innocent party and the children of the marriage are dead, the property settled will then return to its original channel. The Court's power will then be at an end. *Sykes v. Sykes* and S. L.R. 2 P. & D. 163. L

## (30) When frustrated.

(a) "Where the trusts of a deed have been determined before proceedings for variation of settlements,—as on a condition in a deed of settlement that a dissolution should render it null and void. *Stone v. Stone* and B., 3 Sw. & Tr. 372. M

(b) "Where the purposes for which a settlement is made have all become impossible, the Court may, direct the trustees to reconvey the property back to the party bringing it into settlement." *Meredyth v. Meredyth and L.*, 1895, P. 92. N

## General—(Concluded).

## (31) Disputed paternity.

Disputed paternity pending variation will postpone it till the dispute is settled.  
*Evans v. Evans and B.* 1904, P. 274, 91 L.T. 600. O

## (32) Nullity of Marriage—Decree of Foreign Court—Jurisdiction.

- (a) The power to vary settlements conferred upon the court can only be exercised where the decree upon which the application to vary the marriage settlement is founded has been pronounced by the court.  
*Moore (f.c. Bull) v. Moore or Bull*, 60 L.J., P. 76, (1891), P. 279. P
- (b) "Therefore, where a decree of nullity has been pronounced by the colonial Court, and the parties afterwards returned to this country and applied for leave to file a petition for the variation of their marriage settlement.—*Held*, that the Court had no jurisdiction to entertain such application". *Moore (f.c. Bull) v. Moore or Bull*, 60 L.J., P. 76, (1891), P. 279. Q

## (33) Power under the section to be exercised once for all.

The power of varying settlements after a final decree for dissolution of marriage, is a power to be exercised once for all *Benyon v. Benyon*, 59 L.J., P. 39, 15 P.D. 54, 62 L.T. 381—C.A. R

## (34) Freedom from trusts—Child born.

"On a petition for variation of settlements after a decree for dissolution of marriage by reason of the wife's adultery, where a child had been born between the date of the decree nisi and decree absolute, and fourteen months after the wife had eloped from her husband, the Court refused to transfer funds in settlement to the parties free from the trusts of the settlement" *Pryor v. Pryor*, 56 L.J., P. 77; 12 P.D. 165. S

## (35) Power to deal with capital—Discretion of Judge.

On a petition for variation of a settlement the Judge refused to give the wife, the petitioner, any part of the capital of the fund, which had been all settled by the husband, although there were no children of the marriage, or to order, payment of the petitioner's costs out of the funds. And he gave a portion only of the income to the wife.—The Court of Appeal affirmed the decision, holding that although the Court had undoubted jurisdiction to deal with the capital, it was not for the benefit of the wife to give her any portion of it, and the Court refused to interfere with the discretion of the Judge as to the amount of income awarded to her. *Ponsonby v. Ponsonby*, 53 L.J. P. 112, 9 P.D. 122. T

## I.—"Decree absolute for dissolution of marriage or a decree of nullity."

## (1) Court cannot vary after judicial separation

There is no power to vary after judicial separation. *Gandy v. Gandy*, (1892), 7 P.D. 168, C.A. Laws of England, Vol. XVI, P. 571. U

## (2) Court cannot vary after disobedience of order for restitution.

Nor has the Court power to vary after disobedience to an order for restitution of conjugal rights, See *Swift v. Swift*, (1890), 15 P.D. 118, *Mitchell v. Mitchell*, 1891, P. 166, 208, C.A. Laws of England, Vol. XVI, P. 571. Y

**1.—“Decree absolute for dissolution of marriage or a decree of nullity” —(Concluded).**

**(3) Court cannot vary after dissolution of marriage abroad.**

Nor after dissolution of marriage abroad *Moore v. Bull*, 1891, P. 279. Laws of England, Vol. XVI, P. 571. **W**

**(4) Application of section in cases of nullity.**

(a) The powers of the Court as to settlements extend to all cases of nullity, including those where the decree has been pronounced on the ground of the respondent's impotence *Dormer (otherwise Ward) v Ward*, (1901), P. 20 **X**

(b) So “where a marriage was declared null and void on the ground of the husband's impotence, the Court re-transferred all the property brought into settlement by the wife to her absolutely freed from all the trusts of the settlement” *A v M.*, 10 P.D. 178, 54 L.J.P. 31. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 162 **Y**

**(5) Marriage annulled—No children of the marriage.**

In one case where a marriage was annulled, and there were no children of the marriage, the Court ordered the property of the parties to be reconveyed to each of them respectively freed from the trusts of the settlement upon the alleged marriage *A. f c M. v M.*, 10 P.D. 178, 54 L.J., P. and M. 31, *Leeds v. Leeds*, 57 L.T. 373 **Z**

**(6) Case where there are children of the marriage**

But in cases where there are children of the marriage, due provision will be made for them *Langworthy v. Langworthy*, 11 P.D. 85, 55 L.J., P. and M. 33. **A**

**2.—“Anti-nuptial or post-nuptial settlement.”**

**(i) Settlement, what is**

(a) An absolute assignment, however, of property to a husband by a wife is not a settlement. *Chalmers v Chalmers*, (1892), 68 L.T. 28 (though an innocent wife can obtain maintenance in respect thereof), *Hubbard v. Hubbard*, (1901), P. 157, C.A. Laws of England, Vol. XVI, P. 575. **A-1**

(b) An absolute assignment by a wife to her husband during the marriage of freehold property is not “a settlement” within the meaning of this section. *Chalmers v. Chalmers*, 1 R. 504. **B**

**(2) Post-nuptial settlement, what is.**

(a) “The question whether a deed is a separation deed or a post-nuptial settlement, depends on the intention of the parties to be gathered from the terms of the deed.” *Rowell v. Rowell*, (1900), 1 Q.B. 9. **B-1**

(b) An assignment, made after marriage, of leasehold property and furniture, by a husband in favour of his wife absolutely is not a post-nuptial settlement within the meaning of this section *Hubbard (otherwise Rogers) v. Hubbard*, (1901), P. 157. **C**

(c) An ordinary deed of separation, whereby the husband covenants to pay the wife an allowance, is a post-nuptial settlement within the meaning of this section (*Worsley v. Worsley*, and *Wignall*, L.R., 1 P. 648, 38 L.J., P. & M. 43). **D**

## 2.—“*Anti-nuptial or post-nuptial settlement*”—(Concluded).

### (3) **Post-nuptial settlements, variation of.**

The Court has power to vary a post-nuptial settlement contained in a deed of separation. *Jump v. Jump*, 8 P.D. 159, 52 L.J. P. 71. Browne and Powles on Divorce, 7th Ed., 1905, P. 163. **E**

### (4) **Post-nuptial settlement—Amount reduced—*Dum sola et casta* Clause inserted**

The husband and wife were married in 1884, and separated in 1889 under a deed, by which the husband paid his wife £200 a year, without any *dum casta clause*. He afterwards found that she was living with the co-respondent under the petitioner's name. He thereupon petitioned to have the marriage dissolved, and a decree nisi was pronounced, which was in due course made absolute. Upon petition to vary the post-nuptial deed—*Held*, that the allowance to the respondent should be reduced to £100 per annum, and that this should be payable to the respondent only *dum sola et casta vixerit*. *Saunders v. Saunders*, 69 L.T. 498. **F**

### (5) **Dividends.**

Up to the date of the order, dividends, etc., due and payable pass under the original settlement. *Paul v. Paul*, (1870), L.R. 2 P. & D. 93. Laws of England, Vol. XVI, P. 576. **G**

### (6) **Dividends due before date of order.**

The Court has no authority to alter the destination of dividends due and payable before the date of its order. *St. Paul v. St. Paul*, L.R., 2 P. & D. 93. Browne and Powles on Divorce, 7th Ed., 1905, P. 164. **H**

### (7) ***Lis pendens***

As soon, as a petition for variation is filed, it is in the nature of a *lis pendens*, and nothing done afterwards, before it is heard, diminishes the power of the Court over the settlement. *Constantinidis v. Constantinidis*, (1904), P. 306, C. A. **I**

### (8) **Interest of infant child.**

The Court has no power to vary a marriage settlement, so as to deprive an infant child of the marriage of its interest, even though it would be for the advantage of the infant. *Crisp v. Crisp*, L.R., 2 P. & D. 426. Browne and Powles on Divorce, 7th Ed., 1905, P. 164. **J**

### (9) **Guilty party's property in settlement.**

The amount to be allowed out of guilty party's property in settlement, is, in each case, a matter for the discretion of the Court, *March v. March and P*, L.R., 1 P. & D. 440. **K**

## 3 —“*Property settled.*”

### (1) **“Property,” what is**

“Property” includes not only income, but capital with which the Court may also deal. *Ponsonby v. Ponsonby*, (1884), 9 P. D. 58, 122, C. A. **L**

### (2) **“Property settled” what is.**

(a) “Property settled” is taken to mean the property of which, under, the marriage settlement, the parties or their children are the beneficiaries. *Dormer v. Ward*, (1900), P. 130; (1911), P. 20, C. A. **M**



3.—“ *Property settled* ”—(Continued).

- (b) An annuity, or property taken under a settlement in a representative capacity or an expectancy which has been settled may be included. *Jump v. Jump*, (1883), 8 P. D. 159, *Blood v. Blood*, *supra*, E. v. E. (1902), 18 T. L. R. 643. Laws of England, Vol. XVI, P. 574. N
- (c) A “settled estate,” contrasted with an estate in fee simple, means one as to which the usual powers of alienation, devising and transmitting, are restrained by the limitations of the settlement. *Mickethwait v. Mickethwait*, (1858), 4 C. B. (N. S.) 700. Laws of England, Vol. XVI, P. 574. O

(3) *Property dealt with on variation.*(i) *Annuity.*

An annuity can be dealt with as property settled. *Jump v. Jump*, 8 P. L. 159. P

(ii) *Contingent reversion.*

A contingent reversion cannot, for it is not property actually in reversion. *Stone v. Stone*, and B., 33 L. J. Mat. 95. Q

(iii) *Protected life interests.*

Protected life interests are not interfered with. *Constantinidi v. Constantinidi*, 1905, 1 P. 253. R

(iv) *Property settled on marriage subject to condition.*

When property is settled on marriage, subject to a condition which never arises the marriage being declared null beforehand, the Court cannot ignore the condition. *Dormer v. Ward*, 1901, P. 20. S

(v) *Dividends already due.*

Dividends already due cannot be diverted from their destination by subsequent order of the Court. *Paul v. Paul*, and F., L. R. 2 P. & D. 93. T

(vi) *Dividends due after the order.*

But ——— can be so diverted (*ibid*). U

(vii) *Remainders over.*

(a) Remainders over to the innocent party, when the property is first settled on the guilty party, cannot be made the subject of an order, for the Court can only deal with the guilty party's interest. *Callwell v. Callwell and A.*, 3 S. W. & Tr. 259. Y

(b) But an annuity or remainder over to the guilty party on his surviving the innocent one can be dealt with by order. *Callwell v. Callwell and A.*, 3 S. W. & Tr. 259. W

(4) *Variation of powers of appointment.*

(a) The Court can vary or extinguish powers of appointment of property in marriage settlements on decree of divorce or nullity. *Bosvile v. Bosvile and C.*, 13 P. D. 76, *Maudslay v. Maudslay*, L. R. 2 P. D. 256, *Evered v. Evered and G.*, 31 L. T. N. S. 101. X

(b) The Court will do so, if desirable, to postpone the interests of a second husband to those of the children of the first marriage. *Evered v. Evered and G.*, 31 L. T. N. S. 101. Y

(5) *Covenants to appoint.*

An innocent party will be released from a covenant to appoint in favour of a guilty one, *Beynon v. Beynon and O.C.* 1 P. D. 447; *Besvile v. Besvile and C.*, 13 P. D. 76, *Oppenheim v. Oppenheim and R.*, 9 P. D. 60. Z

3.—“ *Property settled* ”—(Concluded).(6) **Where a marriage settlement gives the wife, on the husband's death a power of appointment in favour of a second husband.**

Where a marriage settlement gives the wife, on the husband's death, a power of appointment in favour of a second husband, and the children of a second marriage, the Court will not, on the dissolution of the marriage through the husband's misconduct, vary the settlement, to enable the wife to exercise the power of appointment before his death. *Pollard v. Pollard*, 1894, P. 172. **A**

(7) **Varying joint power of appointment.**

The Court can extinguish a joint power of appointment of new trustees: *Oppenheim v. Oppenheim and R.*, 9 P. D. 60: *Hope v. Hope and E.*, L. R. 3 P. & D. 226, *Bosville v. Bosville* and C 13 P. D. 76 **B**

(8) **Guilty party's power of appointment**

(a) A guilty party's power of appointment may be deferred *Noel v. Noel*, 10 P. D. 179. **C**

(b) The Court has refused to extinguish a guilty husband's power of appointment among his children *Maulslay v. Maulslay*, 2 P. D. 256. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 171 **D**

(9) **Power of appointment on second marriage in case wife should survive the husband.**

Where a settlement gives a wife, after the death of her first husband, power to appoint in favour of children by a subsequent marriage, the court refused to vary that power after a decree for divorce, so as to enable the wife to exercise the power before her first husband's death. *Pollard v. Pollard*, 63 L.J. P. 104, (1894), P. 172 **E**

(10) **Power of appointing new trustees**

In the variation of settlements the court has jurisdiction to extinguish a joint power of appointment of new trustees *Oppenheim v. Oppenheim*, 53 L.J. P. 48, 9 P. D. 60. **F**

(11) **Separation deeds.**

Ordinary separation deeds, and all other deeds whereby property is settled upon or is paid or secured in any way to a woman in her character of wife, come within the scope of this section *Worsley v. Worsley*, L.R. 1 P. & D. 648. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 163. **G**

(12) **Income derived from respondent's father.**

“Where a guilty husband was entitled to an income of about 612£, a year out of funds derived entirely from his father, and there were certain provisions in the settlement in case of the husband's bankruptcy, an event which had taken place some time before the divorce, the Court ordered the trustees during the life of the wife, and so long as she should remain unmarried and the children of the marriage remain under age, to pay to her the whole income of the settled property, and that, as each of the children attained the age of twenty-one, a sum of 20 £, a year be paid to such child during the life of the mother.” *Marsh v. Marsh*, 47 L. J. P. 34. *Browne and Powles on Divorce*, 1905, 7th Ed., P. 172. **H**

(13) **Alteration of order once made.**

No alteration of order once made on varying settlement is permitted. *Benyon v. Benyon*, 15 P. D. 54, affirming *Butt, J.*, on appeal. **I**

4.—“*Make such orders....as to the court seems fit.*”(1) **Discretion of Court.**

The Court has full and absolute discretion to make such order under this section as to the Court seems fit. *Rattigan on Divorce*, 1897, P. 253. J

(2) **Interference by appellate Court.**

The appellate Court will not interfere with the exercise of such discretion unless some distinct miscarriage is shown, although, in point of fact, the appellate Court might not, if the matter had come before it originally, have exercised its discretion in the same manner and to the same effect (*Ibid.*) K

(3) **Discretion of Court, how exercised**

(a) This discretion must, however, be exercised judicially. (*Ibid.*) L

(b) The Court should consider by whose fault it is that the marriage has come to an end not with a view of punishing the guilty party, but for the purpose of seeing what provisions it is reasonable to make *Wigney v. Wigney*, 7 P D 177, 51 L.J., P. & M. 60—C. A. M

(4) **Considerations for Court.**(i) *General rule laid down.*

“In applying this section to the circumstances of any particular case, the first consideration will be this. What is the pecuniary change operated by the wife's criminality? The Court will look at the probable pecuniary position which the parties and their children would have occupied if the marriage which the settlement contemplated had continued a binding union and the parties had lived in harmony together upon their joint incomes. If this union has been broken, and the common home abandoned by the criminality of one without fault in the other, it seems just that the innocent party should not, in addition to the grievous wrong done by the breach of the marriage vow, be wholly deprived of means to the scale of which he may have learnt to accommodate his mode of life. Nor, in viewing the matter on the other side, does it seem either just or equitable that funds, which were intended, at the time of the marriage, for the use of both, should be borne off by the guilty party, and perhaps transferred to the hands of the adulterer as the dowry of a second marriage. The interests of society point in the same direction. The relative amounts contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered.” *March v. March and Talumbo*, 36 L J, P & M 28, approved by the Full Court at p. 65. N

(ii) *Innocent party protected.*

(a) The Court will not, at the instance of the guilty party, deprive the innocent party of his or her interest under the settlement, although to do so might be for the benefit of the children. *Thompson v. Thompson and Barras*, 32 L J, P. & M 39, 2 S. & T. 649. O

(b) The innocent party, is generally placed so far as it is practicable, in the same pecuniary position as he or she was before the marriage was dissolved. *Benyon v. Benyon and O'Callaghan*, 1 P.D 447, *Maudslay v. Maudslay*, 2 P.D. 256 P

5.—“*Proviso.*”

## (1) Interest of infant children protected

(a) The children's interests are vigilantly protected, when possible, on variation. *Paul v. Paul*, and F., L.R. 2 P and D. 93, *Webster v. Webster*, and M. 32 L J., Mat. 29. **Q**

(a) Orders are not made to benefit the parent at their expense. *Pecock v. Pecock*, and B., 16 W.R. 712. **R**

(c) Usually their interests will not be interfered with at all. *Pryor v. Pryor*, and S., 12 P D. 165. **S**

(d) The Court may deprive the infant children of their interest under the settlement to benefit them in another way, i.e., by accelerating another interest. *Whitton v. Whitton*, 1901, P. 348 **T**

## (2) Interests of infant children, sometimes adversely affected

“In exercising its discretion the Court ought to consider the effect of its order as a whole. Therefore, although it has always been the practice to consider first the interests of the children, there may be cases in which the Court will deprive even infant children of part of their interest under a settlement”. *Whitton v. Whitton*, (1901), P 348  
*Browne and Powles on Divorce*, 7th Ed., 1905, P 162 **U**

## (3) Unborn children's interests.

Unborn children's interests have been passed over on consent of the only persons living, and interested in the settlement, on the innocent settlor's petition. *Morrison v. Morrison*, (1905), P 90, 92 L T. 476 **Y**

## PRACTICE AND PROCEDURE.

## (1) Application for variation how made.

- The application is made by a separate petition. Divorce Rule. 95, 97, 102, 204. **W**

## (2) Procedure in cases of such applications.

The procedure is, as far as practicable the same as in a petition for maintenance  
 Divorce Rules 95, 97—102, 201 *Laws of England*, Vol XVI, P 571 **X**

## (3) Period for variation.

(a) Period for variation is after decree nisi. *Wigney v. Wigney*, 7 P.D 232. **Y**

(b) The proceedings take place after decree absolute. *Constantinidi v. Constantinidi*, 1901, P 306, 91 L.T. 276. **Z**

## (4) Practice

And the Court disregards anything the parties may do, after decree absolute, and before proceedings to vary the settlement. *Constantinidi v. Constantinidi*, 1901, P 306, 91 L T. 273. **A**

## (5) Time for filing petition.

(a) It may be filed before or after decree absolute. *Constantinidi v. Constantinidi*, 1901, P. 306, C A, Matrimonial Causes Act, 1859 (22 and 23 Vic. c. 61), S 5 *Laws of England*, Vol 16, P 571. **B**

(b) The petition may be filed at any time before the decree nisi is made absolute. *Rattigan on Divorce*, 1897, F. 248 **C**

(c) No time is fixed as the period within which the application is to be made. *Laws of England*, Vol. XVI, P. 571. **D**

5 —“ *Proviso* ”—(Continued).

## PRACTICE AND PROCEDURE—(Continued).

(6) **Delay effect of.**

(a) But undue delay though sometimes overlooked may be fatal. *Benyon v. Benyon*, (1876), 1 P.D. 447 Laws of England, Vol. 16, P. 571; *Clifford v. Clifford*, (1884), 9 P.D. 76 C.A. **E**

(b) Even if the petition is filed after the decree absolute the Court will not refuse to entertain it if the delay is not unreasonable. (*Ibid*) **F**

(7) **Inquiry into petition when made.**

But, though the petition for variation of marriage settlements should ordinarily be filed before the decree nisi is pronounced, the Court has no jurisdiction to make any inquiry or order until after the decree has been made absolute. *Horne v. Horne*, 30 L.J., P. & M., 111. **G**

(8) **Time for filing answer.**

Where a husband filed his petition for variation after obtaining a decree nisi for dissolution, but before decree absolute, the Court of Appeal ordered the wife to file her answer within one month after decree absolute, and dismissed an order of the Court below directing her to file her answer before the decree was made absolute. *Constantinidis v. Constantinidis*, (1904), P. 306, 73 L.J. P. 91 91 L.T. 273, 20 T.L.R. 573 Browne and Powles on Divorce, 7th Ed., 1905, P. 452 **H**

(9) **What is good answer.**

“It is no answer to a petition to vary, that proceedings to obtain an administration of the trusts of the same settlement are pending in the Chancery Division” *Marsh v. Marsh*, 47 L.J.P. 78. Browne and Powles on Divorce, 7th Ed., 1905, P. 452. **I**

(10) **Right to cross examine husband as to means.**

The fact of a wife being an adulteress does not bar her right to cross-examine her husband as to his means. *Driffeld v. Driffeld*, 65 L.T. 795. Browne and Powles on Divorce, 7th Ed., 1905, P. 453. **J**

(11) **Amending order.**

As to amending order for varying a settlement, see *Cavendish v. Cavendish*, 38 L.J.P. 13, 19 L.T. 497; *Gladstone v. Gladstone*, (1876), 1 P.D. 442, 45 L.J.P. 82, 35 L.T. 380. **K**

(11-a) **Money ordered to be paid for benefit of child**

Where money has been ordered to be paid to a parent for the benefit of a child, such order should contain the words “as long as it remains in his (or her) custody”. *Sykes v. Sykes*, L.R. 2 P. & D. 163, 39 L.J.P. 52, 23 L.T. 239. See also *Pocock v. Pocock*, 18 L.T. 338. Browne and Powles on Divorce, 7th Ed., 1905, P. 455. **L**

(12) **Person that should apply for variation**

The applicant is usually the successful party, but, at times, the application devolves upon others. *Smith v. Smith and R.*, L.R. 12 P.D. 102. **M**

(13) **Contents of petition.**

The petition should give full information as to the means of the applicant. *Webster v. Webster and Milford*, 32 L.J., P. & M. 29. **N**

5.—“*Proviso*”—(Continued).

## PRACTICE AND PROCEDURE—(Continued).

(14) **Signing petition for variation.**

(a) Signing the petition is usually done by the petitioner. *Ross v. Ross*, 7 P.D. 20 **O**

(b) The petition should be signed by the petitioner. *Wootton Isaacson v. Wootton-Isaacson*, 1902, P. 146. Laws of England, Vol. 16, P. 571 **P**

(15) **Solicitor may sometimes sign for petitioner.**

(a) But by leave obtained an affidavit, it may be signed by the solicitor. *Ross v. Ross*, (1892), 7 P D 20 Laws of England, Vol 16, P 571. **Q**

(b) Under special circumstances—as where he is abroad and his signature cannot be obtained without considerable delay—his solicitor is allowed, on motion and satisfactory affidavit, to sign for him. *Ross v. Ross*, 7 P D. 20. **R**

(16) **Service of petition.**

(a) The petition must be served personally, unless service is dispensed with or substituted service allowed *Snelling v. Snelling*, (1890), 63 L.T. 263, in *Nevill*, (1893), 69 T.L.R. 463. Laws of England, Vol. 16, P. 572. **S**

(b) The service must be not only on the respondent, but on all persons who have a legal or beneficial interest in the property in respect of which the application is made. Laws of England, Vol. 16, P. 572. **T**

(c) And these persons must, if necessary, similarly appear and plead for which no leave is necessary. Divorce Rules 97–99. **U**

(d) Notice of the appointment must be given to them, and *prima facie* they are entitled to be heard at the inquiry. Laws of England, Vol. 16, P. 572 **V**

(e) The order can be made in the respondent's absence, where he has been served with notice of the application, and with a copy of the petition. *Lawrence v. Lawrence*. 32 L J., Mt. 124 **W**

## EXAMPLES.

(i) In one case service was dispensed with, where respondent and his trustee were both bankrupt, and notice was given to the official receiver. Laws of England, Vol 16, P 572, *Snelling v. Snelling*, (1890), 63 L T. 263 **X**

(ii) In one case substituted service on trustee in Australia was refused and service was dispensed with. In this case neither the trustee in Australia nor the other trustee on whom service has been made had any beneficial interest *Taylor v. Taylor*, (1892) 66 L T 267. **Y**

(17) **Service of petition—Respondent and surviving Trustee both uncertificated Bankrupts—Notice to Official Receiver**

The Court dispensed with service of a petition to vary a marriage settlement in a case where the respondent and the surviving trustee of the settlement were both uncertificated bankrupts, and where notice of the application to dispense with service had been given to the chief official receiver in bankruptcy. *Snelling v. Snelling*, 63 L.T. 263. **Z**

5.—“*Proviso*”—(Continued).

## PRACTICE AND PROCEDURE—(Continued).

(18) **Trustee resident in Australia—Service.**

One trustee resident in England was duly served with petition to vary. Co-trustees were resident in Australia, Court refused to order substituted service on trustee-resident in Australia, but dispensed with service on him altogether, on being satisfied that neither trustee had any beneficial interest in the property *Taylor v. Taylor*, 66 L T. 267. **A**

(19) **Injunction.**

(a) While an inquiry is pending under this section the Court will by injunction, if necessary, restrain the husband or wife, as the case may be, from disposing of the settled property *Watts v. Watts*, 24 W.R. (Eng.) 623. **B**

(b) And it will do so even before the order for variation of the settlement has been made. *Noakes v. Noakes and Hill*, 4 P D. 60; 47 L J, P and M. 20. **C**

(20) **Fraud on Court—Injunction.**

Frauds on the Court may be restrained by injunction. *Noakes v. Noakes and H.*, 4 P.D. 60 **D**

(21) **Orders under the section not retrospective.**

Orders under this section are not retrospective *Paul v. Paul and F.*, L.R., 2 P. and D. 93. **E**

(22) **Jurisdiction of Court not retrospective.**

(a) The Court's jurisdiction is not retrospective *Constantinidis v. Constantinidis*, 1905, P. 253 **F**

(b) The trustees of the respondent wife's settlement will not be ordered to return to the petitioner accumulations of past income under the trusts of petitioner's settlement. (*Ibid.*) **G**

(23) **Court will not vary for sole purpose of compelling respondent to restore a child.**

The Court will not vary a marriage settlement merely for the purpose of compelling a respondent to restore a child to the custody of the petitioner. *Symonds v. Symonds*, L.R., 2 P & D 447 *Browne and Powles on Divorce*, 7th Ed., 1905, P. 166. **H**

(24) **Right of wife respondent to cross-examine husband as to his means.**

(a) The fact that the respondent is an adulteress would not bar her right to cross-examine her husband as to his means, in proceedings for variation of settlements *Driffield v. Driffield*, 65 L T. 795. **I**

(b) But it may be otherwise if it appear that the wife's proposal to cross-examine the husband was vexatious. (*Ibid.*) **J**

(25) **Costs of application to vary settlements.**

Where in a suit for dissolution, the co-respondent has been condemned in costs, he would be liable for the costs of the petitioner and respondent incurred in obtaining an alteration of the marriage settlement *Gill and Hill and Hogg*, 3 S. & T 354, 33 L.J., P. & M. 43; *Stone v. Stone and Brownrigg*, 3 S. & T. 372; 33 L.J., P. & M. 95. **K**

**5.—“*Proviso*”—(Concluded).**

**PRACTICE AND PROCEDURE—(Concluded).**

**(26) Costs out of corpus of settled fund.**

The Court will sometimes order the costs of the variation, or even of the petition generally, to be paid out of the *corpus* of a settled fund. *Hipwel v. Hipwell*, (1892), P. 147, *Hamilton v. Hamilton and Pralormo* (1893), 68 L T 467 Laws of England, Vol 16, P 576 **L**

**(27) Costs of variation ordered out of wife's settled funds.**

(a) In one case the costs of application to vary settlements were ordered to be paid out of the wife's settled funds. *Hamilton v Hamilton*, 68 L. T 467. **M**

(b) On a motion for variation of settlements after a decree for dissolution of the marriage on the ground of the wife's adultery, the Court, on the recommendation of the registrar, and with the consent of the guardian *ad litem* of infant children of the marriage, allowed the costs of all parties to be paid out of the wife's settled fund *Hamilton v. Hamilton*, 1 R. 506, 64 L T 167 **N**

**(28) Wife's costs not considered.**

Where a marriage has been dissolved on the ground of the wife's adultery, the Court will not, when directing the variation of the marriage settlements, take into consideration the amount of costs incurred by the wife. *Noel v. Noel*, 54 L J, P. 73, 10 P D. 169. **O**

**(29) Guardian applying—Costs.**

Where a guardian of children properly makes an application for variation of a settlement, he may be allowed his costs *Ling v. Ling and Croker*, (1865) 4 Sw. & Tr. 99. Laws of England, Vol. 16, P 576. **P**

**XI.—Custody of Children.**

**41.** In any suit for obtaining a judicial separation the Court may from time to time, before making its decree,

Power to make orders as to custody of children in suit for separation.

make such interim orders, and may make such provision in the decree, as it deems proper with respect to the custody, maintenance and education

of the minor children, the marriage of whose parents is the subject of such suit, and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the said Court

**(Note).**

**N B.**—See notes under S. 44, *infra*

**42.** The Court, after a decree of judicial separation, may upon

Power to make such orders after decree

application (by petition) for this purpose make, from time to time, all such orders and provision, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the



decree, or for placing such children under the protection of the said Court, as might have been made by such decree or by interim orders in case the proceedings for obtaining such decree were still pending.

(Note).

N.B.—See notes under S. 44, *infra*.

43. In any suit for obtaining a dissolution of marriage or a decree of nullity of marriage instituted in, or removed to a High Court, the Court may from time to time, before making its decree absolute or its decree (as the case may be), make such interim orders, and may make such provision in the decree absolute or decree,

and in any such suit instituted in a District Court, the Court may from time to time, before its decree is confirmed, make such interim orders, and may make such provision on such confirmation,

as the High Court or District Court (as the case may be) deems proper with respect to the custody, maintenance and education of the minor children, the marriage of whose parents is the subject of the suit,

and may, if it think fit, direct proceedings to be taken for placing such children under the protection of the Court.

(Note)

N.B.—See notes under S. 44, *infra*

44. The High Court, after a decree absolute for dissolution of marriage or a decree of nullity of marriage,

and the District Court, after a decree for dissolution of marriage or of nullity of marriage has been confirmed,

may, upon application by petition for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance and education of the minor children, the marriage of whose parents was the subject of the decree, or for placing such children under the protection of the said Court, as might have been made by such decree absolute or decree (as the case may be), or by such interim orders as aforesaid.

(Notes).

General.

(1) **Corresponding English Law.**

(a) "In any suit or other proceedings for obtaining a judicial separation or a decree of nullity of marriage, and on any petition for dissolving a marriage, the Court may from time to time, before making its final

**General—(Continued).**

decree, make such interim orders, and may make such provision in the final decree, as it may deem just and proper with respect to the custody, maintenance, and education of the children the marriage of whose parents is the subject of such suit or other proceeding and may, if it shall think fit, direct proper proceedings to be taken for placing such children under the protection of the Court of Chancery. See S. 35 of 20 and 21 Vic., C. 85. **Q**

- (b) "The Court may, at any time before final decree on any application for, restitution of conjugal rights, or after final decrees if the respondent shall fail to comply therewith, upon application for that purpose, make from time to time all such orders and provisions with respect to the custody, maintenance, and education of the children of the petitioner and respondent as might have been made by interim orders during the pendency of a trial for judicial separation between the same parties." See S. 6 of 47 and 49 Vic., C. 68. **R**

- (c) "In any case where a decree for judicial separation, or a decree either nisi or absolute for divorce, shall be pronounced the Court pronouncing such decree may thereby declare the parent by reason of whose misconduct such decree is made to be a person unfit to have the custody of the children (if any) of the marriage, and, in such case, the parent so declared to be unfit shall not, upon the death of the other parent, be entitled as of right to the custody or guardianship of such children. See S. 7 of 49 and 50 Vic., C. 27. **S**

**(2) Power under summary jurisdiction (Married Woman) Act, 1895—English Law.**

- (a) The Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., C. 39), gives power to Magistrate to make orders for the custody of children in cases coming before them. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 129. **T**

- (b) But all their orders are subject to an appeal to the Probate, Divorce and Admiralty Division. (*Ibid*) **U**

**(3) Limit of age—English Law.**

- (a) A father had been held to have a right to claim the custody of his children by legal process up to the age of sixteen. *Req. v. Homes*, M C 17. **V**

- (b) Until quite recently the Court of Divorce has adopted this age as the limit up to which it would deal with applications for the custody and maintenance of children. See *Mallinson v. Mallinson*, L R., 1 P. and D. 221. **W**

- (c) Since some time in 1894, however, the Court has made orders for the custody and maintenance of children up to the age of twenty-one years. *Thomasset v. Thomasset*, (1894), P. 295. 63 L J P 140. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 133. **X**

**(4) No power to make orders in suits for restitution.**

- (a) The power given by the Matrimonial Causes Act, 1884, sect. 6, to make orders, as to the custody, maintenance, and education of the minor children, in suits for restitution of conjugal rights, has not been conferred by this Act upon the Courts of this country. See *Chambers v. Chambers*, 39 L.J., P. & M. 56. **Y**

**General—(Continued).**

(b) Nor have the Courts in this country been given powers similar to those conferred on the English Court by sect. 7 of the Guardianship of Infants Act, 1886. *Rattigan on Divorce*, 1897, P. 269. **Z**

**(5) No jurisdiction as to custody or access where petition is dismissed.**

The Court has no power to make an order as to children where a petition is dismissed. *Seddon v. Seddon*, 2 S. & T. 640. **A**

**(6) Parties domiciled abroad—Judicial separation—Order as to custody.**

(a) The Court has jurisdiction to grant a decree of judicial separation where the parties are domiciled abroad, provided they are resident in England at the time of the commencement of the suit *Armstrong v. Armstrong*, (1898), P. 178. **B**

(b) In such a case it has also power to make an order as to the custody of the children. *Armstrong v. Armstrong*, (1898), P. 178 *Brown and Powles on Divorce*, 7th Ed., 1905, P. 127. **C**

**(7) Who may intervene.****(i) Intervention by third parties**

(a) When a petition for the custody of children after a final decree of dissolution is before the Court, persons other than the parents may intervene, and bring before the Court such facts as in their opinion the interests of the children may require *Chetwynd v. Chetwynd*, 4 Sw. & Tr 151, 34 L.J., Mat. 130, But see also *Davis v. Davis*, 14 P D 162 **D**

(b) After a decree of judicial separation in favour of the party in whose custody children of the marriage have been placed, the Court may allow the intervention of any person in their behalf to question the propriety of the continuance of such custody. *Godrich v. Godrich*, 43 L.J., Mat. 2; L.R., 3 P. 134 **E**

(c) Upon any question regarding the custody, maintenance, or education of the children, the marriage of whose parents is the subject of the suit, third parties may intervene and plead on behalf of such children, if they show that they are entitled to do so *Chetwynd v. Chetwynd*, 34 L. J., P. & M. 130; L.R., 1 P. 39. **F**

(d) "It was the obvious intention of the legislature that the Court should have the power to make such orders as it might think necessary for the benefit of the children themselves, and it could not properly exercise that most useful power if it were to decline altogether to hear what third persons had to say on the matter. It might be that a worthless father and mother having been divorced might marry again, and neither of them might be willing to have the care of the children. It would be a great misfortune if this Court were to abdicate the power given to it by these sections, by holding that no third persons could intervene for the benefit of the children." *Chetwynd v. Chetwynd*, 34 L.J., P. & M. 130, L.R., 1 P. 39. **G**

(e) In a later case, it was held that sect. 4 of the Matrimonial Causes Act, 1859, refers only to an application to be made by one of the parents, and that, upon the death of the parent who was entitled under a decree of judicial separation to the custody of the child, it was not competent to a third party to apply for the custody of such child *Davis v. Davis*, 14 P D. 162. **H**

## General—(Continued).

(ii) *Form of such intervention*

The form of such intervention is by petition, and the interveners act at their own risk as to costs. *Chetwynd v Chetwynd*, 4 Sw. and Tr. 151, 34 L.J., Mat. 130. I

(iii) *Costs of intervention by third parties.*

If a third party intervenes he does so at the peril of being condemned in costs if the intervention proves unsuccessful. *March v. March*, L.R., 1 P 437, See also *Chetwynd v Chetwynd*, 4 Sw Tr 151. J

(iv) *Intervention by relations—Costs.*

When relations intervene in an application for the custody of a child, they do so at the peril of being condemned in costs, if their intervention is unsuccessful. *March v March and Palumbo*, L.R., 1 P 437. K

(v) *Intervention by grandfather.*

In one case even after a final decree of judicial separation, the grandfather of the children was allowed to intervene and question the propriety of the continuance of the order, which had been made in favour of the petitioner for the custody of the children *Goodrich v. Goodrich*, L.R., 3 P. 134. L

## A—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN.

## I.—INTEREST OF CHILDREN PRIMARILY CARED FOR.

(1) **Court must first see what is for the benefit of the children.**

(a) "The first duty of the Court is to consider what is for the benefit of the children,—that should be the paramount consideration with the Court." *Sir R. Phillimore, D'Alton v D'Alton*, 4 P.D. at p. 91. M

(b) The interests of the children are paramount pending suit and on final decree *Philp v Philp*, 41 L.J. Mat. 891; *D'A v D'A*, 47 L.J. Mat.

(2) **Mother given custody of children of tender years.**

Children of tender age are usually entrusted to the mother, maintenance and access being provided for in the order *C. v. C* 27 L.J. Mat. 86, *B v. B*, 30 L.J. Mat. 156 N-1

(3) **Education.**

On the question of education, the Court considers the welfare of the children from the points of view of their religious education worldly career and general bringing up *D'Alton v. D'Alton*, (1878), 4 P. D. 87; *Symington v. Symington*, (1875), L.R., 2 Sc & Div 415, *Witt v. Witt*, (1891), P. 163, Laws of England, Vol 16, P 578. O

## II.—INNOCENT PARTY PRIMA FACIE ENTITLED TO CUSTODY.

(1) **Rights of innocent party to custody of children.**

(a) The innocent parent has a *prima facie* right to the custody of the children. *Martin v. Martin*, 29 L. J., P & M. 106, 2 L T. 118. P

(b) As a rule, an innocent mother will not be deprived of the comfort and society of her children, because of her husband's misconduct to her, *Hyde v. Hyde*, 29 L. J. Mat. 150. Q

**General—(Continued).****A.—PRINCIPLES NO WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Continued).****II.—INNOCENT PARTY PRIMA FACIE ENTITLED TO CUSTODY—(Continued).**

- (c) Innocent parties are generally entitled to the custody of the children, even when no misconduct to them is proved against the guilty party, provided the interest of the children do not suffer. *Milford v. Milford*, L. R., 1 P. & D. 715. **R**

**(2) Reason of the above rule.**

"With regard to the rights of the petitioner, the principle which guides the Court is, that the innocent party shall suffer as little as possible from the dissolution of the marriage, and be preserved, as far as the Court can do so, in the same position in which she was while the marriage continued—first, by giving her a sufficient pecuniary allowance for her support, and, secondly, by providing that she should not be deprived of the society of her children unnecessarily. As it has been put by one of my predecessors, 'the wife ought not to be obliged to buy the relief to which she is entitled owing to her husband's misconduct, at the price of being deprived of the society of her children.' Per *Hennen, J.*, in *D'Alton v. D'Alton*, 4 P.D. at p. 88 **S**

**(3) But, it would be otherwise if the interests of the children require that they ought not to be with the innocent party.**

But the interest of the children overrides this rule as to the *prima facie* right of the innocent party. *D'A v. D'A*, 47 L.J. Mat. 59. **T**

**(4) Means of innocent party is also to be considered**

Hence regard is also had to the means of education and maintenance which the innocent party has. *Milford v. Milford*, L. R., 1 P. and D. 715 **U**

**(5) Education of the children.**

The education of the children will be free from their mother's control, if such is their interest, though in other respects her rights will be observed. *D'A v. D'A*, 47 L.J. Mat. 59. **Y**

**(6) Guilty party given custody when the guilt was not towards children.**

When, under peculiar circumstances, there had been no acts of violence towards the children, the Court gave up one of them to the father, the party complained of. *Martin v. Martin*, 29 L.J., Mat. 106, 2 L.T. 118. **W**

**(7) Guilty husband affectionately disposed towards children—Custody of sons.**

Where there appears to be no continuance of immorality, and the husband is affectionately attached to his children, and has always been so, and engaged in a profitable business, an order which should take from him the custody of his sons would not be conducive to their future welfare. *Lymington v. Lymington*, L. R., 2 H.L. (Sc.) 415. **X**

**(8) Custody of daughters in the above case—Mother preferred to father.**

(a) In a similar case, it would be a very different matter with regard to the daughters. *Lymington v. Lymington*, L. R., 2 H.L. (Sc.) 415. **Y**

(b) Their mother, against whom nothing has been proved, is the natural person to have the custody of the daughters. *Lymington v. Lymington*, L.R. 2 H.L. (Sc.) 415.

## General—(Continued).

## A.—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Continued).

## II.—INNOCENT PARTY PRIMA FACIE ENTITLED TO CUSTODY—(Concluded).

## (9) Husband guilty—Custody of children under fourteen years of age—Mother's right—English case-law.

(a) The Court, in a decree for a judicial separation, on the ground of adultery of the husband, on proof that he continued to live in adultery, and that the child of the marriage, a boy of thirteen, resided with him, there being no imputation on the wife, ordered that she should have the custody of the child until the age of fourteen, provision being made for the husband having access to him. *Hyde v Hyde*, 29 L. J. Mat 150 **A**

(b) The Court, in its decree for a judicial separation, on the ground of the husband's adultery, ordered that the wife should have the custody of the children under fourteen, until they should attain that age, on proof that the husband continued the adulterous intercourse. *Duggan v. Duggan*, 29 L J, Mat. 159. **B**

(c) Where the Court decrees a judicial separation at the suit of a wife, by reason of cruelty, it will, in making an order as to the custody of the children according to the circumstances of the case, exercise a discretionary power exceeding that which is exercised by Courts of law and equity respecting the custody of infants. *Marsh v. Marsh*, 1 Sw. Tr 312, 28 L J Mat 13 **C**

(d) In a case, when there was no suggestion that the children had been cruelly or improperly treated by the husband, the Court directed the children to remain in the custody of the mother so long as she maintained and properly educated them, without expense to her husband (he to have proper access to them) till they should respectively attain the age of fourteen. *Marsh v Marsh*, 1 Sw & Tr 312, 28 L J, Mat. 13. **D**

## (10) Interests of children, paramount consideration

(a) In determining the custody of children, the interests of the children are paramount with the Court. *D'Alton v D'Alton*, 47 L J., P. 59, 4 P.D. 87. **E**

(b) "A wife having obtained a decree of judicial separation on the ground of cruelty, the Court being satisfied that the children of the marriage would not be brought up as carefully and morally by their father as by their mother, as an act of justice to her, and for the advantage of the children, ordered that she should have the custody of them with provision for their father having access to them." *Suggate v. Suggate*, 1 Sw & Tr 489, 29 L J, Mat. 167 **F**

## (11) Wife successful in suit entitled to custody as a rule

(a) Where the wife succeeds in her suit, she is generally entitled to the custody of the children. *Boynton v. Boynton*, 2 S. & T 275, 30 L J P 156. Browne and Powles on Divorce, 7th Ed, 1905, P 132. **G**

(b) The successful party is generally entitled to custody. *Boynton v. Boynton*, 2 Sw. & Tr 275 **H**

## General--(Continued).

## A.—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Continued).

## II.—INNOCENT PARTY PRIMA FACIE ENTITLED TO CUSTODY—(Continued).

(c) But the Court will not deprive the father of the power of discharging his parental duties, except so far as is inevitable when the children remain in the custody of their mother. *Maudslay v. Maudslay*, 2 P D. 256. I

(d) Where the wife is the innocent party, she is entitled to the custody of the children as of right. See *Macleod v. Macleod*, 6 B.L.R. 318, see also *Chetwynd v. Chetwynd*, L R. 1 P. & D. 39; *Hyde v. Hyde*, 29 L J. P & M. 150, *Duggan v. Duggan*, 29 L.J P. & M. 159, *Suggate v. Suggate*, 1 S & T 492, *Boynlon v. Boynlon*, 2 S. & T. 275, *Marsh v. Marsh*, 1 S. & T 312, cited and followed in 6 B.L.R. 318. J

(e) Where a wife obtains a decree for judicial separation on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children. 6 B L.R. 318. K

## (12) Reason of the above rule.

In committing them to the charge of the mother when the innocent party, the Court acts upon the principle that a wife ought not to be deprived of the comfort and society of her children by reason of the wrongful act of the husband. *D'Alton v. D'Alton*, 47 L.J., P. 59. 4 P.D. 87. L

## (13) Above rule when departed from.

(a) Courts will depart from the rule as to giving the custody to a successful wife when it is for the interest of the children that their education should be free from her control. *D'Alton v. D'Alton*, 47 L.J., P 59, 4 P.D. 87. M

(b) For another case where the custody of a child was refused to a successful wife. Sec 3 Sw & Tr 248. N

## (14) Innocent wife asking for allowance, no disqualification.

Innocent wife not to be deprived of her right to custody simply because she is compelled to ask for allowance. See *Milford v. Milford*, L.R. 1 P. 715. O

## (15) Husband's conduct.

If the husband's conduct has caused the breaking up of the home, his rights are disregarded in the injured mother's favour, if she is free from blame, both before and on decree of dissolution. *Chetwynd v. Chetwynd*, 35 L.J Mat. 21, *Marsh v. Marsh*, 1 Sw. & Tr. 313. P

## (16) Prima facie right of father—Conduct towards children considered.

(a) The father's right of custody is respected when he has done his duty to them, though his conduct to his wife may have been blameable. *Martin v Martin*, 2 L.T. N.S. 118. Q

(b) The Court usually permits the husband to retain the custody of children who are not of tender years, with access to the mother. (*Ibid.*) R

## General—(Continued).

## A.—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Continued).

## III.—GUILTY PARTY GENERALLY NOT GIVEN CUSTODY OF CHILDREN.

## (1) Generally guilty party not to be given custody of children

(a) The Court will generally refuse to give the custody of the minor children to the guilty party, whether husband or wife. *Hyde v. Hyde*, 29 L.J. P. & M. 150 *Marsh v. Marsh*, 1 S. & T. 312, 28 L.J. P. & M. 13. *Suggate v. Suggate*, 1 S. & T. 429, 29 L.J. P. & M. 167, *Milford v. Milford*, L.R. 1 P. 715, 34 L.J., P. & M. 63; *Bent v. Bent* and *Footman*, 2 S. & T. 292, 30 L.J. P. & M. 175, *Clout v. Clout* and *Helbone*, 2 S. & T. 391, 30 L.J. P. & M. 176, *Kelly v. Kelly* and *Saunders*, 5 B.L.R. 71, *Goad v. Goad*, No. 69 P.R. 1870. S

(b) If either is considered unfit, the Court will grant custody to the other, if not also unfit. *Sugate v. Sugate*, 22 L.J. Mat. 29 L.J. Mat. 167. T

## (2) Exceptions to the above rule.

## (i) Guilty husband reforming his conduct and otherwise fit.

Where the guilty party is the father, but has discontinued his adultery and is living a respectable life, and it is found that he has always treated his children with kindness, the Court, while placing the minor daughters in the custody of their mother, may allow the minor sons to remain with their father. *Lymington v. Lymington*, L.R. 2 H.L. (Sc.) 415. *Martin v. Martin*, 29 L.J. P. & M. 106. U

## (ii) Guilty wife.

But, in the case of a guilty wife, the circumstances will have to be very exceptional before the Court will give her the custody of the minor children. *Barnes v. Barnes* and B.L.R. 1, P. 463. Y

## (iii) Child of tender age - Mother's health affected by separation

(a) When the child is of a very tender age and is at the time living with some one other than its father, and the health of the mother or the child is being seriously affected by the separation, in such a case the mother, though guilty, would be allowed to have the custody of such child. *Barnes v. Barnes and Beaumont*, L.R. 1 P. 463. W

(b) Where a wife had obtained a decree for judicial separation by reason of her husband's misconduct, the Court refused to give her the custody of one of the children of the marriage, who was an idiot and of the age of twelve, on the ground that the court would only deprive the father of the custody of his child in favour of the innocent wife, when it was for her solace that she should have such custody. *Cooke v. Cooke*, 3 Sw. & Tr. 248, 32 L.J. Mat. 180. X

## (3) Guilty wife—Discretion of Court.

(a) Where a decree for dissolution of marriage has been made on the ground of the adultery of the wife, and the infant children of the marriage have given into the custody of the husband, the court is not precluded from making an order giving the divorced wife access to them. *Handley v. Handley*, (1891), P. 124, 63 L.T. 535. Y

(b) But as a general rule such an order will not be made. *Handley v. Handley*, (1891), P. 124; 63 L.T. 535. Z



## General—(Continued).

## A—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Concluded).

## III.—GUILTY PARTY GENERALLY NOT GIVEN CUSTODY OF CHILDREN—(Continued).

(c) When a marriage is dissolved on the ground of a wife's adultery, the Court will not order that she have the custody of, or access to, the children of the marriage. *Bent v Bent and Footman*, 2 Sw. and Tr. 392, 30 L.J., Mat. 175. **A**

## (4) Guilty wife—Giving custody to husband.

On a sentence of dissolution of marriage by reason of wife's adultery, the Court will make an order on her to deliver up the custody of the children, rather than leave the husband to the delay and expense of establishing his right as father at common law. *Boyd v. Boyd and Collins*, 1 Sw. and Tr. 562, 29 L.J., Mat. 79. **B**

## (5) Husband leading dissolute life—Espionage.

(a) When a father, after a decree dissolving his marriage, is shown to be leading a notoriously dissolute life, the Court will hold him disqualified to have the custody of his child. *March v March and Palumbo*, 1 R. 1 P. 437. **C**

(b) The Court views with disfavour an attempt to get up a charge of adultery against a husband, who has obtained a decree dissolving his marriage, by tracking him from place to place with a view to obtain an order depriving him of the custody of his children. *March v March and Palumbo*, 1 R., 1 P. 437. **D**

## (6) The home broken up by the husband.

The wife being blameless, the Court will not assist the husband by whose misconduct the matrimonial home was broken, but will charge him with the maintenance of the children if he can pay for it. *Milford v. Milford*, L.R., 1 P. & D. 715. **E**

## (7) Guilty parties.

Guilty parties usually lose both custody and access, but in fit cases the latter is permitted. *Bent v Bent and F*, 30 L.J., Mat. 175, *Clout v. Clout and H*, *ibid.* 176, *Seddon v. Seddon*, 31 L.J., Mat. 102, but see *Witt v Witt*, L.T. Fb. 21, 1891, *Rowbotham v Rowbotham*, 1 Sw. & Tr. 191. **F**

## (8) Subsequent misconduct of petitioner—Effect

Where a wife had obtained a decree for the dissolution of her marriage, together with an order for the custody of her children; on proof that the mother was leading a profligate life, the Court varied the order, and gave the custody of the children to the father, in spite of the fact that he had been found guilty of adultery. *Witt v. Witt*, (1891) P. 163, 60 L.J., P. & M. 63. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 182.

**N B.**—In arriving at the decision in this case, the Court was guided by the authority of the House of Lords in a Scotch case, the ultimate result of which was that the custody of the sons was given to the father and that of the daughters to the mother. *Symington v Symington*, L.R., 2 Sc. & Div. 415. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 183. **G**

## General—(Continued)

## A.—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Continued)

## III.—GUILTY PARTY GENERALLY NOT GIVEN CUSTODY OF CHILDREN—(Concluded).

(9) **Death of innocent party will not entitle guilty party to custody**

A guilty party *may* lose the custody of his children, even on the innocent party's death. *Skinner v. Skinner*, 13 P D 90. H

## IV.—CASE WHERE BOTH PARENTS ARE UNFIT—CUSTODY GIVEN TO A THIRD PERSON

**Neither parent fit to have custody—Custody given to third person.**

(a) Where the Court was of opinion that neither of the parents was fit to have the care of the children, it ordered that certain relatives who had intervened should have the custody of them, the parents being allowed reasonable access. *Chetwynd v. Chetwynd*, L R, 1 P. & D 39. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 131. I

(b) When a marriage has been dissolved on the ground of the misconduct of the husband, the Court, although it may deem him unfit to have the care of the children of the marriage, will not deprive him of his legal right to their custody in favour of the wife if she also is unfit to be entrusted with them. In such a case it will give the custody of the children to some third person. *Chetwynd v. Chetwynd*, 35 L J. Mat. 21, 13 L T 471. J

## V.—IMPARTIAL CUSTODIANS PREFERRED

(1) **Impartial custodians preferred, pending suit.**

(a) The Court prefers removal of the children to an independent person, pending suit. *Boynston v. Boynston*, 1 Sw. & Tr 321. K

(b) An impartial person will not be interfered with. *Curtis v. Curtis*, 27 L J Mat 75, *Spratt v. Spratt*, 1 Sw. and Tr 215. L

(2) **Custody given to grandfather.**

Where a marriage was dissolved on the ground of the wife's adultery, the custody of the children was given to their paternal grandfather, the father being absent in India. *Browne and Powles on Divorce* 7th Ed., 1905, P. 132. M

(3) **Custody in father's absence.**

The Court decreed the custody of the children, in a suit for dissolution by the husband, who was in India, to the father or his agent, with a view that, in the father's absence the grandfather should have charge of them. *Ling v. Ling and Prior*, 13 L T. 683. N

## VI.—MISCELLANEOUS CASES

(1) **Wife unable to support children**

A wife living separately from her husband, and who has obtained the custody of their child but is herself unable to support it, may pledge her husband's credit for reasonable expenses incurred by her in providing for the child. *Baseley v. Forder*, 9 B. and S. 599. 37 L J. Q.B. 237. O

(2) **Wife petitioner leaving child in custody of intimate friend**

Where a wife, who was about to petition for a dissolution of her marriage, removed a child from home, the Court, on evidence that the husband's mother was on good terms with her daughter-in-law and attached to

## General—(Continued).

## A.—PRINCIPLES ON WHICH COURTS ACT IN MAKING ORDERS AS TO CUSTODY OF CHILDREN—(Concluded).

## VI.—MISCELLANEOUS CASES—(Concluded).

the child of the marriage, ordered the custody of it to be given to her. *Boynton v. Boynton*, 1 S. & T. 324 Browne and Powles on Divorce, 7th Ed., 1905, p. 131. P

## (3) Attempt to get up charge of adultery against husband to obtain custody

The Court views with disfavour an attempt to get up a charge of adultery against a husband who has obtained a decree dissolving his marriage, by tracking him from place to place, with a view to obtain an order depriving him of the custody of his children. *March v. March*, L. R., 1 P. & D. 437 Browne and Powles on Divorce, 7th Ed., 1905, P. 132 Q

## (4) Sanity of wife

Where an application by the wife for the custody of children was opposed on the ground that she was not of sound mind and the medical evidence was conflicting, the Court directed her to be examined by a physician nominated by itself, and on his certificate gave her the custody of the children *Duggan v. Duggan*, 29 L.J.P. 159 Browne and Powles on Divorce, 7th Ed., 1905, P. 133 R

## (5) Children in mother's custody—Father still allowed certain rights over them

"Where the Court has thought it right to give the custody of the children to the mother, it does not necessarily follow that it will go further and deprive the father of the power of exercising parental judgment and discrimination with regard to them, except so far as is inevitable from their remaining in the custody of the mother" *Maudslay v. Maudslay*, 2 P.D. 256. Browne and Powles on Divorce, 7th Ed., 1905, P. 132. S

## (6) Subsequent variation of order

If the parent, to whose custody the minor children have been entrusted is subsequently proved to be leading an immoral life, the Court will rescind its order and give the custody of them to the other parent if proved to be leading a respectable life, or to some other proper person. *Marsh v. Marsh and Plaumbo*, L.R., 1 P. 437, *Witt v. Witt*, (1891) P. 163; 60 L.J. P. & M. 63. T

## B—INTERIM ORDERS.

(1) Interim order for access *pendente lite*.

(a) The Court has also jurisdiction to order that one of the parties to the suit shall have access merely to the children of the marriage. Browne and Powles on Divorce, 7th Ed., 1905, P. 130. U

(b) And this jurisdiction it generally exercises *pendente lite*, by an *interim* order *Thompson v. Thompson*, 2 S. & T. 402. V

(c) Until the Court passes its final decree in the suit, the Court can only make an *interim* order as to the custody, maintenance or education of the minor children. See *Cubley v. Cubley*, 30 L.J., P. & M. 161. W

## General—(Continued)

## B.—INTERIM ORDERS—(Continued).

## (2) Order pending suit for restitution.

The Court has no power to make an order as to the custody of children pending a suit for restitution of conjugal rights. *Chambers v. Chambers*, 39 L. J. Mat. 56, 22 L. T. 727 **X**

## (3) Father's rights respected pending suit.

(a) The Court will hesitate before interfering during the pendency of the suit with the father's legal right to the custody of his children, however young. *Cartledge v. Cartledge*, 2 Sw. & Tr. 567. **Y**

(b) A father has in English Law, a legal right to the custody of his child, whether male or female, from its birth until it attains the age of twenty-one. *In re Agar Ellis*, 21 Ch. D. 317, *Thomasset v. Thomasset*, (1894), P. 295, 63 L. J. P. & M. 140 **Z**

## (4) Mother's desire not considered except in special cases

The mother's ordinary natural desire for them will not prevail with the Court, if the children and she do not suffer by being apart. *Cartledge v. Cartledge*, 2 Sw. & Tr. 567. **A**

## (5) Mother given preference when her health suffers by separation from children

(a) If her health suffers from their absence when they are very young, and they are not under their father's roof the mother may be given custody. *Barnes v. Barnes and B.*, 1 R. 1 P. & D. 463 **B**

(b) In the above case the Court made an order, giving the custody of two infant children the one being of the age of between three and four years and the other of eighteen months—to the mother, the respondent in a suit for dissolution of marriage, on the ground that the mother's health was suffering from being deprived of their society, and that they were living with a stranger and not with the father (*Ibid*) **C**

## (6) Wife taking possession of child

(a) A wife left her husband's house with a view of instituting a suit for dissolution of marriage by reason of cruelty and adultery, taking with her then boy between seven and eight years of age, whom she placed in a school kept by an intimate friend of her own. On an application for an interim order to prevent the father removing him from the school. *Held*, that the wife's intimate friend could not be considered an indifferent person between the parties, and the Court ordered the child to be given up to the husband's mother, who, from the letters, appeared to be on good terms with the daughter-in-law, and attached to the boy. *Baughton v. Baughton*, 1 Sw. & Tr. 424 **D**

(b) Pending a suit for dissolution of marriage by a husband by reason of the wife's adultery, she, in an improper manner, obtained possession of an infant child of the marriage, then living with the husband. On the husband again taking the child from her, he endeavoured by violence to get it from him, but failing, applied to the Court for an order that it might be restored to her. The Court rejected the application, on account of the impropriety of her conduct, and condemned her in the costs of the motion. *Allen v. Allen and P. Arch.*, 29 L. J. Mat. 166. **E**

## General—(Continued).

## B.—INTERIM ORDERS—(Concluded).

## (7) Both parties to be before the Court.

It is generally necessary that both parties must be before the Court before an interim order can be made. *Stacey v. Stacey*, 29 L.J., P. and M. 63. **F**

(8) *Ex parte* application to restrain removal.

The Court, upon affidavit that the petitioner believed her husband intended to remove the only child out of the jurisdiction of the Court, made an order, *ad interim*, upon the petitioner's *ex parte* application, restraining the respondent from removing the child *Harris v. Harris*, 63 L. T. 262. **G**

## (9) Application for interim order to be kept distinct from main question in suit.

(a) Applications for interim orders for the custody of a child should be kept distinct from the main question in the suit. See *Wallace v. Wallace*, 32 L.J., P. and M. 31. **H**

(b) But the Court, at the hearing of a cause, will not entertain an application for custody of children if it is founded on evidence which would not be admissible in the cause. (*Ibid*) **I**

(c) If, however at the hearing, the facts proved would warrant such an order, *e.g.*, if the respondent's adultery is proved, the Court may direct that the petitioner have the custody of the children until further orders. *Wallace v. Wallace*, 32 L.J., P. and M. 31 **J**

## C.—ORDERS AS TO ACCESS TO CHILDREN.

## (1) Pending suit—Interests of children to be considered

(a) In exercising its discretion in the matter of access to children by their parents, pending suit, the Court is mainly influenced by considerations for the interests of the children *Philip v. Philip*, 41 L.J., P. 89, 27 L.T. 592. **K**

(b) Therefore, when it was satisfied that the visit of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused the mother an order for access pending suit, though there was reason to apprehend that the separation of the mother from the child would exercise a prejudicial effect on the mother's health (*Ibid.*) **L**

## (2) Motive for access

On an application for an order of access to children pending a suit on behalf of the mother, the Court may require to be satisfied that the motive is natural love and affection for the children, and that the mother has no indirect objects in view, as to which lapse of time in making the application may be material *Codrington v. Codrington and Anderson*, 3 Sw. and Tr. 456 **M**

## (3) Access to children and change of custody—English Law and Practice.

(a) A husband or wife, parties to a suit, may, at any time after decree, apply by summons for access to the children of the marriage. Divorce Rule 212, Laws of England, Vol. XVI, P. 577. **N**

(b) And the registrar may make such order as he thinks fit, subject to appeal to the Court by either party if dissatisfied. (*Ibid.*) **O**

## General—(Continued).

## .C.—ORDERS AS TO ACCESS TO CHILDREN—(Continued).

(c) A wife's adultery ought not to be regarded for all time, and in all circumstances, as sufficient to disentitle her to access to, or even to custody of, her child, if under sixteen. (*Ibid.*) P

(d) The fact that change of custody or liberty of access may unsettle the mind of the infant is only a circumstance to be considered, and ought not to be regarded as a complete bar to any change of custody or to a new order for access. *Stark v Stark and Hutchins*, (1910), P. 190. Q

## (4) Cases where applications for access to children were refused.

(i) *Wife's application for access not bona fide.*

In case it is found that the ———, such application would be refused. *Codrington v Codrington and Anderson*, (1861), 3 Sw. & Tr. 496. R

(ii) *Application for access by guilty wife.*

(a) An ——— was not refused till the time for rehearing had expired. *Godenrich v. Godenrich and Tara, Forder and Kelsey*, (1869), 19 L.T. 611. S

(b) It was formerly held that the Court would not give even access to children to a wife found guilty of adultery. *Bent v. Bent*, 2 S. & T 392, 5 L.T. 139. T

(c) But subsequently the Court of Appeal decided that there was no general rule of practice as to this, but that the Court had an absolute discretion in the matter. *Handley v. Handley*, (1891), P 124, 63 L.T. 535. *Browne and Powles on Divorce*, 7th Ed., 1905, P 130. U

(d) When the marriage is dissolved on account of the adultery of the wife, she is not entitled to have access to the children of the marriage. 5 B.L. R 71. Y

(e) But when the wife obtains a decree for judicial separation on the ground of her husband's cruelty and adultery, and there is nothing to impeach her own conduct, the Court will allow her to have the custody of the children. 6 B L R. 318. W

(iii) *Wife lunatic*

In case where the wife was found to be a lunatic, an application for access by her was refused in the interests of the child. *Philp v. Philp*, (1872), 41 L J. (P. & M) 89. X

(iv) *Access refused to mother where such access would be against the interests of the child.*

Where the Court in the matter of access to children was satisfied that the visits of the mother to the child, who was in a very sickly state, might retard the child's recovery, it refused her an order for access pending suit, though there was reason to apprehend that such refusal might injure her health. *Philp v Philp*, 41 L J, P 89, 27 L T 592. *Brown and Powles on Divorce*, 7th Ed., 1905, P. 130. Y

(v) *Respondent disobeying order of Court.*

The Court, having granted a decree dissolving the marriage between the parties, on the petition of the wife, further ordered that, on certain conditions, and after due notice, she should have access to her

## General—(Continued).

## C.—ORDERS AS TO ACCESS TO CHILDREN—(Concluded).

children The respondent for a time removed himself and one child beyond the jurisdiction of the Court, and on his return denied to the petitioner access to the child on the terms laid down by the Court. On the suggestion that he was again about to leave this country, and on consideration of the approaching vacation, the Court ordered that the child should be delivered up to its mother forthwith, and that she should have the custody of it until the fifth day of the following term *Portugal v Portugal*, L J, Mat. 103, 15 W R 9. See also *Allen v Allen*, 51 L J., P 77, *Hyde v Hyde*, 57 L.J. P. 89 Z

(vi) *Costs of motion for access.*

(a) The costs of an unsuccessful motion by a wife for access to the children of the marriage will not be allowed *Hepworth v Hepworth*, 30 L J., Mat. 253. A

(b) Where the Court decrees a judicial separation in favour of the husband on the ground of cruelty, and the wife afterwards applies on motion for access to some of the children of the marriage, and an order for access is made, the wife is not entitled to have the costs of the motion taxed against her husband, as he has not refused her access to the children since the date of the decree *Bacon v Bacon*, L R., 1 P 167 B

## D—PRACTICE AND PROCEDURE.

(1) **Prayer for custody in petition**

(a) Where it is intended to ask for the custody of children, words to that effect should be inserted in the prayer of the petition. *Boddy v Boddy*, 30 L J., P 163 Browne and Powles on Divorce, 7th Ed., 1905, P 133 C

(b) If the permanent custody of the child is claimed a prayer to that effect should be inserted in the petition *Seymour v. Seymour*, 1 Sw & Tr 332. D

(c) The Court will not, at the hearing of a suit for dissolution of marriage by reason of the wife's adultery, order the petitioner to have the custody of the children of the marriage, unless the petitioner prays for such custody *Boddy v. Boddy and Grover*, 30 L J., Mat 163 E

(2) **Custody not prayed for in petition—Separate petition must be filed.**

"If the custody of the children of the marriage is not prayed for in the petition it is necessary to file a separate petition for that purpose, which must be filed and served in the same way as an ordinary petition." Browne and Powles on Divorce, 7th Ed., 1905, P 413. F

(3) **Order for custody when asked for at hearing**

"Where the custody of the children is asked for at the hearing, the order for such custody forms part of the decree" Browne and Powles on Divorce, 7th Ed., 1905, P 413. G

(4) **Applications for custody how made—English law and practice.**

Applications for purposes of custody are made on summons to the Judge in Chambers, supported by affidavit. See Divorce Rule 104; *Anthony v. Anthony*, (1860), 30 L J. (P.M. and A.) 208. H

## General—(Continued)

## D.—PRACTICE AND PROCEDURE—(Continued).

## (5) Application for access, how made—English law and practice.

Applications for access are made to a registrar, subject to appeal to the Judge.  
Divorce Rule 212. I

## (6) Affidavits.

The Court will not allow affidavits to be read as to the truth or falsehood of charges brought by the parties to the petition against each other.  
*Ryder v. Ryder*, 2 Sw. & Tr 225, 30 L J, Mat. 44. J

## (7) Paternity of child, question as to, must be raised on pleadings.

Where the respondent desires to question the paternity of children, whose custody is claimed in a petition, the question of such paternity must be specifically raised in the answer, otherwise the party opposing the custody will not in future be allowed, at the hearing, to question the paternity. *Gordon v. Gordon and Bell*, (1903), P 92, Browne and Powles on Divorce, 7th Ed., 1905, P. 134. K

## (8) Allegation of illegitimacy—Proof of non-access to be given.

(a) "Where a wife respondent alleged that a child born during the marriage was the child, not of the petitioner but of the co-respondent, and desired the custody of it on that ground, the Court held that she must show that her husband could not have had such access to her as might result in his paternity." Browne and Powles on Divorce, 7th Ed., 1905, P. 131. L

(b) Otherwise the presumption of legitimacy must prevail. *Gordon v. Gordon and Granville Gordon*, (1903), P. 141. Browne and Powles on Divorce, 7th Ed., 1905, P. 131. M

## (9) Agreement between parties as to custody.

The statutory power of the Court as to maintenance and education of children after decree is not affected by any agreement made between the parents. *Bishop v. Bishop*, (1897), P. 638, 66 L J P 69. Browne and Powles on Divorce, 7th Ed., 1905, P. 131. N

## (10) Motive of applicant.

(a) The Court will require to be satisfied that the motive of the applicant is natural love and affection for the children, and that he or she has no indirect object in view. *Codrington v. Codrington*, 3 S & T, 496, 10 L. T. 387. Browne and Powles on Divorce, 7th Ed., 1905, p. 131. O

(b) Where the object of a wife who claimed the custody of the two children of the marriage was to bring them up in the Roman Catholic religion, they having been previously brought up as Protestants, the Court committed their custody to the mistress of the school in which their father had placed them, but gave to both parents full access to them. *D'Alton v. D'Alton*, 4 P D 87. Browne and Powles on Divorce, 7th Ed., P. 131. P

## (11) Intervention of third parties allowed.

The Court will, if the circumstances of the case warrant it, allow persons, who are not parties to a suit, to intervene and plead upon the question of the custody, maintenance and education of the children of parents,



## General—(Continued).

## D.—PRACTICE AND PROCEDURE—(Continued).

whose marriage is the subject of the suit. See *Chetwynd v. Chetwynd*, L.R., 1 P. & D. 39, 31 L.J., P. 130 *Goodrich v. Goodrich*, L.R., 3 P. & D. 134. Browne and Powles on Divorce, 7th Ed., 1905, P. 131; *March v. March and Palumbo*, (1867), L.R., 1 P. & D. 437. Q

## (12) Application by a third person when made.

Such an application cannot, however, be made by a third party after the death of a petitioner. *Davis v. Davis*, (1889), 14 P.D. 162. R

## (13) Custody given to third person.

If entrusting the children to an innocent mother would result in a change of their religion, the custody may be given to a third party. *D'Alton v. D'Alton*, (1878), 4 P.D. 87 Laws of England, Vol. 16, P. 579. S

## (14) Ability to provide better maintenance to child, no ground to prefer a third person

Nor will a guilty husband's father be allowed to have the children, against the will of the wife, merely because he is able to provide for them better than she. *Milford v. Milford*, (1869), L.R., 1 P. and D. 715. Laws of England Vol. 16, P. 579. T

## (15) Costs of third parties intervening

If third parties intervene, they will do so at their own risk as to costs. *March v. March*, L.R., 1 P. and D. 437 Browne and Powles on Divorce, 7th Ed., 1905, P. 131. U

## (16) Both parties to be before the Court

The Court is not in a position to deal with a petition for custody of children until both parties are before the Court *Stacey v. Stacey*, 29 L.J., Mat. 63, 8 W.R. 341. Y

## (17) Order as to custody on motion to make decree nisi absolute—Notice.

(a) The Court will grant the custody of children on the motion for making a decree nisi absolute without petition. *Davies v. Davies*, 15 W.R. 344 (Eng.) W

(b) But notice must be given previously to the other side of the intention to apply for such custody. *Davies v. Davies*, 15 W.R. 344 (Eng.). X

## (18) Service of petition

(a) On a petition by wife for the custody of her children it was held that where the original petition contained a prayer for the custody of the children an order may be made without further notice to the respondent. See *Horne v. Horne*, 30 L.J., P. & M. 200, *Wilkinson v. Wilkinson*, 30 L.J., P. & M. 200 (note) cited in 18 C. 473 (476). Y

(b) Where the petitioner in a suit for judicial separation desires an order as to the custody of the children of the marriage, after the decree has been made, the intervention of the Court should be sought by petition. 18 C. 473 (476). Z

(c) Generally speaking, in such a case the Court will not act *ex parte*, but the petition must be served, or some sufficient form of notice must be given in order to show the respondent what the Court is to be asked to do. 18 C. 473 (476). A

## General—(Continued).

## D.—PRACTICE AND PROCEDURE—(Continued).

- (d) But it has been held in England that if notice of that had been given at an earlier stage of the case, then notice of the petition itself need not be given. See 18 C 473 (476) **B**
- (e) Where the respondent was served with a petition for dissolution of marriage containing a prayer for the custody of children, but did not appear on making the decree absolute, the Court gave the custody of children to the petitioner, though no notice of the application has been given to the respondent. *Wilkinson v Wilkinson*, 30 L.J., P. & M 200 (note) followed in 18 C 473 (476) **C**
- (f) Where a copy of the petition praying for a certain order is served on the respondent, and he does not enter an appearance, no notice of a subsequent application for the same relief need be given. *Horne v. Horne*, 30 L.J., P. & M. 200 followed in 18 C 473 (476). **D**
- (g) But if the petition does not contain such prayer, notice to the respondent is necessary. (*Ibid*) **E**
- (h) The original petition need not contain a formal prayer for the custody of the children. 18 C 473 (476) **F**
- (i) It is enough if the petition warned the respondent that such an application would be made. 18 C 473 (477) **G**
- (j) It is more correct procedure not to include a formal prayer for the custody of the child in the original petition, but to make a separate application for it subsequent to the decree. 18 C. 473 (477) **H**

## (19) Delivery—Personal service of order—Writ of sequestration—Discovery in aid of execution.

On the application by a husband, who had obtained a decree nisi for divorce against his wife, an order was made that the wife should deliver up into the custody of the husband the children of the marriage. The wife knew of the order, but evaded service of it, and disobeyed it. On the application of the husband an order was then made declaring the wife contumacious and in contempt, and directing that a writ of sequestration should issue against the estate and effects of the wife, and that her mother, sister and brother-in-law should attend the Court to be examined as to her whereabouts. —*Held on appeal—first*, that as the wife knew of the order for delivery up of the children, and evaded service of it, personal service of the order upon her was not necessary to give the Court jurisdiction to issue the writ of sequestration, *secondly*, that the general form of the writ of sequestration against 'the estate and effects' of the wife, without any express limitation therein to separate property of the wife not subject to a restraint on anticipation, was right, but that the writ would only operate on her separate property which was not so subject, *thirdly*, that the Court had no jurisdiction to order the attendance of third parties for examination (*Scott v Morley*, 20 Q B D 120, *D*, *Miller v Miller*, L R 2 P. 54, *Expl.*) *Hyde v Hyde* 57 L.J., P 89, 13 P D 166, see also *Allen v. Allen*, 54 L J , P. and M 77, 10 P.D. 187 **I**

## General—(Continued).

## D.—PRACTICE AND PROCEDURE—(Continued).

## (20) Non-appearance of respondent

A respondent who is served with a copy of a petition for dissolution of marriage, containing also a prayer for the custody of the children of the marriage, if he does not appear, is not entitled to notice of the application  
*Wilkinson v. Wilkinson*, 30 L.J., Mat. 200, n. J

## (21) Access to child pending suit, power of Court to order

(a) The Court has power to order that the party who has not the custody of the child shall have access to it *pendente lite*. *Thompson v. Thompson*, 2 S. & T. 402, 31 L.J., P. & M. 218. K

(b) The Court has, however, a discretion in the matter of granting such parent access to the child pending suit, and in the exercise of that discretion the paramount consideration for the Court is the interests of the child itself. *Phillip v. Phillip*, 41 L.J., P. & M. 89 L

(c) Where, therefore, it appeared that the visits of the mother to the child, who was in a very weak state of health, might retard its recovery, the Court refused to make an order for access pending suit in her favour, although there was reason to apprehend that the separation from her child would affect the mother's health. *Phillip v. Phillip*, 41 L.J., P. & M. 89 M

## (22) Discretion of Court

The Court will decide each case according to its own circumstances without regard to who has the right to the custody at common law. See *Spratt v. Spratt*, 1 S. & T. 215. Browne and Powles on Divorce, 7th Ed., 1905, P. 131 N

## (23) Common law right of the father to custody.

(a) Whilst the guilt or innocence of the accused party is still in question, the Court will not, except for good cause shown, take away, even by an interim order, the common law right of the father to the custody of his children. *Carthidge v. Carthidge*, 2 S. & T. 567, 31 L.J.P. 85 Browne and Powles on Divorce 7th Ed., 1905, P. 129. O

(b) But where it has been satisfied that the mother's health was being seriously affected by the loss of her children's society, the Court has given her the custody of them *pendente lite*, although she was accused of adultery. *Barnes v. Barnes*, L.R., 1 P. & D. 463 Browne and Powles on Divorce 7th Ed., 1905, P. 129. P

(c) Where a marriage was dissolved on the ground of the husband's adultery and aggravated cruelty the Court inserted in the decree a declaration under this section. *Skinner v. Skinner*, 13 P.D. 90 Browne and Powles on Divorce 7th Ed., 1905, P. 129 Q

(d) But before making an order under this section upon a wife's petition for judicial separation on the ground of her husband's adultery and desertion, the Court will require very strong evidence that he is a person unfit to have the custody of his children. *Woolnuth v. Woolnuth*, 86 L.T. 598 (1902), Browne and Powles on Divorce, 7th Ed., 1905, P. 129. R

## General—(Continued).

## D.—PRACTICE AND PROCEDURE—(Continued).

## (24) Parental control.

The Court will not deprive a respondent father, on decree against him, of the power of exercising his parental judgment and discrimination with regard to his children, except so far as is inevitable from their remaining in the custody of their mother. *Maudslay v. Maudslay*, L.R., 2 P.D. 256. S

(25) Benefit of children and interests of innocent party to be considered. •

In dealing with applications for custody of and access to children, the Court considers, first, what is for the benefit of the children, and secondly, the interests of the innocent party to the suit. *D'Alton v. D'Alton*, 4 P.D. 87, 17 L.J.P. 59. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 129. T

## (26) Children not to be taken out of Court's jurisdiction, except by leave of Court.

Once a suit has been commenced, the children of the marriage should not be removed from the person in whose custody they are *de facto*, or out of the jurisdiction, except by leave of the Court. See *Harris v. Harris*, (1890) 63 L.T. 262. U

## (27) Sanity of wife

An application of a wife for the custody of the children was opposed on the ground that she was not of sound mind. The evidence of medical men adduced by the parties was conflicting, and it appeared that they were not much conversant with affections of the brain. The Court, therefore, directed a personal examination of the wife by an eminent physician, and upon his certificate gave her the custody of the children. *Duggan v. Duggan*, 29 L.J., Mat. 159. Y

## (28) Disobedience to order.

Where the marriage had been dissolved on the wife's petition, but the custody of the child of the marriage had been given to the respondent with access to the wife upon certain terms, the respondent having refused his wife access as ordered, the Court gave her the custody of the child for a limited time. *Portugal v. Portugal*, 35 L.J., P. 103. *Browne and Powles on Divorce*, 7th Ed., 1905, P. 132. W

## (29) Disobedience—Attachment—Knowledge of contents of order.

An order was made in a divorce suit that "the child, issue of the marriage between the petitioner and respondent, be forthwith delivered up to and remain in the custody of the petitioner until further order of the Court, but . . . that such child be not removed out of the jurisdiction of the Court without its sanction" This order was brought to the knowledge of the respondent, who took the child out of the jurisdiction and retained its custody. Legal service was not effected upon him. The Court, upon *ex parte* application by the petitioner, ordered a writ of attachment to issue against the respondent. *Favard v. Favard*, 75 L.R. 661. X

## (30) Penalty for defying order of Court

(a) A parent who improperly removes a child from the custody ordered by the Court may be attached for contempt. See *Symonds v. Symonds*, 1872 L.R., 2 P. and D. 447. Y

## General—(Continued).

## D.—PRACTICE AND PROCEDURE—(Continued).

(b) An *ex parte* application may be sufficient if service be impossible. *Symonds v. Symonds*, L.R., 2 P. and D. 447. \* Z

(c) If an order to give access be disobeyed, custody may be, temporarily at any rate, transferred to the other party *Portugal v. Portugal*, (1866) 35 L.J., P. and M. 108. A

(d) And the Court ought not to hesitate to send to prison a party to a divorce suit who deliberately, not technically only, defies the court and takes the law into his own hands. *Stark v. Stark and Hutchins*, (1910) P. 190, C.A. Laws of England, Vol XVI, P. 578. B

## (31) Refusal to make any order.

Where a husband, by reason of whose misconduct the marriage was dissolved, was living in America, and the children remained in the custody of the mother in this country, the Court refused to make any order as to their custody for any such order must have been final, and the circumstances and relative position of the parties might be materially altered in the lapse of years. *Robotham v. Robotham*, 1 Sw and Tr. 190, 27 L.J., Mat. 61. C

## (32) Variation of order—Custody of child

(a) Where a decree for dissolution of marriage had been pronounced on the wife's petition, on the ground of the husband's adultery and cruelty, and the custody of the children of the marriage had been given to her, the Court, two years afterwards, being satisfied on affidavit that the wife was unfit to be entrusted with the custody of a little girl, a child of eleven years old, one of two children of the marriage, and that the husband had since the decree was made absolute married again, and had been and was then leading a reputable and moral life, gave him the custody of such little girl, in spite of the fact that he had formerly been found guilty of adultery and cruelty. The other child, a boy, had always remained with the husband *Watt v. Watt*, 60 L.J., P. 63, (1891) P. 163. D

(b) It was held that the Court under the corresponding section of the English Statute had no power to vary or alter an order as to the custody of children. *Curtis v. Curtis*, 1 S and T. P. 178, 67 L.J.P. 90. Browne and Powles on Divorce, 7th Ed 1905, P. 127. E

## (33) Maintenance of child in custody of mother.

Where alimony had been allotted to the wife and the only child of the marriage left in her custody, *pendente lite* the court refused to order the husband to contribute to its maintenance. *Cranwell v. Cranwell*, 19 L.T. 611. F

## (34) Rule as to custody in Irish Bill for divorce.

"In an Irish Divorce Bill, although no separate action has been instituted in Ireland for the custody of children, the House of Lords will sanction a clause giving the custody of the children to the innocent party." Hart's Divorce Bill, (1898) A.O. 305—H.L. (Ir). Browne and Powles on Divorce, 7th Ed. 1905, P. 134. G

**General—(Concluded).**

**D.—PRACTICE AND PROCEDURE—(Concluded).**

**(85) Injunction.**

- (a) An injunction may be obtained for the direct purpose of preventing the removal of children out of the jurisdiction. *Hyde v. Hyde*, (1888), 13 P.D. 166, C.A. Laws of England, Vol. XVI, p. 579. **H**
- (b) An *interim* injunction was granted *ex parte* to restrain a husband from taking a child out of the jurisdiction till an application for custody *pendente lite* could be made. *Harris v. Harris*, (1890), 63 L.T. 262. **I**

**(96) Costs of wife's application for access**

- (a) The costs of a wife's unsuccessful motion for access to the children pending suit will not be allowed her. *Hepworth v. Hepworth*, 30 L.J., P. and M. 253. **J**
- (b) And a wife who takes out a summons for access, which has not been refused to her, will not be allowed her costs against her husband although she succeeds. *Bacon v. Bacon*, (1886), L.R.1. P. and D. 167. Laws of England, Vol. XVI, P. 579. **K**

**XII.—PROCEDURE.**

**45.** Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure.

Code of Civil Procedure to apply.

(Notes).

**General.**

**(1) Written statement**

- (a) There is nothing written in the Act or in the Code of Civil Procedure which makes it compulsory on a party who tenders a written statement of his own accord to present it before the first hearing of the suit. 4 B. L. R. (O. C. J.) 51. **L**
- (b) Thus, where in a suit for divorce on the ground of the wife's adultery the co-respondent *suo motu* filed a written statement only four days before the hearing, and gave notice thereof only one day before, *held* the application was filed in time and could not be taken off the file. 4 B. L. R., (O. C. J.) 51. **M**

**(2) Scope of this section and S. 7.**

All the procedure under this Act is, according to this section, to be regulated by the Code of Civil Procedure. S. 7 of the Act applies not to points of procedure, but to the general principles and rules on which the Court is to act and give relief. 4 B. L. R. (O. C. J.) 51. **N**

**(3) Applicability of provisions of Civil Procedure Code.**

S. 141 of the Civ. Pro. Code, 1908, provides as follows —

"The procedure provided in this Code (Act V of 1908) in regard to suits shall be followed, as far as can be made applicable, in all proceedings in any court of civil jurisdiction." **N-I**

**46.** The forms set forth in the schedule to this Act, with such variation as the circumstances of each case require, may be used for the respective purposes mentioned in such schedule.

Forms of petitions  
and statements.

(Notes).

General.

(1) **Forms adopted from those in use in English Courts.**

These forms are in the main taken from those issued by the Court for Divorce and Matrimonial causes in England. See *Macrae on Divorce*, 1871, P. 134 O

(2) **Forms not intended to be literally followed**

(a) These forms are not intended to be literally followed, but only to serve as general examples. See *Per Cresswell, J. in Evans v. Evans*, 1 Sw. & Tr 78. P

(b) Thus, though the form concerning the respondent's statement as to income merely makes him state his net annual income, it has been held that this is not sufficient, but that the gross annual income should be stated and that the deductions therefrom are to be specified. *Nokes v. Nokes*, 3 Sw. & Tr 529, 33 L J, P. & M. 24 Q

**47.** Every petition <sup>1</sup> under this Act for a decree of dissolution of marriage or of nullity of marriage, or of judicial separation \* \* \* shall <sup>2</sup> \* \* \* state that there is not any collusion <sup>3</sup> or connivance <sup>4</sup> between the petitioner and the other party to the marriage ;

Stamp on petition.

Petition to state  
absence of collusion.

the statements contained in every petition under this Act shall be verified by the petitioner or some other competent person in manner required by law for the verification of plaints <sup>5</sup>, and may at the hearing be referred to as evidence <sup>6</sup>.

Statements to be  
verified.

(Notes).

General.

(1) **Corresponding English Law.**

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), S. 41, Provides that—

“ Every person seeking a decree of nullity of marriage, or a decree of judicial separation, or a dissolution of marriage, or a decree in a suit of jactitation of marriage, shall, together with the petition or other application for the same, file an affidavit verifying the same so far as he or she is able to do so, and stating that there is not any collusion or connivance, between the deponent and the other party to the marriage.”

**1.—“Every petition.”**

**(1) Court Fees.**

For Court fee, see the COURT FEES ACT, 1870 (VII of 1870), Sch. II, No 20. **R**

**(2) Stamp, Provision as to.**

The section as originally enacted contained a provision as to the value of the stamp to be affixed on the petitions. This is now removed from this section, and the Court Fees Act, 1870, enacts that every petition under this Act, except a petition under S. 44 which is specially exempted must bear a Court Fee stamp of the value of Rs. 20. See Court Fees Act, 1870, Sch II, Art 20. **S**

**2 —“Separation . shall . state.”**

**N.B.**—The words “or of reversal of judicial separation, or for restitution of conjugal rights, or for damages, shall bear a stamp of five rupees, and”, and the words: “in the first, second and third cases mentioned in this section” were repealed by Act VII of 1870

**3.—“Collusion.”**

**N B.**—See Notes under S 13, *supra*.

**4.—“Connivance”**

**N.B.**—See Notes under S 12, *supra*

**5.—“Manner required by law for the verification of plaints.”**

**Verification of pleadings, provisions as to—in the Civ Pro. Code.**

- (1) “Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.
- (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true
- (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed” See Civ Pro. Code, 1908, O. VI, r 15. **T**

**6.—“May at the hearing be referred to as evidence.”**

**English Law.**

According to the practice of the English Courts an affidavit filed in support of a petition cannot be taken as evidence at the hearing. The petitioner must prove the case *alunde*. See *Deane v. Deane*, 1 S. & T. 90, Ratigan on Divorce, 1897, P 283. **U**

**48.** When the husband or wife is a lunatic or idiot, any suit under this Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the committee or other person entitled to his or her custody.

Suits on behalf of lunatics.



## (Notes).

## General.

N.B.—See also notes under S. 49, *infra*.

- (1) **Suit by next friend of lunatic before adjudication of lunacy under Act XXXV of 1858—Maintainability—C.P.C., 1882, Ch. XXXI.**

After the institution of a suit for partition of certain lands by X (a lunatic) by his next friend Y, the former was adjudged to be of unsound mind under Act XXXV of 1858 and Y was appointed a guardian of the person, as well as manager of the estate of the lunatic. *Held* (1) that Y was not competent to sue as next friend of the lunatic, under the provisions of Ch. XXXI, Civ. Pro. Code, 1882. The provisions of that chapter are only applicable to cases where a person has been adjudicated a lunatic under Act XXXV of 1858 previously to the institution of the suit, (2) that, irrespective of the provisions of Ch. XXXI of Civ. Pro. Code, 1882, on equitable principles, Y cannot sue in respect of the immoveable property belonging to X and (3) that the fact that X was adjudicated a lunatic under Act XXXV of 1858 and Y was appointed manager of the estate of the lunatic after the suit was instituted did not cure the original defect in the proceedings as instituted. 13 B. 656. Y

- (2) **C.P.C., 1882, Ss. 443, 463—Lunatic defendant—No adjudication under Act XXXV of 1858—Guardian—Practice.**

Although S. 443 of the Code read with S. 463, does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind except in the case where he has been adjudged to be of unsound mind under Act XXXV of 1858, still, upon general principles, and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds, on inquiry, that he is of unsound mind so as to be unfit to defend the suit. (See *Daniel*, Ch. Pr. Vol. I, p. 182) 16 B. 132. [33 C. 1094=10 C.W.N. 719=4 C.L.J. 306; 20 A. 2, 23 B. 653=1 Rom. L.R. 88, 24 M. 504]. W

- (3) **C.P.C., 1882, S. 463—Lunatic defendant—Guardian *ad litem*—Act XXXV of 1858.**

Until a lunatic is declared such, under the provisions of Act XXXV of 1858, a guardian *ad litem* cannot be appointed, under Chap. XXXI of the C.P.C., for a so-called lunatic in a suit. 6 M. 380. [Diss., 33 C. 1094 (1097)=10 C.W.N. 719=4 C.L.J. 306; 13 B. 656; 20 A. 2, 24 M. 504]. X

**49.** Where the petitioner is a minor, he or she shall sue by his or her next friend to be approved by the Court; Suits by minors.  
and no petition presented by a minor under this Act shall be filed until the next friend has undertaken in writing to be answerable for costs.

Such undertaking 1 \* \* \* shall be filed in Court, and the next friend shall thereupon be liable in the same manner and to the same extent as if he were a plaintiff in any ordinary suit.

## (Notes).

## General.

PROVISION OF THE CIVIL PROCEDURE CODE WITH REGARD TO  
SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND  
MIND.

## (1) Minor to sue by next friend.

"Every suit by a minor shall be instituted in his name by a person who, in such suit, shall be called the next friend of the minor." See O. XXXII, r. 1, C.P.C., 1908 Y.

## (2) Where suit is instituted without next friend, plaint to be taken off the file.

"Where a suit is instituted by, or on behalf of, a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit." See Civ. Pro. Code, 1908, O XXXII, r. 2. Z

## (3) Guardian for the suit to be appointed by Court for minor defendant.

"Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. See Civ. Pro. Code, 1908, O XXXII, r. 3. A

## (4) Who may act as next friend or be appointed guardian for the suit.

Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit. Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff. Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. No person shall without his consent be appointed guardian for the suit. Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the

**General—(Continued).**

parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the re-payment or allowance of such costs as justice and the circumstances of the case may require. See Civ. Pro. Code, 1908, O. XXXII, r. 4 **B**

**(5) Representation of minor by next friend or guardian for the suit.**

"Every application to the Court on behalf of a minor, other than an application under rule 10, Sub-rule (2), shall be made by his next friend or by his guardian for the suit. Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader." See Civ. Pro. Code, 1908, O. XXXII, r. 5 **C**

**(6) Receipt by next friend or guardian for the suit of property under decree for minor.**

"A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—(a) by way of compromise before decree or order, or (b) under a decree or order in favour of the minor. Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application." See Civ. Pro. Code, 1908, O. XXXII, r. 6. **D**

**(7) Agreement or compromise by next friend or guardian for the suit.**

No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor. See Civ. Pro. Code, 1908, O. XXXII, r. 7. **E**

**(8) Retirement of next friend**

"Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred. The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor." See Civ. Pro. Code, 1908, O. XXXII, r. 8. **F**

**(9) Removal of next friend.**

"Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's

**General—(Continued).**

interest will be properly protected by him, or where he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal, and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit. Where the next friend is not a guardian appointed or declared by a n authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit. See Civ. Pro. Code, 1908, O. XXXII, r. 9.

G

**(10) Stay of proceedings on removal, etc of next friend.**

"On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place. Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit." See Civ. Pro. Code, 1908, O. XXXII, r. 10.

H

**(11) Retirement, removal or death of guardian for the suit**

- Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit. Where the guardian for the suit, retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place. See Civ. Pro. Code, 1908, O. XXXII, r. 11.

I

**(12) Course to be followed by minor plaintiff or applicant on attaining majority.**

A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application. Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name. The title of the suit or application shall in such case be corrected so as to read thenceforth thus - "A B, late a minor, by C D, his next friend, but now having attained majority." Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application, on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend. Any application under this rule may be made *ex parte*, but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend." See Civ. Pro. Code, 1908, O. XXXII, r. 12.

I

**General—(Concluded).****(13) Where minor co-plaintiff attaining majority desires to repudiate suit.**

"Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit. Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant. The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs. Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant. See Civ. Pro. Code, 1908, O. XXXII, r. 13. **K**

**(14) Unreasonable or improper suit.**

A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by a next friend be dismissed on the ground that it was unreasonable or improper. Notice of the application shall be served on all the parties concerned, and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit." See Civ. Pro. Code, 1908, O. XXXII, r. 14. **L**

**(15) Application of above rules to persons of unsound mind.**

"The provisions contained in rules 1 to 14, so far as they are applicable shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued." See Civ. Pro. Code, 1908, O. XXXII, r. 15. **M**

**(16) Saving for princes and chiefs**

"Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of the Governor-General in Council or a Local Government in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind." See Civ. Pro. Code, 1908, O. XXXII, r. 16. **N**

**N.B.**—For cases on this section relating to suits by and against minors and other disabled persons, See Sanjiva Rao's Commentary on the Code of Civil Procedure, 1908. Notes under O. XXXII.

**"Such undertaking."**

**N.B.**—The words "shall bear a stamp of eight annas and" were repealed by the Court Fees Act, 1870. **O & P**

**50.** Every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court by general or special order from time to time directs:

Service of petition<sup>1</sup>.

Provided that the Court may dispense with such service, altogether in case it seems necessary or expedient so to do.

(Notes).

General.

### Corresponding English Law.

The Matrimonial Causes Act, 1857 (20 and 21 Vict., C. 85), S. 42, provides that—

“Every such petition shall be served on the party to be affected thereby, either within or without Her Majesty's dominions, in such manner as the Court shall by any general or special order from time to time direct, and for that purpose the Court shall have all the powers conferred by any statute on the Court of Chancery. Provided always, that the said Court may dispense with such service altogether in case it shall see necessary or expedient so to do.” Q

### I —“Service of petition.”

#### (1) Personal Service.

(a) “Citations, and all other instruments requiring *personal* service, including petitions, must be personally served if possible. Divorce Rules 10 & 16. R

(b) The service must be in the manner as the Court directs by general or special order. M C A. 1857, S. 42. S

#### (2) Service dispensed with.

(a) Wherever expedient, service may be dispensed with altogether. M.C.A., 1857, S. 42. T

(b) When service of summons on a co-respondent is dispensed with under this section the Court ought to assign its reasons for doing so. *D L. Salve v. Alber D. Salve*, P J. 1896, P. 221. U

#### (3) Service on a foreigner abroad—English Law

“As the Court had no jurisdiction against a foreigner, *after he had quitted England*, for not rendering conjugal rights to his wife while here, a petition for restitution under these circumstances could not be served abroad before 1884.” *Firebrace v. Firebrace*, 4 P. D. 63, 69; *Chichester v. Chichester*, 10 P. D. 186. Y

#### (4) Service out of jurisdiction of the Court.

(a) Service out of the jurisdiction of the Court, *except in* suits for restitution against a foreigner (see M C A. 1857, Ss. 41 & 42, App. A., *sed quare*) may be effected without leave by the general order of the Court, and in the manner specified in the order on motion, when a special order is required. Dixon on Divorce, fourth edition, P. 106. W

(b) “But now the Court appears to have jurisdiction against all respondents disobeying an order for restitution—under M C A. 1884, S. 5—and if so all the proceedings in a restitution suit may be served out of the jurisdiction.” Dixon on Divorce, fourth edition, P. 105. X

#### (5) Proceedings after decree—Service of decree to be proved.

“In any subsequent proceedings after decree disobeyed, the petitioner must prove service of the decree at a place from which the respondent could have obeyed the decree within the time specified.” *Bateman v. Bateman*, 1901, P. 198. Y

I.—“ *Service of Petition* ”—(Continued).(6) **Service of instruments by parties.**

Parties must not serve any instruments in their own case    *Dixon on Divorce*, fourth edition, P. 106. Z

(7) **Service, how effected.**

The original must be produced, if required, and a true copy delivered to the party served.    *Divorce Rules*, 11 and 16 A

(8) **Petition and citation are served together.**

When the copy of the citation is served, a certified copy of the petition under seal shall be delivered with it    *Divorce Rule* 12. B

(9) **Acceptance of service by solicitor is bad**

(a) Service must be personal, unless otherwise directed    *Milne v. Milne*, 34 L J , Mat 143. C

(b) No one can accept service for a respondent without leave, and, if he does so, the irregularity is not cured by appearance.    *De Niceville v. De Niceville*, 37 L J., Mat 43 D

(10) **Duplicate citations**

(a) Citations, exact copies of one another, may be obtained for service in several places    *Dixon on Divorce*, fourth edition, P. 106. E

(b) “ When the party to be served is known to be in one of three places, copies may be despatched simultaneously to each city, and thus loss of time in service will be avoided.” *Dixon on Divorce*, fourth edition, P. 106 F

(c) “ Again, when the respondent and co-respondent have separated, duplicate citations are needed ”    *Dixon on Divorce*, fourth edition, P. 106. G

(11) **Neglecting to cite persons**

“ When an opportunity to serve an intended party is passed over, and a difficulty subsequently arises, the Court may refuse substituted service.    *Dixon on Divorce*, fourth edition, P. 107. H

(12) **Service—When damages are claimed.**

“ A petition containing a claim for damages must be served on the adulterer and the wife personally, unless such service is dispensed with, or other service is ordered instead ”.    M C A 1857, 33. I

(13) **Service on minors**

(a) Minors should be served in the presence of their natural or legal guardians or other persons *in loco parentis*    *Cooper v. Green*, 2 Add. 454 , *Broune v. Wildman*, 29 L J , Mat. 54 J

(b) In such a case the certificate of service must state that such service was effected.    *Cooper v Green*, 2 Add 454 , *Brown v. Wildman*, 28 L.J., Mat. 54. K

(14) **Service on lunatics**

————— should be in the presence of the master of the asylum.    *Bawden v. Bawden*, 2 Sw & Tr. 417. L

(15) **Time for service and appearance.**

“ Time for service and appearance varies, according to the distance at which the citation is served, and the time requisite to reach the Court.” *Dixon on Divorce*, fourth edition, P 107. M

## 1. — "Service of petition"—(Continued).

## (16) Orders and decrees, service of.

(a) When orders and decrees must be served personally, the original, or an office copy under seal, must be produced to the party served, and annexed to the affidavit of service, and marked as an exhibit by the commissioner or other person before whom the affidavit is sworn. Divorce Rule 117. **N**

(b) Service of a Divorce Court decree upon a domiciled English subject is good. *Dicks v. Dicks*, 81 L T 462, and see M.C.A. 1894, S. 5. **O**

(c) It takes effect if served as to enable the respondent to obey it within a reasonable time. *Dicks v. Dicks*, 81 L T 462, and see M.C.A. 1894, S. 5. **P**

## (17) Serving the Attorney-General under Legitimacy Declaration Act.

"A copy of the petition and the verifying affidavit under this Act must be delivered to the Attorney-General a month before the petition is filed, and he must be a respondent upon the hearing of the petition, and in all the subsequent proceedings." Dixon on Divorce, fourth edition, P. 108 **Q**

## (18) Substituted service

Substituted service is in order to inform the party sued of the proceedings against him, when he is avoiding service, or when his address is not known. *Bland v. R*, L R , 3 P. & D 233, 44 L J., Mat. 14, 32 L T, N.S., 404, 23 W R 419, Col. in Digest, 183. **R**

## (19) Difficulty in service not to be a bar to obtaining redress.

(a) A suitor should not be prevented from obtaining redress by a difficulty in service of the proceedings. *Bland v. R*, L R , 3 P. & D. 233, 44 L J., Mat. 14, 32 L T, N.S. 404 **S**

(b) Care must also be taken to see that a respondent is not condemned unheard. *Bland v. R*, L R 3 P & D 233, 44 L J, Mat. 14; 32 L T, N.S. 104; 23 W.R. 419, Col. in Digest, 183. **T**

## (20) Procedure in applying for substituted service

Leave for substituted service must be applied for, by motion to the Judge, or, in the Judge's absence, to the Registrar, supported by affidavit. Divorce Rule 13 **U**

(21) The motion for substituted service is *ex parte*

(a) ——— and after to only the petitioner and the party to be served. Dixon on Divorce, fourth edition, P. 108 **Y**

(b) Such motion can be made as soon as the petition and verifying affidavit are filed, and without notice to other parties in the suit. Dixon on Divorce, fourth edition, P. 108 **W**

## (22) Affidavits in support.

(a) Affidavits in support must be filed by the party interested. *Williams v. Williams and P*, 1896, P. 153. **X**

(b) Another must be filed by an independent deponent. Dixon on Divorce, fourth edition, P. 108 **Y**

## (23) Substituted service, when permitted and when not

(a) Substituted service is not permitted until the impossibility of effecting personal service is manifest. *Rowbotham v. Rowbotham*, 1 Sw. and Tr. 73, 6 W R. 328, 27 L.J., Mat. 33, *Sudlow v. Sudlow*, 29 L.J., Mat. 1, *Lacey v. Lacey*, *Ibid.* 24. **Z**



## I.—“ Service of petition ”—(Concluded).

- (b) All reasonable efforts to discover it must have been made and have failed before substituted service can be granted. (*Ibid.*) *Sudlow v. Sudlow*, 28 L J., Mat. 4. A
- (c) When every effort has been made and the respondent has disappeared without trace, or is known to have absconded to avoid citation, and cannot be discovered, leave would be granted for substituted service. *Deane v. Deane*, 4 Jur. N.S. 148; *Parker v. Parker and M* 5 Jur. N.S. 103; *Cook v. Cook*, 28 L J Mat. 5. B
- (24) **Absence abroad, no ground for substituted service.**  
Absence abroad, and ignorance of the absentee's address, are not sufficient grounds, for granting substituted service. *Sudlow v. Sudlow*, 28 L.J. Mat. 4. C
- (25) **Wilful suppression of party's address.**  
Wilful suppression of party's address, in a suit for restitution, justifies an order for substituted service of the demand for cohabitation as well as of the petition and citation *In the matter of the Petition of Sheehy*, 1 P.D. 423; 25 W.R. Col in Dig. 123. D
- (26) **Respondent living out of jurisdiction and his address unobtainable.**  
Where the respondent is living out of the jurisdiction, and his address is unobtainable, substituted service would be ordered. *Waters v. Waters*, 34 L T, N.S. 33. E
- (27) **Substituted service, how effected**  
(a) “ When an absent respondent, whose whereabouts and address are unknown, is known to be in communication with some person, an attempt should be made to serve him through that person, who may be willing to despatch the necessary instruments to the respondent.” *Chandler v Chandler*, 27 L J, Mat 35 F
- (b) “ Where the respondent is believed to be avoiding service it may be effected on a third party through whom it is likely to come to his knowledge.” *O'Sheehy v. O'Sheehy*, 24 L T, N.S. 367, *Hillas v. Hillas*, May 6th. See Pritchard's Digest P. 211, No. 59; *Coz v. Coz*, L T., Nov. 30th, Div. Business, notes of decisions G
- (c) In one case “ Substituted service was directed on a relative of the respondent known to be in communication with him, but unfriendly to the petitioner, and also upon another relative ignorant of the respondent's address, and by an advertisement in a newspaper named by the Court, to the effect that the petition had been filed and that the citation had issued ” *Lacey v. Lacey*, 28 L J., Mat. 24; and see *Appleyard v. Appleyard*, L.R., 3 P. and D. 258. H
- N.B.**—“ This case seems to imply that if a person is unfriendly to the petitioner he must not be trusted as the only means of effecting service ” *Dixon on Divorce*, fourth edition, P. 110.

(28) **Serving a convict.**

- “ Serving a convict may be through some official of the gaol, on affidavit that such service will reach him.” *Bland v Bland*, 44 L J., Mat, 14, L.R. 3 P. and D. 233. I

51. The witnesses in all proceedings before the Court, where their attendance can be had, shall be examined orally, and any party may offer himself or herself as a witness, and shall be examined, and may be cross-examined and re-examined, like any other witness.

Mode of taking evidence.

Provided that the parties shall be at liberty to verify their respective cases in whole or in part by affidavit<sup>1</sup>, but so that the deponent in every such affidavit shall, on the application of the opposite party, or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally, and after such cross-examination may be re-examined orally as aforesaid by or on behalf of the party by whom such affidavit was filed.

(Notes).

General.

N.B. —See notes under S. 52, *infra*

#### 1 —“ Affidavit.”

#### (1) Provisions of the Code of Civil Procedure relating to affidavits.

##### (i) *Power to order any point to be proved by affidavit.*

“ Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable. Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.” See Civ. Pro. Code, O. XIX, r. 1 J

##### (ii) *Power to order attendance of deponent for examination.*

“ Upon any application, evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent. Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.” See Civ. Pro. Code, 1908, O. XIX, r. 2. K

##### (iii) *Matters to which affidavits shall be confined.*

“ Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted; provided that the grounds thereof are stated. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.” See Civ. Pro. Code, 1908, O. XIX, r. 3. L

#### (2) Suit for dissolution of marriage—Affidavit—Practice.

(a) A party in a suit for dissolution of marriage is not entitled, as a matter of right, to give evidence by affidavit. 13 P.R. 1891. M

(b) When a petitioner in a suit for dissolution of marriage offers himself or herself as a witness under the permission contained in this section, it is desirable that the examination should be oral, and in the presence of the Court trying the petition. 13 P.R. 1891. N

## 1.—“Affidavit ”—(Continued)

(3) Co-respondent residing abroad applying to be examined on commission—  
Affidavit.

(a) In a suit for divorce by husband against wife on the ground of the wife's adultery with the co-respondent, if the co-respondent resides in England and by means of an affidavit denies the guilt and expresses an intention to be examined on commission, it was held that it would be desirable and proper for the Courts in India to have acceded to the application to be examined by commission. 18 W.R. 480 (P.C.) = 10 B.L.R. (P.C.) 301 = I.A. Sup. Vol 106. **O**

(b) The admission of the wife charged with adultery is not evidence against the co-respondent. (*Ibid*) **P**

(c) A decree may be set aside as regards the co-respondent while it is retained as regards the wife charged with adultery (*Ibid.*) **Q**

(d) As to the evidence which would suffice to prove the charge of adultery as against the co-respondent. See 18 W.R. 480 (P.C.) = 10 B.L.R. (P.C.) 301 = I.A. Sup. Vol 106. **R**

## (4) Stamp on affidavit.

An affidavit does not require a stamp 12 B. 276 **S**

## (5) When affidavit necessary

(a) Where a rule to show cause had been obtained on the facts set out in the plaint, the Judge declined to refuse the hearing of the rule simply because no verified petition or affidavit had been filed 6 C. 485 = 8 C.L.R. 43 **T**

(b) An application for stay of execution should be supported by an affidavit. 15 B. 596. **U**

## (6) When affidavit not necessary.

(a) It is not necessary to support a petition by affidavit, when the facts mentioned in it are in themselves matters of record and are proved by copies of proceedings filed with the application. 32 C. 146 **Y**

(b) Where the facts in a petition to the High Court, appear sufficiently from the judgments of the lower Courts, no affidavit need be filed. 8 C.L.J. 308. **W**

(c) In a motion to vary Commissioner's report the rule should be argued on the evidence taken by the Commissioner and not upon affidavits. 1 B. 158. **X**

## (7) When affidavit sufficient.

The parties entered into a compromise deed, but one of them subsequently withdrew from the same. In a proceeding to force the party to consent to it, affidavits of the parties were held to be sufficient. 7 B. 304 **Y**

## (8) Who should make an affidavit.

(a) An affidavit of documents when there are several plaintiffs, should be made by all of them. 15 B. 7. **Z**

(b) An affidavit of documents may be required from a minor defendant. 19 B. 350. **A**

(c) When a person unable to read or write, presents himself to affirm solemnly, it will be sufficient to get his mark affixed in lieu of his signature. 9 W.R. 357. **B**

## 1.—“ Affidavit ”—(Continued)

(9) **Form of affidavit.**

Affidavits should comply with the terms of this rule. In cases of interlocutory applications, the statements of the declarant's belief are admissible, but the belief must be stated and reasonable grounds thereof set forth.

9 Bom L R. 540.

C

(10) **Contents of affidavit.**

An affidavit should not contain inferences but only bare facts. 6 Bom L R. 704.

D

(11) **Rule to show cause**

A rule to show cause must be supported by an affidavit. The affidavit must be sufficient, so that, if no cause is shown, the rule could be made absolute on the affidavit. 3 B L R. App 153 = 12 W.R. 113.

E

(12) **Summons.**

(a) An affidavit of service of summons should show that proper efforts have been made to know when and where the defendant is likely to be found. 19 C 201.

F

(b) An affidavit of proper service of summons should show (1) that proper efforts were made to find the other party and (2) that the copy of the summons was affixed on the door of the house in which he ordinarily resided. 26 C 101 = 2 C W N 574.

G

## PRACTICE OF ENGLISH COURTS AS TO AFFIDAVIT.

(1) **Time for filing affidavits**

“ When the Judge ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the registry within eight days from the time when such direction was given, unless the Judge Ordinary shall otherwise direct.” Divorce Rule, 51.

H

(2) **Time for filing them in undefended cases**

**N B**—The above rule was amended by rule 188, which is in the following terms —

“ In an undefended cause, when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the registry at any time up to ten clear days before the cause is heard.” Divorce Rule, 188.

I

(3) **Counter affidavits, time for filing**

“ Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer.” Divorce Rule, 52.

J

(4) **Copies to be delivered to other parties on day of filing.**

“ Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.” Divorce rule, 53.

K

(5) **Affidavits in reply cannot be filed without leave**

“ Affidavits in reply to such counter-affidavits cannot be filed without permission of a registrar.” See Divorce rule, 54.

L

## 1.—“Affidavit”—(Continued).

PRACTICE OF ENGLISH COURTS AS TO AFFIDAVIT  
—(Continued).

## (6) Order to cross-examine on affidavits, application for.

“Application for an order for the attendance of a deponent for the purpose of being cross-examined in open Court shall be made to the Judge, on summons”. Divorce Rule, 55. M

## (7) Cases partly verified by affidavits.

The instances in which the Court has allowed cases to be proved wholly by affidavits have been extremely rare, but it has not been uncommon to allow a case to be partly proved by affidavits. Browne and Powles on Divorce, 7th Ed., 1905, P. 573. N

## (8) Cases tried on affidavit only are few.

“The cases in which the Divorce Court has allowed the parties to verify their cases wholly by affidavit have been very few.” Browne and Powles on Divorce, 7th Ed., 1905, P. 235. O

## (9) Cases verified in part by affidavit.

“But the instances where a petitioner has been allowed to prove his or her case partly by affidavit have not been uncommon.” Browne and Powles on Divorce, 7th Ed., 1905, P. 235. P

## EXAMPLES.

A petitioner has been allowed to prove the following by affidavit —

## (i) Witnesses at a distance.

(a) A marriage where the witnesses to that part of the case resided in Scotland.

*M'Kechnie v. M'Kechnie*, 1 S. & T. 550, 28 L.J. P. 31. Q

(b) A conviction for bigamy where the witnesses resided at a distance. *Macartney v. Macartney*, L.R., 1 P. & D. 259, 36 L.J.P. 38; 15 L.T. 193. R

## (ii) Proof of preliminary facts.

The preliminary facts of the co-habitation and separation when he resided in Australia were allowed to be proved by affidavits. *Adams v. Adams*, 29 L.T. 699. S

## (10) Bigamy in America.

“In a pauper cause, where the husband was, at the time of the hearing, undergoing a sentence for bigamy in America, a decree ~~was~~ was made on the oral evidence of the petitioner alone, corroborated entirely by affidavits.” *Batley v. Batley* (Unreported), cited in Browne and Powles on Divorce, 7th Ed., 1905, P. 235. T

## (11) Corroborative evidence supplied by affidavits

“In fact it may now be taken that the Court will allow a case to be completed by evidence supplied on affidavit, if the justice of the case requires it, and there is no reason to suspect collusion.” Browne and Powles on Divorce, 7th Ed., 1905, P. 236. U

## (12) Affidavits must be sworn in first person, and give true address and description of deponent.

“Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.” Divorce Rule, 138. V

## I.—“Affidavit”—(Continued).

PRACTICE OF ENGLISH COURTS AS TO AFFIDAVIT  
—(Continued).

(19) (a) “If the deponent gives an illusory address, or no address at all, the Court will not allow the affidavit to be used.” *Hyde v. Hyde*, 59 L.T. 523 W

(b) “The affidavit of a married woman should state the description of her husband” *Ellam v. Ellam*, 62 L.T. 331. X

## EXAMPLES.

## (1) The following descriptions have been held to be good descriptions.

- (i) “Merchant”
- (ii) “Manufacturer”
- (iii) “Managing clerk to—”
- (iv) “Clerk to—”
- (v) “Of no occupation” X-1

**N B**—It is generally necessary that the deponent should state his occupation.  
See Browne and Powles on Divorce, 7th Ed., 1905, P. 573.

## (2) The following descriptions have been held to be not sufficient

- (i) “Associate”
- (ii) “Acting managing clerk to—”
- (iii) “Articled clerk”
- (iv) “Solicitor’s clerk”
- (v) “Gentleman”
- (vi) “Esquire (*Ibid.*)” X-2

## (3) Affidavit, joint—Names of persons must be inserted in Jurat, except where all sworn at one time by same officer.

“In every affidavit made by two or more deponents, the names of the several persons making it shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the above-named deponents” Divorce Rule, 199. Y

## (4) Interlineations, alterations, or erasures in body of affidavit.

“No affidavit having, in the jurat or body thereof, any interlineation, alternation, or erasure, shall, without leave of the Court or of one of the registrars, be filed or made use of in any matrimonial cause or matter, unless the interlineation or alteration—other than by erasure—is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure are re-written and signed or initialed in the margin of the affidavit by the officer taking it.” Divorce Rule, 140. Z

## (5) Affidavit by blind or illiterate deponents.

“Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made, is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to

## I.—“Affidavit” —(Concluded).

PRACTICE OF ENGLISH COURTS AS TO AFFIDAVIT  
—(Concluded).

understand the same, and also made his or her mark or wrote his or her signature thereto in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.” Divorce Rule, 141. **A**

## (6) Deaf and dumb deponent

- (a) “The rules are silent as to the practice where a deponent is deaf and dumb” Browne and Powles on Divorce, 7th Ed., 1905, P. 575. **B**
- (b) “If the deaf and dumb deponent can read and write the matter is simple. If otherwise, the commissioner or other authority must be satisfied by an interpreter that such deponent understands fully what he or she is doing. In either case the course that has been pursued should be clearly set out in the jurat.” Browne and Powles on Divorce, 7th Ed., 1905, P. 575. **C**

## (7) Where special time fixed for filing affidavit.

“Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge.” Divorce Rule, 145. **D**

**52.** On any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion.

Competence of husband and wife to give evidence as to cruelty or desertion<sup>1</sup>.

## • (Notes).

## General.

**N.B.**—For detailed notes on Ss. 51 and 52, see Appendix under the heading.

## “EVIDENCE.”

## Corresponding English law.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85), S. 46, provides that—  
“Subject to such rules and regulations as may be established herein provided, the witnesses in all proceedings before the Court where their attendance can be had shall be sworn and examined orally in open Court. Provided that parties, except as hereinbefore provided, shall be at liberty to verify their respective cases in whole or in part by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party or by direction of the Court, be subject to be cross-examined by or on behalf of the opposite party orally in open Court, and after such cross-examination may be re-examined orally in open Court as aforesaid by or on behalf of the party by whom such affidavit was filed.”

**1.—“Competenc of husband and wife to give evidence as to cruelty or desertion.”**

**(1) Who may testify.**

“All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

*Explanation.*—A lunatic is not incompetent to testify, unless he is prevented, by his lunacy from understanding the questions put to him and giving rational answers to them.” See Evidence Act, 1892, S. 118 **E**

**(2) Communications during marriage.**

“No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.” See Evidence Act, 1872, S. 122 **F**

**(3) Number of witnesses.**

“No particular number of witnesses shall in any case be required for the proof of any fact.” See Evidence Act, 1872, S. 134. **G**

**(4) Evidence of respondent when admissible**

(a) The respondent in a suit for divorce can be examined as a witness. 3 B.L. R. App. 6. **H**

(b) By S. 52 she (the respondent) may be compelled to give evidence in the cases there supposed. In other cases her evidence is admissible if she offers herself as a witness. 3 B.L. R. App. 6. **I**

**(5) Proof of unnatural offence.**

A charge of unnatural offence on her person by a wife against her husband in a suit for judicial separation cannot be accepted, without corroboration as an act of legal cruelty justifying a decree for judicial separation. 77 P.R. 1905. **J**

**(6) Proof of adultery.**

(a) This was a suit for dissolution of a marriage on the ground of the adultery of the respondent with the co-respondent. There was the respondent's evidence that she had committed adultery with the co-respondent in 1883 and 1886. As to the adultery in 1886, she, in course of her examination, produced certain letters which she swore she had received from the co-respondent. Some of these letters showed that he had importuned her to visit him in 1886, and the letters raised a violent presumption that adultery was committed on the occasion of that visit. The petitioner in his evidence proved that the co-respondent was in Court at the time of the trial. The co-respondent was not called to contradict any of the evidence given by the respondent at the trial. *Held*, that the petitioner was entitled to have the decree made absolute in respect of the adultery in 1886. 7 A.W.N. 272. **K**



**1.—“Competenc of husband and wife to give evidence as to cruelty or desertion ”—(Concluded).**

- (b) In a suit by the husband for dissolution of his marriage on the ground of the adultery of his wife neither the wife nor the co-respondent could be compelled to give evidence unless, they offered themselves as witnesses. 11 P R 1902. **L**
- (c) Suit for dissolution of marriage on the ground of wife's adultery—Power of Court to order discovery of documents. See 11 P.R. 1902. **M**
- (d) The co-respondent in a suit by a husband for the dissolution of his marriage with his wife on the ground of adultery was summoned by the petitioner in such suit as a witness. The Court did not explain to him, before he was sworn, that it was not compulsory upon, but optional with him to give evidence or not. He did not object to be sworn and replied to the questions asked him by the petitioner's counsel without hesitation, until he was asked whether he had sexual intercourse with the respondent. He then asked the Court whether he was bound to answer such question. The Court told him that he was bound to do so, and he accordingly answered such question, answering it in the affirmative. Had the Court not told him that he was bound to answer such question, he would have declined to answer it. **Held**, under such circumstances, that the co-respondent had not “offered” to give evidence, within the meaning of S. 51 of the Act, and therefore his evidence was not admissible, 4 A. 49. **N**

Power to close doors<sup>1</sup>.

**53.** The whole or any part of any proceeding under this Act may be heard, if the Court thinks fit, with closed doors.

**(Notes).**

**1.—“Power to close doors.”**

**(1) General practice of Judges of the Divorce Division—English Law and Practice.**

The Judges of the Divorce Division sit ordinarily in open Court. Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85), S. 12; see, also, Orders in Council, 12th December, 1883 and 1st March, 1907, W.N. Pt. 2 (1883), P. 591; (1907), P. 79. **O**

**(2) Power to sit *in camera*.**

**a.**

But they have power, inherited from the Ecclesiastical Courts, to sit *in camera*. Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85), S. 22, see, also, *M (falsely called H) v. H.*, (1864), 3 Sw. & Tr. 517. **P**

**(3) Practice as to sitting *in camera*.**

But the practice of sitting *in camera* is, so far as reported, appears to have been adopted only in cases of nullity of marriage for incapacity. *A. v. A.*, (1875), L R 3 P. & D 230; *C v. C.*, (1869), L R. 1 P. & D. 640. **Q**

**(4) Practice where it is difficult to obtain necessary evidence from witnesses in open Court.**

“But in cases where the ends of justice may be defeated owing to the difficulty of obtaining the necessary evidence from witnesses in open Court, the Judges sometimes exercise their inherent jurisdiction and exclude the public from the Court during the whole or part of the hearing.”

*I.—“ Power to close doors ” —(Concluded).*

*A. v. A*, (1875), L.R. 3 P. & D. 230, *Cohen v. Cohen*, (1897), 13 T.L.R. 255, *D. v. D.*, *D. v. D and G.*, (1903) P. 144, *De Lisle v. De Lisle*, (1904), Times 15th March. R

(5) **Where details of case are unpleasant.**

“Occasionally, when the details of the case are very unpleasant, the judge orders the removal from the Court of women and children.” *Barnett v. Barnett*, (1859), 29 L.J. 1 P. M. & A. 28. S

(6) **Where evidence is offensive.**

In one case where the evidence was very offensive, the Court desired that the case of nullity of incapacity should be tried *in Camera*, and, would the consent of counsel, ordered them to be so tried. *H. v. H.*, (1864), 3 Sw. & Tr. 517. T

(7) **Where unnatural offence is alleged.**

In a suit of restitution of conjugal rights, where unnatural offences were alleged, the Court ordered the suit to be tried *in Camera*. *A. v. A*, (1875), L.R. 3 P. & D. 230, *C. v. C*, (1869), L.R. 1 P. & D. 640 U

**54.** The Court may from time to time adjourn the hearing of any petition under this Act, and may require further evidence thereon if it sees fit so to do.

Power to adjourn <sup>1</sup>

**(Notes).**

*I —“ Power to adjourn. ”*

**(1) Provisions of the Code of Civil Procedure regarding adjournments.**

(i) *Court may grant time and adjourn hearing.*

- The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit. See Civ. Pro. Code, 1908, O. XVII, r. 1. Y

(ii) *Costs of adjournment.*

In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment. Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded. See Civ. Pro. Code, 1908, O. XVII, r. 1. W

(iii) *Procedure if parties fail to appear on day fixed.*

Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit. See Civ. Pro. Code, 1908, O. XVII, r. 2. X

(iv) *Court may proceed notwithstanding either party fails to produce evidence, etc.*

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which

## 1.—“Power to adjourn ”—(Concluded).

time has been allowed, the Court may, notwithstanding such default, proceed to decide the suit forthwith”. See Civ. Pro. Code., 1908, O. XVII, r. 3. Y

## (2) Sufficient cause for which adjournments have been granted

- (a) Where a party was misled into a belief by the Court that all his witnesses could not be examined in a single day and so did not produce all his witnesses on the date of hearing, the Court was justified in granting an adjournment 5 C W N. 195=28 C 37 at PP. 50 to 53. Z
- (b) When a case is adjourned on condition that the party asking for further adjournments should deposit the costs of the other party, a further adjournment could be properly refused, if the costs are not deposited. 6 O.C 41. A
- (c) Although a case may have been posted for final disposal, if the Judge thinks that further evidence is necessary, he should adjourn the case. 7 W. R. 84 B
- (d) When the witnesses who have been summoned are absent, the party must be allowed further time to re-summon them. 4 O.C 379, see 2 L B. R. 91 (*contra*). C
- (e) In case the witnesses are not served with summons, the Court should grant an adjournment, unless there is pressing necessity for proceeding with the case. 2 A.W.N 127, 4 O C 41 D

## (3) Party taken by surprise.

- (a) When the case is taken up on a day for which the case was not posted, time should be given to the party if he asks for it 18 W R 325 E
- (b) The plaintiff wanted time as he was taken by surprise The Court allowed him time. 7 W R 81 F
- (c) Two connected suits were posted for hearing together on the same date. Another Judge who succeeded to the office disassociated the cases and posted them for different dates The plaintiff in one of them applied for adjournment to summon his witnesses. Held the case was a fit one for an adjournment to be granted 11 A W N 112 G
- (d) Where a defendant has not been served with the summons in time so as to enable him to produce his evidence, he should be given time if he asks for it. 18 W.R. 141. H
- (e) Advocates should not expect that their cases will be adjourned as a matter of course, because they are engaged in some other case It is their duty to make suitable arrangements U B R. 1897-1901, P. 527. I
- (f) If a party applies for summons so late that summons cannot be served, the Court can refuse to adjourn the case. But neither the Court nor the Nazir has the power to refuse to issue summons on the ground that summons could not be served 2 O.C. 31. J
- (g) When the defendant knows for a long time that his case would be heard on a certain date, the fact that he was sick and could not take out summons to witnesses is no sufficient ground for an adjournment. 24 W.R. 202 K

## (4) Court of revision, powers of.

A Court of revision ought not to lightly interfere with the discretion exercised by the lower Court as to the sufficiency of the cause on which adjournment has been applied for 17 M.L J. 225=30 M 274. 28 C. 37. L

55. All decrees<sup>1</sup> and orders made by the Court in any suit or proceeding under this Act shall be enforced and may be appealed from,<sup>2</sup> in the like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the laws, rules and orders for the time being in force

Provided that there shall be no appeal from a decree of a District Judge for dissolution of marriage or of nullity of marriage nor from the order of the High Court confirming or refusing to confirm such decree.

No appeals as to costs

Provided also that there shall be no appeal on the subject of costs only

(Notes).

General.

#### (1) Corresponding English Law

(a) The Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85), S. 52, provides that—

“All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same manner or the like manner as the judgments, orders and decrees of the High Court of Chancery may now be enforced and put in execution”

• (b) As regards costs, the Matrimonial Causes Act, 1857, S. 51 provides as follows—

“ \* \* \* Provided always that there shall be no appeal on the subject of costs only.”

M

#### I.—“Decrees.”

##### (1) “Decree”—Meaning.

(a) “Decrees” in this section include both decrees nisi and decrees absolute. 22 B. 612 (614).

N

(b) Throughout the Act, when it is intended to distinguish between these two classes of decrees, they are distinguished in appropriate language. [See (e.g.) Ss. 44, 56 & 57]. Hence when no such distinguishing language is used, decree includes both classes. 22 B. 612 (614)

O

(c) The decree nisi does not dissolve the marriage. See *Abbott v. Abbott*, 4 B. L. R. (O.C.J.) 51; *Walter v. Walter*, 15 Pro. D., 152, cited in argument in 22 B. 612 (614).

P

(d) Under this Act an appeal lies from a decree absolute although the decree nisi has been left unchallenged. 22 B. 612.

Q

##### (2) Appeal against decree absolute—Limitation.

An—must be filed within 20 days from the date of the decree, that being the period prescribed for appeals from decrees made on the original side of the High Court under the law for the time being in force. 22 B. 612

R

**2.- "All decrees and order . . . shall be enforced and may be appealed from."**

**(1) Court fees.**

For Court-fee on memorandum of appeal, see the Court Fees Act, 1870 (VII of 1870), Sch. II, No. 20. S

**(2) Right of appeal.**

(a) An appeal lies from all decrees and orders passed by a single Bench in the exercise of its original jurisdiction in proceedings under the Indian Divorce Act, by virtue of S 55 of the Act and S. 9 of the Punjab Courts Act 18 P.R. (1903). T

(b) On a petition for judicial separation filed by the wife on the ground of her husband's adultery and cruelty, the District Judge found the first charge unproved, but the second charge proved, and granted her a decree on that ground alone. The petitioner preferred an appeal to the Chief Court to set aside the finding of the District Judge as to the first charge. *Held*, that, inasmuch as the finding against the petitioner on the issue as to adultery could not affect her remedy for subsequent misconduct by her husband, the existence of that finding did not entitle her to appeal or to have that finding specifically embodied in the decree for the purposes of appeal. 56 P R. (1904), (6 C. 206, 6 C. 319 (F.B.), 6 W.R. Mts. 18, 7 A 606, 21 A. 117, 18 C. 647, 11 C 301 (P C), 35 L J P. & M, 101, L R. 13 L J.P. & D, 6, L R. 1 S. & T. 168, L R 28 L J P. 55, L R 37 L J.P. 77, R) U

(c) A husband brought a suit for divorce against his wife on the ground of her adultery, the co-respondent appeared in that suit. The respondent appealed on the ground (*inter alia*) that the adultery was not proved. *Held* that in that appeal the co-respondent was not entitled to be heard in opposition to the appeal. 5 B.L R 71. V

**(3) Period of limitation expiring during vacation—Power of Prothonotary to receive and file memorandum of appeal presented on the day the Court re-opens.**

Where the period of limitation for the filing of an appeal has expired during vacation, a party to a suit has a right under the provisions of the Limitation Act, to have his appeal admitted on the day the Court re-opens, and the Prothonotary of the High Court has power to receive and file a memorandum of appeal on that day. 6 B. 487. W

**(4) Appeal filed after time—Cause of delay**

(a) When an appeal is filed after it is time-barred and the appellant desires to take the benefit of S 5 of the Limitation Act (1877), the cause of the delay should be stated at the time the appeal is filed. 22 P.R. 1903. X

(b) Under S. 16 of the Punjab Courts Act, it is not necessary for Judges of the Punjab Chief Court to pronounce judgment in open Court on dates fixed before hand and duly announced to parties or counsel. 22 P. R. 1903. Y

(c) The Judge of the Punjab Chief Court, may in the exercise of His Original Civil Jurisdiction either write his judgment in English or deliver it orally. 22 P.R. 1903. Z

(d) If delivered orally, it must be delivered in open Court. 22 P R 1903 A

(e) And where any of the above-mentioned practices leads to delay in the parties knowing of the issue of the judgment, such delay is no sufficient cause for preventing the appeal out of time. 22 P.R. 1903. B

2.—“ *All decrees and order....shall be enforced and may be appealed from* ”—(Concluded).

(5) **Copy of decree appealed against to be filed with memorandum of appeal.**

(a) An Appellate Court cannot dispense with the presentation of a copy of the decree appealed against 22 P R. 1903. **C**

(b) And an appeal filed without either a copy of the decree or judgment is not a good appeal in law. 22 P R 1903. **D**

**56.** Any person may appeal to Her Majesty in Council from any decree (other than a decree *nisi*) or order under this Act of a High Court made on appeal or otherwise,

Appeal to Queen  
in Council.<sup>1</sup>

and from any decree (other than a decree *nisi*) or order made in the exercise of original jurisdiction by Judges of a High Court or of any Division Court from which an appeal shall not lie to the High Court,

when the High Court declares that the case is a fit one for appeal to Her Majesty in Council.

(Notes).

**1.—“ Appeal to Queen in Council.”**

**(1) Provisions of the Code of Civil Procedure relating to appeals to the King in Council**

(i) *When appeals lie to King in Council.*

Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction,

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction, and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council. See C P.C., 1908, S. 109. **E**

(ii) *Value of subject-matter.*

In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law. See C.P.C., 1909, S. 110 **F**

## I. — "Appeal to Queen in Council" — (Continued).

## (iii) Bar of certain appeals.

Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

- (a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court for the time being, or
- (b) from any decree from which under section 102 no second appeal lies. See C.P.C., 1908, S. 111. G

## (iv) Savings.

Nothing contained in this Code shall be deemed—

- (a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or
- (b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts. See Civ. Pro. Code, 1908, S. 112. H

## (2) Appeal to Privy Council—Court's discretion—Practice.

The discretion exercised by a High Court in granting sanction to appeal to the Privy Council is a judicial discretion which the Privy Council has power to review if necessary. 5 C.W.N. 193=3 Bom. L.R. 154=23 A. 227=11 M.L.J. 56=28 I.A. 11 (P.C.). See, also, 5 C.W.N. 689=23 A. 415. I

## (3) Interlocutory order.

- (a) No appeal lies to the Privy Council on an interlocutory order passed by the High Court. 11 M.L.J. 65=28 I.A. 28=28 C. 442=5 C.W.N. 153=3 Bom. L.R. 78=23 A. 220 (P.C.), 2 A. 65. J
- (b) But an interlocutory order may be impeached before the Privy Council on appeal from the final decree. 1 A.L.J. 26. K
- (c) No appeal lies to the Privy Council from an interlocutory judgment or order of a judge of the High Court until such judgment or order has been subjected to an appeal to the High Court under cl. 15 of the Letters Patent, except in those cases in which, by reason of the number of the Judges who have made such order, an appeal under cl. 15 is given directly to the Privy Council. 9 B.H.C. 398. L

## (4) Suit for restitution of conjugal rights.

- (a) A suit for restitution of conjugal rights and possession of a wife is not one to which any special money value can be attached for the purposes of jurisdiction. 18 C. 378 (13 C. 282, F.) M
- (b) In a suit for restitution of conjugal rights, no appeal lies to the Privy Council, as of right, although the suit was valued above Rs. 10,000 and the valuation was relied on by the defendant. 18 C. 378. N

## 1.—“Appeal to Queen in Council ”—(Continued).

## (5) Concurrent findings of fact—General rule as to non-interference.

(a) The Privy Council will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. 4 C.W.N. 808 (810)=28 C 1=27 I.A. 116. See, also, 19 C 452 (P.C.)=19 I.A. 101, 1 C.W.N. 697 (698) (P.C.)=24 I.A. 183, 25 C. 189, 3 C.W.N. 249, 14 C. 296 (P.C.)=14 I.A. 7, 17 C. 882 (P.C.)=17 I.A. 70, 20 C. 560 (P.C.)=20 I.A. 38, 9 C.W.N. 74 (78) (P.C.)=31 C. 871=31 I.A. 127; 4 M.I.A. 431; 7 W.R. (P.C.) 73, 5 W.R. (P.C.) 79, 6 M.I.A. 27, 8 M.I.A. 477; 22 C. 609=21 I.A. 51 (P.C.), 28 C 190, 23 C. 918=23 I.A. 102 (P.C.); 4 Bom. L.R. 248=177 P.L.R. 1905=59 P.R. 1905; 61 P.R. 1900; 6 C.W.N. 241=11 M.L.J. 379=25 M 215=29 I.A. 38 (P.C.), 16 C. 753=16 I.A. 125 (P.C.). **O**

(b) Where the decree of an appellate Court has approved the decision of the Court immediately below it, upon the issue of fact and no substantial question of law is involved no appeal is open under S. 596 of the Code of 1882 and leave should be refused. 16 A. 271 (P.C.), 8 M.I.A. 477, 1 W.R. 47 (P.C.), 2 C.W.N. 601, 23 A 94 (98)=21 A.W.N. 8, 5 C.W.N. 455=28 C. 190. **P**

(c) In the absence of substantial error, either in the finding of the facts, or in principles of law applied, the Privy Council will not disturb the judgment appealed against, unless they are satisfied that the judgment is materially wrong. 17 W.R. 185 (P.C.)=14 M.I.A. 401 **Q**

(d) The Judicial Committee will not interfere, unless it is satisfied, beyond all reasonable doubt, that there was some miscarriage in the Courts below in respect of some principle which they acted upon, in respect of some presumption to which too much weight was given, or in respect of something as to which the Committee could see that there was a matter of principle involved which it ought to set right for the guidance of the Courts of India in other cases. 15 W.R. 5 (P.C.)=6 B.L.R. 168. **R**

(e) For a case where the Privy Council refused to disturb the concurrent judgment of the Courts below on questions of fact, remarking that even if it felt any doubts, it would hesitate to protract the litigation by sending the case back to India. See 11 W.R. 35 (P.C.)=2 B.L.R. 85 (P.C.). **S**

## (6) Reasons for not interfering with concurrent findings.

(a) Where the point at issue, is a question of fact only, there is a strong presumption in favour of the judgment of the Court below, as the Judges in India possess advantages in forming an opinion of the probability of the transaction, and, in some cases, of the credit due to the witnesses. 4 M.I.A. 131 (433), 7 W.R. (P.C.), 73, see, also, 6 M.I.A. 27. **T**

(b) But that does not relieve the Court of the last resort, from the duty of examining the whole evidence, and forming its opinion upon the whole case. 4 M.I.A. 431 (433), 7 W.R. (P.C.), 73; see, also, 6 M.I.A. 27. **U**



## I.—“Appeal to Queen in Council”—(Continued).

## (7) Cases where Judicial Committee may interfere with concurrent findings.

- (a) Although the Judicial Committee adhere to the rule not to disturb the findings of two concurrent Courts in India upon a question of fact, yet such rule does not prevail where the Courts in India have never dealt with the real question raised by the issues and have drawn wrong inferences from the evidence. In such a case, the Court of ultimate appeal will disregard those concurrent judgments, and decide the case upon the evidence contained in the record. 13 M. I. A. 232. **Y**
- (b) Although the Privy Council is reluctant to interfere with a question of fact yet if it has to deal with conflicting judgments of which the decree of the Principal Sudder Amm was founded on a careful local investigation and the judgment of the High Court overruling that decree was not supported on satisfactory grounds, the decree of the Court of first instance would be restored. 15 W. R. 20 (P. C.) = 6 B. L. R. 677 = 13 M. I. A. 607. **W**
- (c) The concurrence of opinion of two Courts in India, even upon a mere question of fact does not always prevent their Lordships acting upon their own independent judgment. 10 M. I. A. 135 (136). **X**
- (d) For a case in which the Judicial Committee departed from the rule of not disturbing the concurrent findings of two lower Courts on questions of fact, the circumstances of the case being of so peculiar a character as to take it out of the scope of the general rule. See 18 W. R. 180, 10 B. L. R. 301, Sup. Vol. I. A. 106. **Y**

## (8) Concurrent findings—Grounds of decision of two Courts different—Effect

- (a) Where the appellate Court confirms the decision of the first Court, but on different grounds and for different reasons, there is no appeal to the Privy Council. 5 Bom. L. R. 100 = 25 A. 109 = 30 I. A. 35 (P. C.), see, also, 20 C. 87 (P. C.) = 20 I. A. 95 (P. C.), 7 C. W. N. 225 = 30 I. A. 41 = 30 C. 303 (P. C.). **Z**
- (b) It cannot detract from the weight of concurrent findings of fact that different Courts, in arriving at the same results upon the same evidence, have not been influenced by precisely the same consideration, difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, necessarily leads to one and the same inference. 20 C. 87 (P. C.) = 20 I. A. 95. **A**
- (c) The rule—that the Board will not disturb a finding as to facts, upon which both the Courts below are agreed, unless such finding can be shown to be clearly erroneous,—is none the less applicable because the Court may not have taken precisely the same view of the weight to be attached on each particular item of evidence, and in this way may not have been quite agreed on the grounds of their decision. 7 C. W. N. 225 = 30 I. A. 41 = 30 C. 303 (P. C.). **B**
- (d) In order to affirm the decision of the Court below it is sufficient for the appellate Court to affirm the decree, it need not also affirm the grounds of fact on which the judgment was passed. 25 A. 109 (P. C.) = 30 I. A. 35 = 5 Bom. L. R. 100. **C**
- (e) The word “decision” in this section means merely the decision of the suit by the Court, and cannot, like the word “Judgment” be defined as meaning the statement of the grounds, on which the Court proceeds to make the decree. 25 A. 109 (P. C.). **D**

**I.—“Appeal to Queen in Council ”—(Continued).**

- (f) A decree of the High Court dismissing an appeal for want of prosecution, the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing, is a decree affirming the decision of the Court immediately below. 20 A. 367. **E**

**(9) Question of genuineness of documents**

Where the question involved was one of fact turning on the genuineness of the documents which were found by the lower Courts to be fabricated, the Judicial Committee refused to interfere 16 W.R. 9 (P.C.)=8 B.L.R. 113 **F**

**(10) Lower Court not considering the evidence in the case**

The mere fact of the — is not by itself a ground of interference by the Judicial Committee with the concurrent findings of the lower Courts 17 C. 882 (P.C.) – 17 I A 70 **G**

**(11) Question of credibility of witnesses**

(a) The Judicial Committee will not disturb a judgment of a Court in India upon a —, unless it is manifestly clear, from the probabilities attached to certain circumstances in the case, that the Court below was wrong in the conclusion drawn from such evidence 6 M.I.A. 27 **H**

(b) In cases that turn upon the credibility of the testimony given, the appellate Court is disposed to defer to the judgment of the Judges who, with the advantage of local experience, have had the means of seeing the witnesses under examination and of inspecting the original document 9 M I A 156, 1 W R (P C ), 17 **I**

(c) It is not the practice of the Judicial Committee to advise the reversal of a decision of the Court below, merely on the effect of the evidence or the credit due to witnesses as the Judges in India have better means of determining questions of fact than the appellate Court. 1 W.R 30 (P.C.)=9 M I A 66. **J**

**(12) Royal Prerogative of Privy Council to admit appeals independent of statute.**

(a) The King in Council possesses, by virtue of the Royal Prerogative, a clear appellate jurisdiction over the judgment of all Courts of Justice established in any of the British dominions beyond the seas, and, notwithstanding the express statutory rights of appeal, from the decisions of the Supreme Court and the Sudder Courts. 8 M I A. 270 (272). See, also, 1 W R (P C ), 13, 15 B. 155 (158) , 18 I A. 6 (P.C.), 17 A. 112 (116). **K**

(b) It has been repeatedly held that, notwithstanding the statutes which prescribe the time and mode of appealing and the limits in point of amount, the power of the Queen in Council to entertain petitions for leave to appeal where the conditions imposed by the Statute have not been complied with, remains in full force 8 M.I.A 270 (272). **L**

(c) Thus it is quite discretionary with the Judicial Committee to admit an appeal from the Supreme or Sudder Courts, in cases far below the appealable amount mentioned in the Statutes, and long after the period prescribed by the Statute for filing a petition of appeal in India has expired. 8 M I A 270 (272). **M**

1.—“*Appeal to Queen in Council*”—(Continued).

(d) Such petitions have frequently been admitted, and have led to a reversal of the judgment of the Courts below. 8 M.I.A. 270 (272). **N**

(e) But the Courts in India have no power to allow or entertain a petition for leave to appeal, or to stay execution, or to take security for costs of an appeal, except strictly in accordance with the terms of the Statute or with any order the Privy Council may make in the particular case. 8 M.I.A. 270 (272, 273). **O**

(f) No provisions by Statute or Charter being made for appeals to Her Majesty in Council from judgments of the Court of the Judicial Commissioner of Oudh, created on the annexation of that Kingdom in the year 1858, the Judicial Committee, to prevent the denial of justice, admitted an appeal, under Statute 3rd and 4th, Will IV, c. 41. 8 M.I.A. 270 (*Ibid.*) **P**

(g) It is in the power of the Judicial Committee of the Privy Council, exercising prerogative right under the Crown, so to advise Her Majesty, if they should think an appeal ought to be allowed. 1 W.R. (P.C.) 13. **Q**

(13) **Duty of a Court of ultimate appeal.**

The — is to judge from the evidence and not to infer from probabilities. 11 M.I.A. 177 (178). **R**

(14) **Special leave will be granted in the following cases**

(a) Where the case involves a serious question of law. 3 C.W.N. ccxxxviii, 6 C.W.N. 362 (P.C.) = 24.A. 174 = 29 I.A. 10. **S**

(b) Where the point in dispute is not measurable in money value, but is of great public and private importance. 5 C.W.N. 193 = 11 M.L.J. 56 = 8 Bom. L.R. 154 = 23 A. 227 = 28 I.A. 11 (P.C.), 8 M.I.A. 1 = 4 W.R. 55 (P.C.). **T**

(c) If their Lordships of the Privy Council find that, in a case in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to be an unsound reason, then they would advise Her Majesty to admit the appeal. 15 B. 155 (P.C.) = 18 I.A. 6; 8 M.I.A. 270; 1 W.R. (P.C.) 13. **U**

(15) **Cases where special leave was not granted.**

(a) The High Court will not, in the exercise of its discretion, allow an appeal to the Privy Council upon a mere question of practice such as an order for the inspection of documents. 9 B.H.C. (O.C.J.) 398. **Y**

(b) The Queen in Council would not directly interfere to appoint or continue a manager or a receiver. 4 C.W.N. 34 (36) = 27 C. 1 = 26 I.A. 281. **W**

(c) The Queen in Council would not direct the High Court to make any order for *interim* protection, unless their Lordships were satisfied that the Court below had jurisdiction. 4 C.W.N. 34 (36) = 27 C. 1 = 26 I.A. 281. **W-1**

(d) *Quære*.—Whether the High Court has jurisdiction to make *interim* orders pending appeal by special leave? 4 C.W.N. 34 (36) = 27 C. 1 = 26 I.A. 281. **X**

(e) Where there are concurrent findings of the lower Court and of the High Court upon questions of fact and no question of law arises, a certificate granting leave to appeal to His Majesty in Council should not be granted. 5 C.W.N. 455 = 28 C. 190; 23 A. 94 (98) = 21 A.W.N. 8; **Y**

I.—“*Appeal to Queen in Council*”—(Continued).

16 C. 753=16 I. A. 125; 17 C. 246 (249); 177 P.L.R. 1905=59 P.R. 1905; 4 Bom. L.R. 249=6 C.W.N. 241=11 M.L.J. 379=25 M. 215; 29 I.A. 38 (P.C.); 19 C. 253 (270)=19 I.A. 48 (53) (P.C.); 61 P.R. 1900; 20 B. 699, 18 C. 23. **Y**

(f) Where the local Statutes contemplate that appeals to lie to the Privy Council shall be allowed by the local Court satisfying itself as to its competency, and the local Court, in its order in one case, expressly left the question of competency open, *held* that the appeal was not competent. 10 C.W.N. 7=15 M.L.J. 461 (P.C.). **Z**

(g) The Judicial Committee would not interfere with the decision of the High Court, unless they were satisfied that the refusal of the High Court to admit the appeal out of time was wrong. 30 C. 309. **A**

(16) **Privy Council, special leave to appeal to—Procedure.**

(a) In preferring an appeal to the Privy Council, in a case which is under the appealable value, a person who asks for special leave to appeal should first apply to the High Court for a certificate, that the case “is otherwise a fit one for appeal.” 6 C.W.N. 362 (365) (P.C.)=24 A. 174=29 I.A. 40. **B**

(b) Special leave to appeal will be given only in cases which involve a substantial question of law or of general interest. 6 C.W.N. 362 (364)=24 A. 174=29 I.A. 40 (P.C.). **C**

(17) **The course of any person wishing to appeal from a judgment of the Judicial Commissioner.**

(a) ———, will be to send to his agents or legal advisers in England, a copy of the judgment, and of so much of the proceedings as may suffice to render his case intelligible, and to show what his grounds of appeal are, and to instruct such agents to apply, by petition, to the Judicial Committee for leave to appeal from the judgment complained of. 8 M.I.A. 270 (273). **D**

(b) If the Judicial Committee think fit to grant such leave, it will cause notice to be given to the Court in India and to the respondents in the cause, and all proceedings in the cause must then be translated and transmitted by the Court to England, in the mode usual in ordinary appeals from the Sudder Court, unless the Privy Council make any special order as to the mode of transmission, or the documents to be sent. 8 M.I.A. 270 (273). **E**

(c) Until an order is made by the Privy Council, the Courts in India will have no jurisdiction to interfere in any way with the appeal, either in transmitting the record, staying execution, or otherwise. 8 M.I.A. 270 (273). **F**

(d) There can, however, be no objection, in cases which appear to him of sufficient magnitude to warrant an appeal, to his authenticating the copies or translations of the proceedings about to be sent home by person contemplating an appeal. 8 M.I.A. 270 (273). **G**

(18) **Contents of petition for special leave to appeal to Privy Council.**

(a) It is incumbent upon a party applying for special leave to appeal, to set out in the petition a full statement of the facts and legal grounds, to show that there is a substantial case on the merits and a point of law involved, proper to be determined by the appellate Court. 11 M.I.A. 1. **H**

**I.—“Appeal to Queen in Council”—(Continued).**

(b) In one case, a petition for special leave to appeal contained a general statement of the proceedings in India, and an averment that they were irregular and contrary to law. Such petition was ordered to be dismissed or to stand over for amendment as being too general and vague. 11 M.I.A. 1. I

(c) On the amended petition, stating in detail the facts and specifically showing legal grounds of objection to the decree and order of the Court below refusing leave to appeal, special leave to appeal was granted. 11 M.I.A. 1. J

**(19) Petition of appeal to Privy Council—Diligence in filing, necessary.**

(a) In the case of a petition of appeal to the Privy Council being filed, due diligence must be shown in transmitting the appeal to the Privy Council. 3 B.L.R. (O.C.) 126 K

(b) Otherwise, on the the application of the respondent the High Court has the power to strike the petition off the file 3 B.L.R. (O.C.) 126. L

**(20) Leave to appeal granted without authority—Objection, when to be taken.**

An objection that an appeal has come before the Judicial Committee without proper authority ought to be taken at the earliest moment. 15 B.L.R. 221. M

**(21) Objection to rescind leave to appeal**

(a) An objection to rescind leave to appeal ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason that, if the leave to appeal is on that ground rescinded, no further costs are incurred; and it is wrong to leave the objection until the hearing of the appeal when the record has been sent from India, and when all the costs attending the hearing have been incurred. 23 W.R. 113 (117)=14 B.L.R. 394 (406). N

(b) But such objection may be entertained by the Privy Council at any stage of the appeal, and is not unfrequently heard when the appeal is called on, and before the arguments on the merits have commenced. 15 B.L.R. 221 O

(c) In one case, an appeal being called on, and before the case was gone into on the merits, an objection was taken by the respondent, which appeared to be well-founded. The appellant thereupon applied to the Judicial Committee to grant him special leave to appeal, *nunc pro tunc*. Held, that it was competent to the Judicial committee to grant such special leave, but leave was refused under the particular circumstances of the case. 15 B.L.R. 221. P

**(22) Mis-statements in petition—Special leave, objection, when to be taken.**

(a) Where special leave to appeal to the Privy Council is granted upon a petition in which material mis-statements are made, objection should be taken by the respondent by a preliminary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on has been entered on. 14 B.L.R. 394. Q

(b) Where it was not clear that the material mis-statements in the petition has been made with an intention to deceive, and the objection to the appeal was only taken at a late stage of the hearing, the Judicial Committee declined to dismiss the appeal, but refused the appellant the costs of the appeal. (*Ibid.*) R

I.—“*Appeal to Queen in Council*”—(Continued).(23) **Appeal to Privy Council—Time for—Privy Council rules.**

(a) The High Court has no power to allow an appeal to Her Majesty in Council, when the petition is not presented within six calendar months from the date of the decree complained of 1 B L R (O.C.) 39. **S**

(b) When the six months expired during the Durga Puja vacation, and the petition of appeal was presented on the first day the Court resumed its sittings, *held* that the petition was too late, and leave could not be given to appeal 1 B L R (O.C.) 39. **T**

(24) **Appeal to Privy Council—Review of order of admission.**

An appeal to the Privy Council being once admitted, whether properly or erroneously, the High Court has no further jurisdiction to review its order, and declare the appeal rejected 6 W R. M. 97. **U**

(25) **Notice of transmission of record to respondent, if necessary.**

There is no rule, among those made by the High Court under the authority of law, that the respondent in an appeal to the Queen in Council shall receive formal notice of the transmission of the record of the appeal, of the pendency whereof he had notice 19 A 200, (P.C.). **Y**

(26) **Re-hearing of appeal—Practice.**

(a) It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in the Privy Council can be re-heard, and that an order once made, that is, a report submitted to His Majesty and adopted, by being made an Order in Council, is final and cannot be altered 2 M.I.A. 181 (215)=1 Moo. (P.C.), 117, 14 M. 439 (441); 19 A 200=24 I A 19 (P.C.)—(*Per Lord Brougham, J.*). **W**

(b) The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in the United Kingdom. 2 M.I.A. 181 (215)=1 Moo. (P.C.) 117—(*Per Lord Brougham, J.*). **X**

(c) Whatever, therefore, has been really determined in those Courts must stand, there being power of re-hearing for the purpose of changing the judgment pronounced 2 M.I.A. 181 (216)=1 Moo. (P.C.) 117—(*Per Lord Brougham, J.*). **Y**

(d) Nevertheless, if by misprison in embodying the judgments, errors have been introduced, these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. 2 M.I.A. 181 (216)=1 Moo. (P.C.) 117 (*Per Lord Brougham, J.*). **Z**

(e) The House of Lords have corrected mistakes introduced through inadvertence in the details of judgments or have supplied manifest defects, in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. 2 M.I.A. 181 (216)=1 Moo. (P.C.) 17—(*Per Lord Brougham, J.*). **A**

(f) But with the exception of one case in 1669 of doubtful authority, here, and another in parliament of still less weight in 1644, no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced. 2 M.I.A. 181 (216)=1 Moo. (P.C.) 117 (*Per Lord Brougham, J.*). **B**

## I.—“Appeal to Queen in Council”—(Continued).

- (g) This is a salutary maxim which ought to be observed by all Courts of last resort—*Interest reipublice ut sit finis litium*. 10 M. 73 (78) (P.C.) = 13 I.A. 155. **C**
- (h) The strict observance of the above maxim may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decision of such a tribunal as the Privy Council. 10 M. 73 (78) (P.C.) = 13 I.A. 155. **D**
- (i) As to instances of the exercise of the power of correcting errors by House of Lords, see *Hull v. Spence*, Lord's Journ., 46 Vol., 536, *Dent v. Buck*, Lord's Journ., 17 Vol., 76 *Oundle v. Barton*, Lord's Journ., 15 Vol., 170, *Calthrop v. May*, Lord's Journ., 19 Vol., 435, cited in 2 M.I.A. 181 (216, 217) = 1 Moo. (P.C.) 17. **E**

## (27) Re-hearing, when allowed.

- (a) There may be exceptional circumstances which will warrant the Judicial Committee in allowing, even after an order of Her Majesty in Council has issued upon their report, a re-hearing at the instance of one of the parties. 10 M. 73 (78) (P.C.) = 13 I.A. 155. **F**
- (b) But this is an indulgence with a view mainly to doing justice when, by some accident, without any blame, the party has not been heard, and an order has been made, inadvertently, as if he had been heard. 10 M. 73 (78) (P.C.) = 13 I.A. 155. see also, 2 M.I.A. 181 = 1 Moo. (P.C.) 117; 2 M.I.A. 181 (220) = 1 Moo. (P.C.) 117. **G**
- (c) Even before report, whilst the decision of the Board is not yet *res judicata* great caution has been observed in permitting the re-hearing of appeals. 10 M. 73 (78) (P.C.) = 13 I.A. 155. **H**

## (28) Restoring to file appeals dismissed for want of prosecution.

- (a) Where an appeal was dismissed for want of prosecution, if the delay be explained, and the cause of it is sufficient, the appeal would be restored to the file. 21 B. 723 (724) = 24 I.A. 128 (P.C.). **I**
- (b) But such a restoration can only be allowed on conditions as to costs, and on security to be given in England. 21 B. 723 (724) (P.C.) = 24 I.A. 128. **J**

## (29) Discovery of new evidence.

The judgment of the Judicial Committee reported to and confirmed by Her Majesty in Council cannot be re-opened only for the reason that new evidence is forthcoming. 14 M. 439, (441). **K**

## (30) Want of express notice.

- (a) The mere allegation that the respondent to the appeal had, in consequence of their having had no express notice that the appeal had been set down for hearing, allowed the hearing of the appeal to take place *ex parte* is not sufficient to entitle them to a re-hearing thereof. 19 A. 209 (211) = 24 I.A. 49 (P.C.). **L**
- (b) There were four respondents in an appeal to the Privy Council. At the hearing, the appeal was allowed *ex parte* against all the respondents. One respondent afterwards petitioned for a re-hearing, on the ground that neither he nor his agents had notice that the appeal had been

I. —“*Appeal to Queen in Council*”—(Continued).

entered, or fixed for hearing, until after it had been decided. On enquiry it appeared that the petitioner had inaccurately described the suit to his agents as an appeal against himself only, without mentioning the names of the other respondents, and the agents, on being told at the Privy Council Office that no appeal so entitled was pending, had taken no further steps. Held that there had been omission and neglect on the petitioner's part, and on the part of his agents, such as to prevent the Judicial Committee from recommending a re-hearing of the case. 2 B.L.R. (P.C.) 60=12 I.A. 257. **M**

(31) “*Ex parte*” petition—Re-hearing—Practice.

Where a petition is *ex parte*, it is a universal and a most important rule of the Privy Council, that every fact which is material to the determination of the question raised upon the petition should be truly and fairly stated. 8 M I.A. 193 (195). **N**

## (32) Mere question of practice—Order for inspection of documents

No appeal will be allowed to Privy Council upon a mere question of practice (as) an order for the inspection of documents. 9 B II.C. 398 (401). **O**

## (33) Technical objection not taken in Court below.

Their Lordships will not entertain a purely technical objection to a party's right of action which was not taken in the Court below. *Per Lord Brougham, J*, in 5 M I.A. 26, 3 M I.A. 229, see, also, 1 I.A. 413, that they will not entertain any grounds of appeal not so taken. **P**

## (34) Wrong admission of evidence.

(a) Where some evidence has been wrongly admitted, their Lordships, who are Judges of the fact, will consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees. 4 B.L.R. 499; 9 B.L.R. 371. **Q**

(b) The Privy Council will not interfere merely on the ground that the High Court had admitted documents tendered by the appellant which the first Court had rejected. 24 C 1 (P.C.)=23 I.A. 97. **R**

## (35) New point, not be taken for first time before Council.

(a) An objection on a new point cannot be allowed to be taken for the first time before the Privy Council. 22 M. 515 (518) (P.C.)=26 I.A. 55; see, also, 25 C. 187, 1 C.W.N. 649. **S**

(b) Point not raised in the plaint before District Judge nor in the High Court cannot be raised before the Judicial Committee. 1 C.W.N. 649=25 C. 187=24 I.A. 191 (P.C.). **T**

(c) A point not having been raised by the issues in the suit, the Privy Council refused to decide the question. 10 B.L.R. 1=14 M I.A. 176. **U**

(d) A person alleging one title in the Lower Court cannot set up a totally new case on appeal. I.A. Sup. Vol 131 (146). **V**

(e) An appellate Court cannot declare a right in favour of one of the parties where no issue has been fixed on the point, and the right has not been set up in the lower Court. 12 C 239=12 I.A. 166. **W**



I.—“*Appeal to Queen in Council*”—(Concluded).(36) **Discretion of lower Court not interfered with by the Judicial Committee.**

The Judicial Committee is always reluctant to interfere with a matter of discretion exercised by the Courts in India, unless it can be shown that the Court has acted upon an erroneous principle. 12 W.R. 27 (P.C.) = 8 B L R. 8 (P.C.) = 13 M.I.A. 15. X

(37) **Costs**

No appeal against a decree merely as to costs would be allowed. 1 M I A, 479 Y

(38) **Right to apply to Privy Council, if confined only to king's subject.**

If a Court administering Justice on the King's behalf makes an order, judicial in its nature, by which some one is unjustly and injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. 3 C L J. 395 = 8 Bom. L.R. 129 = 10 C.W.N. 361 = 3 A L J. 250 = 33 C. 219 Z

(39) **Dismissal of appeal for want of prosecution by Privy Council**

(a) The Privy Council dismissed an appeal for want of prosecution, upon a certificate of the Registrar of the Supreme Court that no further proceedings had been taken for a long time after the order allowing the appeal. See 6 M I A 346 A

(b) For a case of dismissal of appeal to Privy Council for default in deposit of security and in transcribing record, see 1 C 142 B

XIII.—*Re-marriage.*

**57.** When six months after the date of an order of a High Court confirming the decree for a dissolution of marriage made by a District Judge have expired,

or when six months after the date of any decree of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction,

or when any such appeal has been dismissed,

or when in the result of any such appeal any marriage is declared to be dissolved,

but not sooner, it shall be lawful for the respective parties to the marriage to marry again, as if the prior marriage had been dissolved by death :

Provided that no appeal to Her Majesty in Council has been presented against any such order or decree .

When such appeal has been dismissed, or when in the result thereof the marriage is declared to be dissolved, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death

Liberty to parties to marry again.

## (Notes).

## General.

## (1) Corresponding English Law.

The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), S. 37, provides that—

“When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death. Provided always, that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person.” **C**

## (2) Marriage before expiration of the period prescribed by this section.

(a) A— is void. See *Cluchester v. Mure f.c. cluchester*, 32 L.J., P. & M. 146 **C-1**

(b) A person, who has obtained a decree for dissolution of marriage, cannot lawfully contract a second marriage in the lifetime of his divorced wife within six months of the decree becoming absolute. “The decree of the High Court” referred to in S. 57 of the Indian Divorce Act, means decree absolute, and not the decree nisi. 9 A.L.J. 108. **D**

## (3) Re-marriage between divorced parties.

(a) ——— is valid. See *Fendall, otherwise Goldsmid v. Goldsmid*, 2 P. D. 263, 46 L. J., P. & M. 70 **E**

(b) But it seems that children born of such re-marriage would not get the benefit of settlements made on the former marriage on the children of the parties. See *Bond v. Taylor*, 31 L. J., P. & M. 784, see, also, *Rattigan Divorce*, 1897, P. 306. **F**

**58** No clergyman in Holy Orders of the<sup>1</sup> \* \* \* Church of England<sup>2</sup> \* \* \* shall be compelled to solemnize the

English clergyman not compelled to solemnize marriages of persons divorced for adultery.

marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty or censure of solemnizing or refusing to solemnize

the marriage of any such person.

## (Notes)

## General.

## (1) Corresponding English Law.

The corresponding portion of the English statute Law runs as follows —

“When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the

**General—(Concluded).**

respective parties thereto to marry again, as if the prior marriage had been dissolved by death. Provided always, that no clergyman in holy orders of the United Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person." See S. 57 of 20 & 21 Vict. c. 85 Matrimonial Causes Act, 1857. **G**

**{2} Scope of section.**

Under this section a clergyman cannot be compelled to solemnize the marriage only of that party whose former marriage has been dissolved on the ground of such party's adultery.

It seems the clergyman is however bound to solemnize the second marriage of an innocent party. See Rattigan on Divorce, 1897, pp. 306, 307. **H**

**1.—"Holy orders of the, etc."**

**N. B.**—The word "United" in this section was repealed by the Repealing Act XII of 1873. **I**

**2—"Church of England, etc."**

**N. B.**—The words "and Ireland" in this section were repealed by the Repealing Act XII of 1873.

**. 59. When any Minister of any Church or Chapel of the said (1)**

English Minister  
refusing to perform  
ceremony to permit  
use of his church.

\* \* \* \* Church refuses to perform such marriage service between any persons who, but for such refusal would be entitled to have the same service performed in such Church or Chapel,

such Minister shall permit any other Minister in Holy Orders of the said Church entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel.

**(Notes).****General.****Corresponding English Law.**

The corresponding portion of the English Statute Law is as follows.—

"Provided always, that when any minister of any church or chapel of the United Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said united church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel." See Matrimonial Causes Act, 1857 (20 & 21 Vic. C. 85) S. 58. **J**

**1—"The said....church."**

**N. B.**—The word "United" was repealed by Act XII of 1873.

Decree for separation or protection-order valid as to persons dealing with wife before reversal.

60. Every decree for judicial separation or order to protect property obtained by a wife under this Act shall, until reversed or discharged, be deemed valid, so far as necessary, for the protection of any person dealing with the wife.

No reversal, discharge or variation of such decree or order shall affect any rights or remedies which any person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of such decree or order and of the reversal, discharge or variation thereof

All persons who in reliance on any such decree or order make any payment to, or permit any transfer or act to be made or done by, the wife who has obtained the same shall, notwithstanding such decree or order may then have been reversed, discharged or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order been discontinued, be protected and indemnified as if, at the time of such payment, transfer or other act, such decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued,

unless, at the time of the payment, transfer or other act, such persons had notice of the reversal, discharge or variation of the decree or order or of the cessation or discontinuance of the separation.

(Notes).

General.

#### Corresponding English Law.

(a) S. 8 of the Matrimonial Causes Act, 1858 (21 & 22 Vict., c. 108), provides as follows —

"In every case in which a wife shall, under this Act, or under the said Act of the 20th and 21st Vict., c. 85, have obtained an order to protect her earnings or property, or a decree for judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual, and no discharge, variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied or discharged in respect of any debt, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation or reversal thereof, and property of or to which the wife is possessed or entitled for an estate in remainder or in reversion at the date of the desertion or decree (as the case may be) shall be deemed to be included in the protection given by the order or decree." **K**

**General—(Concluded).**

(b) S. 10 of the same Act provides as follows.—

"All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to or permit any transfer or act to be made or done by the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed or varied or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer or other act, such order or decree were valid and still subsisting without variation in full force and effect, and the separation of the wife from her husband had not ceased or been discontinued, unless at the time of such payment, transfer or other act such persons or corporations had notice of the discharge, reversal or variation of such order or decree, or the cessation or discontinuance of such separation." **L**

**61.** After this Act comes into operation, no person competent to present a petition under sections 2 and 10 shall maintain a suit for criminal conversation with his wife.

Bar of suit for criminal conversation.

**(Notes).****General.****Corresponding English Law.**

The Matrimonial Causes Act, 1857 (20 & 21 Vict., c. 85), S. 59, provides that—

"After this Act shall have come into operation, no action shall be maintainable in England for criminal conversation."

**62.** The High Court shall make such rules under this Act as it may from time to time consider expedient, and may from time to time alter and add to the same:

Power to make rules<sup>1</sup>.

Provided that such rules, alterations and additions are consistent with the provisions of this Act and the Code of Civil Procedure.

All such rules, alterations and additions shall be published in the local official Gazette.

**(Notes).****General.****(1) Corresponding English Law.**

(a) S. 53 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), provides that—

"The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same."

**M**

**General—(Concluded).**

(b) S 54 of the said Act provides that.—

“The Court shall have full power to fix and regulate from time to time the fees payable upon all proceedings before it, all which fees shall be received, paid, and applied as herein directed, provided always that the said Court may make such rules and regulations as it may deem necessary and expedient for enabling persons to sue in the said Court *in forma pauperis*.” **N**

**1.—“Power to make rules.”****Rules for confirmation of decrees for dissolution of marriage**

The following Rule, made by the Honorable the Chief Justice and Judges of Her Majesty's High Court of Judicature at Bombay under S 17 of Act IV of 1869 is published under S. 62 of the Act —

“Cases for confirmation of a decree for dissolution of marriage, received from a District Judge under S. 17 of Act IV of 1869, shall not be heard till after the expiration of six months from the pronouncing of such decree.” See Bombay Government Gazette dated 23rd November, 1870, Pt. I, p. 1278. **O**

**SCHEDULE OF FORMS.**

**No. 1.—PETITION by husband for a dissolution of marriage with damages against co-respondent, by reason of adultery.**

(See sections 10 and 34)

In the (High) Court of

To the Hon'ble Mr. Justice

[or To the Judge of

]

The day of 186

The petition of A. B. of

**SHEWETH,**

1. That your petitioner was on the day of , one thousand eight hundred and , lawfully married to C.B., then C.D., spinster at . (a)

2. That from his said marriage, your petitioner lived and cohabited with his said wife at and at , in , and lastly at in , and that your petitioner and his said wife have had issue of their said marriage, five children, of whom two sons only survive, aged respectively twelve and fourteen years.

3. That during the three years immediately preceding the day of one thousand eight hundred and , X.Y. was constantly, with few exceptions residing in the house of your petitioner at aforesaid, and that on divers occasions during the said period, the dates of which are unknown to your petitioner, the said C. B. in your petitioner's said house committed adultery with the said X Y

Note —(a) If the marriage was solemnized out of India the adultery must be shown to have been committed in India.

4. That no collusion or connivance exists between me and my said wife for the purpose of obtaining a dissolution of our said marriage or for any other purpose.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a dissolution of the said marriage, and that the said X.Y do pay the sum of rupees 5,000 as damages by reason of his having committed adultery with your petitioner's said wife, such damages to be paid to your petitioner, or otherwise paid or applied as to this (Hon'ble) Court seems fit

(Signed) A. B. (a)

#### *Form of Verification*

1. A B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

—

No 2.—*Respondent's statement in answer to No 1.*

In the Court of                      the                      day of

Between A B., petitioner,

C. B., respondent, and

X. Y., co-respondent

C.B., the respondent, by D E, her attorney [or wakil in answer to the petition of A B says that she denies that she has on divers or any occasions committed adultery with X.Y., as alleged in the third paragraph of the said petition.

Wherefore the respondent prays that this (Hon ble) Court will reject the said petition

(Signed) C. B.

No. 3.—*Co-respondent's statement in answer to No. 1.*

In the (High) Court of

The                      day of

Between A B., petitioner,

C.B., respondent, and

X Y, co-respondent.

(a) The petition must be signed by the petitioner.

X.Y., the co-respondent, in answer to the petition filed in this cause, saith that he denies that he committed adultery with the said C.B. as alleged in the said petition.

Wherefore the said X.Y. prays that this (Hon'ble) Court will reject the prayer of the said petitioner and order him to pay the costs of and incident to the said petition

(Signed) X. Y.

No. 4.—PETITION for Decree of Nullity of Marriage.

(See section 18)

In the (High) Court of

To the Hon'ble Mr. Justice [or To the Judge of ]

The day of , 186 .

The petition of A. B. falsely called A. D.,

SHEWETH,

1. That on the day of , one thousand eight hundred and , your petitioner, then a spinster, eighteen years of age, was married in fact, though not in law, to C.D., then a bachelor of about thirty years of age, at [some place in India].

2. That from the said day of , one thousand eight hundred and , until the month of , one thousand eight hundred and , your petitioner lived and cohabited with the said C.D., at divers places, and particularly at aforesaid.

3. That the said C.D. has never consummated the said pretended marriage by carnal copulation

4. That at the time of the celebration of your petitioner's said pretended marriage, the said C.D. was, by reason of his impotency or malformation, legally incompetent to enter into the contract of marriage.

5. That there is no collusion or connivance between her and the said C.D. with respect to the subject of this suit

Your petitioner therefore prays that this (Hon'ble) Court will declare that the said marriage is null and void.

(Signed) A.B.

*Form of Verification See No. 1.*



No. 5.—PETITION *by wife for judicial separation on the ground of her husband's adultery.*

(See section 22.)

In the (High) Court of

To the Hon'ble Mr. Justice

[or To the Judge of ]

The day of 186 .

The petition of C. B., of , the wife of A. B.

SHEWETH,

1. That on the day of , one thousand eight hundred and *sixty* your petitioner, then C. D., was lawfully married to A. B. at the Church of , in the .

2. That after her said marriage, your petitioner cohabited with the said A. B. at and at , and that your petitioner and her said husband have issue living of their said marriage, *three* children, to wit, etc., etc. (a).

3. That on divers occasions in or about the months of *August*, *September* and *October*, one thousand eight hundred and *sixty* , the said A. B., at aforesaid, committed adultery with E. F., who was then living in the service of the said A. B. and your petitioner at their said residence aforesaid

4. That on divers occasions in the months of *October*, *November* and *December*, one thousand eight hundred and *sixty* , the said A. B., at aforesaid, committed adultery with G. H., who was then living in the service of the said A. B. and your petitioner at their said residence aforesaid.

5. That no collusion or connivance exists between your petitioner and the said A. B. with respect to the subject of the present suit.

Your petitioner therefore prays that this (Hon'ble) Court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

(Signed)

C. B. (b)

*Form of Verification: See No. 1.*

No. 6.—Statement in answer to No. 5.

In the (High) Court of

Note.—(a) State the respective ages of the children.

(b) The petition must be signed by the petitioner.

*B. against B.*

The                      day of

The respondent, *A. B.*, by *W. Y.*, his attorney [*or vakil*], saith,—

1. That he denies that he committed adultery with *E. F.*, as in the third paragraph of the petition alleged.

2. That the petitioner condoned the said adultery with *E. F.*, if any.

3. That he denies that he committed adultery with *G. H.*, as in the fourth paragraph of the petition alleged.

4. That the petitioner condoned the said adultery with *G. H.*, if any.

Wherefore this respondent prays that this  
(Hon'ble) Court will reject the prayer of the  
said petition.

(Signed) *A. B.*

*No. 7.—Statement in reply to No 6.*

In the (High) Court of

*B. against B.*

The                      day of

The petitioner, *C. B.*, by her attorney [*or vakil*], says—

1. That she denies that she condoned the said adultery of the respondent with *E. F.* as in the second paragraph of the statement in answer alleged.

2. That even if she had condoned the said adultery, the same has been revived by the subsequent adultery of the respondent with *G. H.* as set forth in the                      paragraph of the petition.

(Signed) *C. B.*

*No. 8.—PETITION for a judicial separation by reason of cruelty.*

[*See section 22* ]

In the (High) Court of

To the Hon'ble Mr. Justice                      [*or To the Judge of*                      ]

The                      day of                      186                      .

The petition of *A. B.* (wife of *C. B.*) of

·SHEWETH,

1. That on the                    day of                    , one thousand eight hundred and                    , your petitioner, then *A. D.*, spinster, was lawfully married to *C. B.* at

2. That from her said marriage, your petitioner lived and cohabited with her said husband at                    until the                    day of                    , one thousand eight hundred and                    , when your petitioner separated from her said husband as hereinafter more particularly mentioned, and that your petitioner and her said husband have had no issue of their said marriage.

3. That from and shortly after your petitioner's said marriage, the said *C. B.* habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her in the coarsest and most insulting language, and beating her with his fists, with a cane, or with some other weapon.

4. That on an evening in or about the month of                    one thousand eight hundred and                    , the said *C. B.* in the high way and opposite to the house in which your petitioner and the said *C. B.* were then residing at                    aforesaid, endeavoured to knock your petitioner down, and was only prevented from so doing by the interference of *F. D.*, your petitioner's brother.

5. That subsequently on the same evening, the said *C. B.*, in his said house at                    aforesaid, struck your petitioner with his clenched fist a violent blow on her face.

6. That on one Friday night in the month of                    , one thousand eight hundred and                    , the said *C. B.*, in                    , without provocation, threw a knife at your petitioner, thereby inflicting a severe wound on her right hand.

7. That on the afternoon of the                    day of                    , one thousand eight hundred and                    , your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, with assistance withdrew from the house of her said husband to the house of her father at                    , that from and after the said                    day of                    , one thousand eight hundred and                    , your petitioner hath lived separate and apart from her said husband, and hath never returned to his house or to cohabitation with him.

8. That there is no collusion or connivance between your petitioner and her said husband with respect to the subject of the present suit.

Your petitioner, therefore, prays that this (Hon'ble) Court will decree a judicial separation between your petitioner and the said *C B.*, and also order that the said *C. B.*, do pay the costs of and incident to these proceedings

(Signed) *A. B.*

*Form of Verification See No 1.*

No. 9.—*Statement in answer to No 8*

In the (High) Court of

The                      day of  
Between *A B*, petitioner, and  
*C. B.*, respondent.

*C B.*, the respondent, in answer to the petition filed in this cause by *W J*, this attorney [*or vakil*], saith that he denies that he has been guilty of cruelty towards the said *A.B.*, as alleged in the said petition.

(Signed) *C.B.*

No. 10—PETITION *for reversal of decree of separation.*

(*See section 24.*)

In the (High) Court of

To the Hon'ble Mr. Justice                      [*or To the Judge of* ]

The                      day of                      186                      .

The petition of *A. B*, of

SHEWETH,

1. That your petitioner was on the                      day of                      , lawfully married to

2. That on the                      day of                      , this (Hon'ble) Court at the petition of                      , pronounced a decree affecting the petitioner to the effect following, to wit,—

[*Here set out the decree.*]

3. That such decree was obtained in the absence of your petitioner, who was then residing at

[*State facts tending to show that the petitioner did not know of the proceedings : and, further, that had he known he might have offered a sufficient defence,*]

or

That there was reasonable ground for your petitioner leaving his said wife for that his said wife

[*Here state any legal grounds justifying the petitioner's separation from his wife*]

Your petitioner, therefore, prays that this (Hon'ble) Court will reverse the said decree.

(Signed) *A. B.*

*Form of Verification See No 1.*

No. 11.—PETITION for Protection-order.

(*See section 27.*)

In the (High) Court of

To the Hon'ble Mr Justice [or To the Judge of ]

The day of 186

The petition of *C.B.*, of ,

The wife of *A. B.*

SHEWETH,

That on the day of she was lawfully married to *A. B.* at

That she lived and cohabited with the said *A. B.* for years at , and also at , and had had children, issue of her said marriage, of whom are now living with the applicant, and wholly dependent upon her earnings

That on or about , the said *A. B.*, without any reasonable cause, deserted the applicant, and hath ever since remained separate and apart from her

That since the desertion of her said husband, the applicant hath maintained herself by her own industry [or on her own property, *as the case may be*] and hath thereby and otherwise acquired certain property consisting of [*here state generally the nature of the property.*]

Wherefore she prays an order for the protection of her earnings and property acquired since the said day of , from the said *A. B.*, and from all creditors and persons claiming under him.

(Signed) *C.B.*

No. 12.—PETITION *for alimony pending the suit.*

(See section 36.)

In the (High) Court of

B against B

To the Hon'ble Mr. Justice [or To the Judge of ]

The day of 186 .

The petition of C B, the lawful wife of A. B.,

SHEWETH,

1. That the said A. B. has for some years carried on the business of , at , and from such business derives the nett annual income of from Rs. 1,000 to 5,000

2. That the said A. B. is possessed of plate, furniture, linen and other effects at his said house aforesaid, all of which he acquired in right of your petitioner as his wife, or purchased with money he acquired through her, of the value of Rs. 10,000.

3. That the said A. B. is entitled, under the will of his father, subject to the life interest of his mother therein, to property of the value of Rs. 5,000 or some other considerable amount (a)

Your petitioner, therefore, prays that this (Hon'ble) Court will decree such sum or sums of money by way of alimony, pending the suit, as to this (Hon'ble) Court may seem meet

(Signed) C. B.

*Form of Verification. See No. 1.*

## No. 13.—Statement in answer to No. 12.

In the (High) Court of

B. against B.

A. B., of , the above-named respondent, in answer to the petition for alimony, pending the suit of C B, says—

1. In answer to the first paragraph of the said petition, I say that I have for the last *three* years carried on the business of , at , and that, from such business, I have derived a nett annual income of Rs. 900, but less than Rs. 1,000.

2. In answer to the second paragraph of the said petition, I say that I am possessed of plate, furniture, linen and other chattels

**Note.**—(a) The petitioner should state her husband's income as accurately as possible.

and effects at my said house aforesaid, of the value of Rs. 7,000, but as I verily believe of no larger value. And I say that a portion of the said plate, furniture and other chattels and effects of the value of Rs. 1,500, belonged to my said wife before our marriage, but the remaining portions thereof I have since purchased with my own monies. And I say that, save as hereinbefore set forth, I am not possessed of the plate and other effects as alleged in the said paragraph in the said petition, and that I did not acquire the same as in the said petition also mentioned.

3. I admit that I am entitled under the will of my father, subject to the life-interest of my mother therein, to property of the value of Rs. 5,000, that is to say, I shall be entitled under my said father's will, upon the death of my mother, to a legacy of Rs. 7,000, out of which I shall have to pay to my father's executors the sum of Rs. 2,000, the amount of a debt owing by me to his estate, and upon which debt I am now paying interest at the rate of five per cent. per annum.

4. And, in further answer to the said petition, I say that I have no income whatever except that derived from my aforesaid business, that such income, since my said wife left me, which she did on the day of last, has been considerably diminished, and that such diminution is likely to continue. And I say that out of my said income, I have to pay the annual sum of Rs. 100 for such interest as aforesaid to my late father's executors, and also to support myself and my two eldest children.

5. And, in further answer to the said petition, I say that, when my wife left my dwelling-house on the                      day of                      last, she took with her, and has ever since withheld and still withholds from me, plate, watches and other effects in the second paragraph of this my answer mentioned, of the value, of as I verily believe, Rs. 800 at the least ; and I also say that, within five days of her departure from my house as aforesaid, my said wife received bills. due to me from certain lodgers of mines, amounting in the aggregate to Rs.                      , and that she has ever since withheld and still withholds from me the same sum.

(Signed) **A.B.**

No. 14.—**UNDERTAKING** *by minor's next friend to be answerable for respondent's costs.*

(See section 49.)

In the (High) Court of

I, the undersigned, A. B., of \_\_\_\_\_, being the next friend of C. D., who is a minor, and who is desirous of filing a petition in this Court, under the Indian Divorce Act, against D. D. of \_\_\_\_\_, hereby under-take to be responsible for the costs of the said D. D. in such suit, and that, if the said C.D. fail to pay to the said D. D. when and in such manner as the Court shall order all such costs of such suit as the Court shall direct him [or her] to pay to the said D.D., I will forthwith pay the same to the proper officer of this Court.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 186 \_\_\_\_.

(Signed) A. B.





# THE DOWER ACT, 1839<sup>1</sup>.

(ACT XXIX OF 1839.)

[Passed on the 16th December, 1839.]

*An Act for the Amendment of the Law relating to Dower.*

1. WHEREAS it is expedient to extend the amendments in 2 and 4 Will.  
the English law of dower contained in the Statute 4, C. 105.

Preamble.

3rd and 4th William IV, Chapter CV, to the  
territories of the East India Company in cases which, but for the  
passing of this Act, would be governed by the English law of dower  
as it existed previously to the passing of the aforesaid Statute;

It is hereby enacted that the words and expressions hereinafter

Interpretation

mentioned, which in their ordinary signification  
have a more confined or a different meaning,  
shall in this Act, except where the nature of the provision or the  
context of the Act shall exclude such construction, be interpreted  
as follows, that is to say, the word "land" shall extend to messu-  
ages, and all other hereditaments, whether corporeal or incorporeal  
(except such as are not liable to dower), and to any share thereof;  
and every word importing the singular number only shall extend and  
be applied to several persons or things as well as one person or thing.

(Notes).

## 1.—"The Dower Act, 1839."

**N.B. 1.**—The whole Act, except as to marriages contracted before 1st January,  
1866, was repealed by Act VIII of 1868

**N.B. 2.**—As to dower when marriage was contracted before 1st January, 1866,  
the Act has been declared, by the Laws Local Extent Act XV of 1874,  
S. 3, to be in force in the whole of British India, except as regards  
the Scheduled Districts

### (1) Act declared in force in the following Districts.

This Act has been declared, by notification under S. 3 (a) of Act XIV of 1874  
to be in force in.—

(a) West Jalpaiguri

.. See Gazette of India, 1881, Pt. I, p. 74.

(b) The Districts of Hazaribagh, Lohar-  
daga (now the Ranchi District, see Calcutta  
Gazette, 1899, Pt. I, p. 44), and Manbhum,  
and Pargana Dhalbhum, and the Kolhan  
in the District of Singhbhum

...

Do.

1881, Pt. I, p. 504.

## I.—“The Dower Act, 1839”—(Concluded).

- (c) The Scheduled portion of the Mirzapur District ... See Gazette of India, 1879, Pt. I, p. 383.
- (d) Jaunsar Bawar ... Do. 1879, Pt. I, p. 382.
- (e) The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan. (Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province, see Gazette of India, 1901, Pt. I, p. 857, and *Ibid*, 1902, Pt. I, p. 575, but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900, S. 3). Punjab and N.W. Code ... Do. 1886, Pt. I, 48
- (f) The District of Sylhet ... Do. 1879, Pt. I, 631
- (g) The rest of Assam (except the North Lushai Hills) ... Do. 1897, Pt. I, p. 299.
- (h) The Scheduled Districts in Ganjam and Vizagpatam, see Fort. St. George Gazette, 1898, Pt. I, p. 666 ... Do. 1898, Pt. I, p. 870.
- (i) It has been extended, by notification under S. 5 of the last mentioned Act, to the Scheduled Districts of Kumaon and Garwal ... Do. 1876, Pt. I, p. 606.
- (j) It has been declared, by notification under S. 8 (b) of the same Act, not to be in force in the Scheduled District of Lahaul. ... Do. 1886, Pt. I, p. 301. A

## (2) Act based on English Statute,

This Act corresponds in most of its provisions with the Dower Amendment Act in England (3 and 4 Wm. IV C. 105). See 6 C. 794 (803) = 8 C. L. R. 76. B

## (3) Applicability of the Act to Armenians English Law of dower if introduced in this country.

(a) The Armenians of Calcutta were, in and prior to 1815, in the habit of treating their landed interests within the tow as realty and governed by the law of England. See *Emin v. Emin* Morton's Morticou p. 244. C

(b) The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband had held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life. 6 C. 794 = 8 C. L. R. 76. D

(c) The English law of dower has been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance. 6 C. 794 = 8 C. L. R. 76. E

(d) Per Garth, C. J — Estates which have been held by British subjects under the name of freehold estates of inheritance, are, in all essential respects, the same estates which have been held in England under the same name. 6 C. 794 = 8 C. L. R. 76. F

## I.—“The Dower Act, 1839”—(Continued).

- (e) The case of *The Mayor of Lyons v. The East India Co.*, 1 M. I. A. 175, does not mean to decide that the Courts of this country are justified in adopting just so much of the English law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. 6 C. 794=8 C. L. R. 76. **G**
- (f) It only points out that there are certain portions of the English Statute law which from their very nature were only passed for reasons connected with England, and which would not be applicable in India or any Colony of the British Crown.—e.g., the Mortmain Acts, the law of Aliens, and the like. 6 C. 794 (795)=8 C. L. R. 76. **H**
- (g) The provisions of S. 1 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed. 6 C. 794 (795)=8 C. L. R. 76. **I**
- (h) *Per Pontifex, J.*—The true construction of S. 17 of 21 Geo. III, C. 70, must confine the words “their inheritance and succession” to questions relating to inheritance and succession by the defendants. 6 C. 794 (795)=8 C. L. R. 76. **J**
- (i) A deed of conveyance of land in Calcutta recited that the vendor was “seised of, or otherwise well entitled” to, the property intended to be sold “for an estate of inheritance in fee-simple,” and it purported to convey such an estate. In a suit for dower by the vendor’s widow against the heirs of the purchaser, *Held* that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him, that the estate conveyed was what it purported to be it being an admission by conduct of parties which amounted to evidence against them. 6 C. 794 (795)=8 C. L. R. 76. **K**
- (j) Armenians have no law of their own and are governed by the English law, and an Armenian widow has been held to be entitled to dower—*Emin v. Emin*, 1 Morlev. 300, Morton by Montagu, 242. See, also, 6 C. 794 (795)=8 C. L. R. 76. **L**
- (k) Lands held by Armenian subjects in Calcutta are subject generally to the English law of inheritance. 6 C. 794 (801)=8 C. L. R. 76. **M**
- (4) **English Law of dower recognized in this country from very early times.**
- (a) So long ago as the year 1815, we have the direct authority of the Supreme Court for deciding—1st, that the English law of dower was at that time recognized, and enforced here as it was in England, and 2ndly, that Armenian subjects of the British Crown resident in Calcutta were amenable to that law. *Per Guth, C. J.* in 6 C. 794 (803)=8 C. L. R. 76. **N**
- (b) “In that case a bill was filed by the widow of an Armenian against the heir-at-law (being the eldest of two sons of her deceased husband), praying to have her dower assigned. Her husband was also an Armenian and the lands out of which the dower was claimed, and of which the husband was alleged to have been seised for an estate of

1.—“ *The Dower Act, 1839* ”—(Continued).

*inheritance in fee-simple*, were, for the most part within the town of Calcutta, though a small portion of them were situate in a neighbouring mouza.

A decree was made in favour of the plaintiff that the dower should be assigned by a commissioner in the usual way, and a final decree was subsequently made confirming the commissioner's report, by a Court.

From that time to the present as far as we know, the correctness of this decision has never been questioned, and we have the further evidence that the law of dower was fully recognized, from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time for the express purpose of barring dower " *Per Garth, C. J.* in 6 C 794 (803)=8 C L.R. 76. O

## (5) Law of dower part of the law of inheritance

(a) The law of dower has always been recognized as a part of the law of inheritance in this country 6 C 794 (801)=8 C.L.R. 76. P

(b) The law of the dower has been recognized in this country, amongst Europeans and Armenians, as a branch of the law of inheritance. 6 C 794 (802)=8 C L R 76 Q

## (6) Estates in this country held by British subjects under the name of free-hold estates of inheritance, nature and incidents of.

(a) Estates which have been held by British subjects in this country under the name of freehold estates of inheritance are in all essential respects the same estates which have been held in England under the same name. 6 C. 794 (802)=8 C.L.R. 76. R

(b) "For a long series of years estates of inheritance have been enjoyed and dealt with by British subjects here in the same way as they have been in England. They have been bought and sold as such. They have been transferred from hand to hand by modes of conveyance which are only applicable to English tenures, and meaningless as applied to any other tenures. They have been considered and treated as such by the Supreme Court since its first establishment, and they have been made the subject of real actions, which we all know constituted a machinery quite inappropriate to any other than English tenures. And lastly, they have over and over again been recognized and dealt with as such by the Indian Legislature

In fact, if Mr. Phillip's argument is well founded, it seems to me, that not only proprietors of land themselves, but also the legal profession, and the Courts of law, and the Legislature, have all for years past been labouring under a very serious mistake " *Per Garth, C.J.*, in 6 C. 794 (802)=8 C.L.R. 76. S

## ENGLISH LAW

## (1) Dower Act XXIX of 1839—Dower, what is.

(a) "After the husband's death a widow becomes, in some cases, entitled to a life interest in part of her late husband's land. This interest is termed the dower of the wife " Williams Law of Real Property 20th Ed., 1906, p. 814. T

## I.—“The Dower Act, 1839”—(Continued).

## ENGLISH LAW—(Continued).

- (b) “Dower is a right conferred upon the widow by the common law, modified in the case of women married after January 1st, 1834, by the Dower Act, 1833, to the enjoyment for her life of a portion of the real estate of which her husband was solely seised for an estate of inheritance in possession.” Co Litt 30 (b), 3 & 4 Will IV, c 105. See Carson, R.P. Stat 362 U

## (2) Early history of the Law of Dower.

“The history of the law of dower deserve a short notice. It seems to be in outline as follows. Tacitus noticed the contrast of Teutonic custom and Roman law, in that it was not the wife who conferred a dowry on the husband, but the husband on the wife. By early Teutonic custom, besides the bride-price, or price paid by the intending husband to the family of the bride, it seems to have been usual for the husband to make gifts of land or chattels to the bride herself. These appear to have taken two forms. In some cases the husband or his father executed before marriage an instrument called ‘*libellum dotis*,’ specifying the nature and extent of the property to be given to the wife. Many forms of this instrument are preserved. The gift is sometimes made to the wife upon condition that if there is no issue of the marriage the property is to return to the heirs of the husband, sometimes the full property is vested in the wife. Another and apparently among the Anglo-Saxons a commoner form of dower is the ‘*morning gift*.’ This was the gift which on the morning following the wedding the husband gave to the wife, and might consist either of land or chattels. It seems probable that in early times, if there was nothing in the form of gift to the contrary, the wife might, notwithstanding the marriage, alienate the property so given to her. This power of disposing of the dower, if it existed, had ceased in Glanvill’s time. By the law as stated by Glanvill the man was bound to endow the woman *tempore desponsationis ad ostium ecclesiae*. The dower might be specified or not. If not specified, it was the third part of the freehold which the husband possessed at the time of betrothal. If more than a third part was named, the dower was after the husband’s death cut down to a third. A gift of less would however be a satisfaction of dower. It was sometimes permitted to increase the dower when the freehold available at the time of betrothal was small, by giving the wife a third part or less of subsequent acquisitions. This however must have been expressly granted at the time of betrothal. A woman could never claim more than had been granted *ad ostium ecclesiae*. Dower too might be granted to a woman out of chattels personal, and in this case she would be entitled to a third part. In process of time however this species of dower ceased to be regarded as legal, and was expressly denied to be law in the time of Henry IV. A trace of it still remains in the expression in the marriage service, ‘With all my wordly goods I thee endow.’ See Digby’s History of the Law of Real Property, 5th Ed., pp 127-129. V

(3) Dower in England previously to the passing of the Dower Act, 3 & 4, Will. IV, C. 105

‘Dower, as it existed previously to the operation of the Dower Act, was of very ancient origin, an retained and inconvenient property which accrued

1.—“*The Dower Act, 1839*”—(*Continued*).ENGLISH LAW—(*Continued*).

to it in the simple times when alienation of lands was far less frequent than at present. If at any time during the coverture the husband were solely seised of any estate of inheritance, that is, fee simple or fee tail, in lands to which any issue, which the wife might have had, might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed by her in severalty during the remainder of her life. This right, having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only, at common law, by means of a fine, in which the wife was separately examined. And when, as often happened, the wife's concurrence was not obtained on account of the expense involved in levying a fine, a defect in the title obviously existed as long as the wife lived. After the abolition of fines, a wife was enabled to release her dower, under the Fines and Recoveries Act, by deed acknowledged, in which her husband should concur. As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, even of those owing to the Crown. It was necessary, however, that the husband should be seised of an estate of inheritance at law, for the Court of Chancery, whilst it allowed to husbands courtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands. The estate, moreover, must have been held in severalty or in common, and not in joint tenancy for the unity of interest which characterizes a joint tenancy forbids the intrusion into such a tenancy of the husband or wife of any deceased joint tenant, on the decease of any joint tenant, his surviving companions are already entitled, under the original gift, to the whole subject of the tenancy. The estate was also required to be an estate of inheritance in possession, although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach. In no case, also, was any issue required to be actually born, it was sufficient that the wife might have had issue who might have inherited. The dower of the widow in Gavelkind lands consisted, and still consists like the husband's courtesy, of a moiety, and continues only so long as she remains unmarried and chaste.

In order to prevent this inconvenient right from attaching on newly purchased lands, and to enable the purchaser to make a title at a future time, without his wife's concurrence, various devices were resorted to in the framing of purchase-deeds. The old-fashioned method of barring dower was to take the conveyance to the purchaser and his heirs, to the use of the purchaser and a trustee and the heirs of the purchaser; but, as to the estate of the trustee it was declared to be in trust only for the purchaser and his heirs. By this means the purchaser and the trustee become joint tenants for life of the legal estate, and the remainder of, the inheritance belonged to the purchaser. If, therefore, the

I.—“*The Dower Act, 1839*”—(Continued).

## ENGLISH LAW—(Continued).

purchaser died during the life of his trustee, the latter acquired in law an estate for life by survivorship, and as the husband had never been solely seised, the wife's dower never arose, whilst the estate for life of the trustee was subject in equity to any disposition which the husband might think fit to make by his will. The husband and his trustee might also, at any time during their joint lives, make a valid conveyance to a purchaser without the wife's concurrence. The defect of the plan was, that if the trustee happened to die during the husband's life, the latter became at once solely seised of an estate in fee simple in possession, and the wife's right to dower accordingly attached. Moreover, the husband could never make any conveyance of an estate in free simple without the concurrence of his trustee so long as he lived. This plan, therefore, gave way to another method of framing purchase-deeds, which will be hereafter explained, and by means of which the wife's dower under the old law was effectually barred, whilst the husband alone, without the concurrence of any other person, could effectually convey the lands.

The right of dower might have been barred altogether by a *jointure*, agreed to be accepted by the intended wife previously to marriage, in lieu of dower. This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses, which, by turning uses into legal estates, of course rendered them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least. If the jointure were made after marriage, the wife might elect between her dower and her jointure. A legal jointure, however, was in modern times seldom resorted to as a method of barring dower when any jointure was made, it was usually merely of an equitable kind, for if the intended wife were of age, and a party to the settlement, she was competent, in equity, to extinguish her title to dower upon any terms to which she might think proper to agree. And if the wife should have accepted an equitable jointure, the Courts of equity would effectually restrain her from setting up any claim to her dower. But, in equity, as well as at law, the jointure, in order to be an absolute bar of dower, was required to be made before marriage. *Williams' Law of Real Property*, 20th Ed., 1906, pp. 314 to 318. W

(4) **Dower under the Dower Act, 3 and 4 Will. IV, C 105—Jointure.**

- “The dower of women married since the 1st of January 1834, may be barred by the acceptance of a jointure in the same manner as before; but, in their case, the doctrine of jointures is of very little moment. For, by the Dower Act, the dower of such women has been placed completely within the power of their husbands.” 3 and 4 Will. IV, c. 105. Gavelkind lands are within the Act; *Farely v Bonham*, 2 John. and H. 177. X



I.—“*The Dower Act, 1839*”—(Continued).

## ENGLISH LAW—(Continued).

(5) *Provisions of the Dower Act, 3 and 4 Will. IV, C. 105.*

- (a) “Under the Act no widow is entitled to dower out of any land, which shall have been absolutely disposed of by her husband in his lifetime or by his will, or in which he shall have devised any estate or interest for her benefit, unless (in the latter case) a contrary intention shall be declared by his will” 3 and 4 Will. IV, c. 105, Ss. 4, 9; see *Lacey v. Hill*, L R. 19 Eq. 346. Y
- (b) All partial estates and interests, and all charges created by any disposition or will of the husband, and all debts, incumbrances, contracts and engagements to which his lands may be liable, shall be effectual as against the right of his widow to dower. 3 and 4 Will. IV, c. 105, S. 5. Z
- (c) The husband may also either wholly or partially deprive his wife of her right to dower, by any declaration for that purpose made by him, by any deed, or by his will 3 and 4 Will. IV, c. 105, Ss. 6, 7, 8. A
- (d) As some small compensation for these sacrifices, the Act has granted a right of dower out of lands to which the husband has a right merely without having had even a legal seisin. 3 and 4 Will. IV, c. 105, S. 3. B
- (e) Dower is also extended to equitable as well as legal estates of inheritance in possession, excepting estates in joint tenancy. 3 and 4 Will. IV, c. 105, S. 2. C
- (f) The effect of the Act is evidently to deprive the wife of her dower, except as against her husband's heir-at-law *Williams Law of Real Property*, 20th Ed., 1906, p. 319. D
- (g) If the husband should die intestate, and possessed of any lands, the wife's dower out of such lands is still left her for her support,—unless, indeed, the husband should have executed a declaration to the contrary. *Williams' Law of Real Property*, 20th Ed., 1906, p. 319 E
- N.B.**—A declaration of this kind has, found its way, as a sort of common form, into many purchase-deeds *Williams' Law of Real Property*, 20th Ed., 1906, p. 319 F

(6) *Assignment of dower.*

- (a) “A widow entitled to dower at common law had, as a rule, no *estate* in her husband's lands until her equal third part thereof had been duly set out and assigned to her after his death, and in this respect the law was not altered by the Dower Act”. 2 Black Comm. 185. G
- (b) Assignment of dower may be made by parol only, and does not require a deed *Co. Litt.*, 35, *Rowe v. Power*, 2 Bos. & Pul. N. R. 1, 34. H
- (c) After the widow has entered upon the land so assigned to her, she becomes seised thereof and acquires, as from her husband, an estate for life therein as tenant in dower. *Rop. Husb. & wife*, 392, 411, 416; *Williams on Settlements*, 89 I

(7) *Possibility of issue inheritable.*

- (a) “The right to dower only attaches on real estate which might possibly be inherited by any issue which the wife might have, whether any such issue were in fact born or not.” *Co. Litt.* 49 (a). J

1.—*The Dower Act, 1839—(Continued).*

## ENGLISH LAW—(Continued).

(b) "Blackstone says —If a man seised in fee simple hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands, for her issue might by possibility have been heir, on the death of the son by the former wife. But if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane his wife, though Jane may be endowed of these lands, yet, if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed for no issue, that she could have, could by any possibility inherit them." 2 Bl. 131. K

(c) "And says Lord Coke. Albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she had no possibility to have issue by him, yet seeing the law saith, that if the wife be above the age of nine years at the death of her husband she shall be endowed, and that woman in ancient times have had children at that age, wherunto no woman doth now attain, the law cannot judge that impossible, which by nature was possible. And in my time, a woman above three score years old hath had a child." Co. Litt. 40 (a). L

(8) *Right of dower, how defeated under the Dower Act, 3 and 4 Will IV, C 105.*

The right to dower of a woman married after January 1st, 1834, may be defeated, as to the whole or any part of the husband's lands by the following means —

- (i) By a declaration in the deed of conveyance to him, or in any deed executed by him, that his widow shall not be entitled to dower out of such lands. 3 and 4 Will IV, C. 105, S. 6. M
- (ii) Or by a declaration in his will as to any land of which he dies wholly or partially intestate, that she shall not be entitled to dower out of such land, or out of any of his land. (*Ibid*). S. 7. N
- (iii) Or by any absolute disposition in his lifetime, or by his will, as to any land so disposed of (*Ibid*), S. 4. O
- (iv) Unless a contrary intention be declared in the will, if the husband devise any land, or any estate or interest therein, by his will to or for the benefit of his widow, out of which land she would otherwise be entitled to dower, she is not to be entitled to dower out of any land of her husband. (*Ibid*), S. 9. See, also, Thomas, *Thomas v. Howell*, 34 Ch. Div. 166. P
- (v) "All partial estates and interests and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land is subject or liable, prevail against the widow's right to dower" (*Ibid*), S. 5. Q

**N.B.—1.** Such is the law in respect of all cases falling within the Dower Act, 1833.

**N.B.—2** That Act applies to all widows whose marriage dates subsequently to January 1st, 1834. (*Ibid*), S. 14.

I.—“*The Dower Act, 1839*”—(Concluded).

## ENGLISH LAW—(Concluded).

## (9) Right of dower, how otherwise defeated—Jointure.

- (a) “The wife’s right to dower may be also barred by a legal jointure settled upon the wife before marriage in substitution for her dower.”  
Goodeve’s Law of Real Property, 5th Ed. 1906, p. 108. **R**
- (b) If settled after marriage, she has her election after her husband’s death between jointure and dower. (*Ibid*). **S**
- (c) A jointure is defined by Sir Edward Coke to be “a competent livelihood of freehold for the wife of lands or tenements, &c, to take effect presently in possession or profit after the decease of her husband, for the life of the wife at the least”—that is, it must not be *pur autre vie*, or for a term of years or other smaller estate, hence it is a freehold. It was called a jointure, because, before the Statute of Uses it was usual on marriage to settle by deed some special estate to the use of the husband and wife for their lives in joint tenancy, or “jointure,” which settlement would be a provision for the wife in case she survived her husband.” Goodeve’s Law of Real Property, 5th Ed., 1906, p. 109, Digby’s Law of Real Property, pp. 331, 352, note, Co Litt. 36 (b). **T**

## (10) Equitable bar to dower by contract.

- (a) “There may be an equitable bar, to dower the ground of which is contract, as when the wife has, being of full age, before marriage, agreed to take something else in lieu of dower, as, for example, a provision out of the personal estate, then she will be restrained in equity from setting up a claim to dower.” Goodeve’s Law of Real Property, 5th Ed., 1906, p. 109. **U**
- (b) “The Court disregards the nature of the property and the *quantum*; and the only question in such cases is whether the provision alleged to have been given in satisfaction of dower was so given or not whether that was part of the contract.” *Dyke v Rendall*, 2 De G M & G, 209, at p. 218, *per* Lord St. Leonards. **Y**

## (11) Effect of the Dower Act, 3 and 4 Will IV, C. 105.

- “The effect of the Act is evidently to deprive the wife of her dower, except as against her husband’s heir-at-law. If the husband should die intestate, and possessed of any lands, the wife’s dower out of such lands is still left to her for her support unless indeed the husband should have executed a declaration to the contrary.” William’s Law of Real Property, 20th Ed., 1906, p. 319. **W**

## (12) Effect of incontinency or second marriage on right to dower

- (a) “Dower was,” says Blackstone, “formerly forfeitable by incontinency or a second marriage. By the famous charter of Henry I, this condition of widowhood and chastity was only required in case the husband left any issue, and afterwards we hear no more of it.” 2 Bl. 133 **X**
- (b) “In Gavelkind lands, however, the right to dower (formerly called “free bench”) is still subject to the condition of the widow remaining chaste and unmarried.” Prerogative Regis, 17 Edwd. II. **Y**

2. \* \* \* \* When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint-tenancy), then his widow shall be entitled in equity to dower out of the same land

Widows to be entitled to dower out of equitable estates.

(Note).

General.

N B.—The words 'And it is hereby further enacted, that' at the commencement of S 2, were repealed by Act XII of 1891

3. \* \* \* \* When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall not have recovered possession thereof Provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced

Seisin shall not be necessary to give title to dower.

(Note)

General.

N B.—The words 'And it is hereby further enacted that' at the commencement of S 3 were repealed by Act XII of 1891

4. \* \* \* \* No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will

No dower out of estates disposed of

(Notes)

General.

N B.—The words 'And it is hereby further enacted, that' at the commencement of S 4, were repealed by Act XII of 1891.

#### Scope and effect of the section

(a) This section is an authority, that before this Act a husband could not alien or devise his lands so as to deprive his wife of her dower 6 C. 794 (804) = 8 C L R 76 Z B

(b) This section purports to *deprive a wife of her right to dower in lands, which may have been aliened or devised by her husband in his lifetime*, which means, if it means anything, that in the view of the Legislature, a wife before the Act, had a right to dower in such lands 6 C 794 (804) = 8 C L R 76 C

(c) This section would not only be superfluous, but misleading unless the wife had such a right. 6 C. 794 (804). D

**5. \* \* \*** All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower.

(Note).

General.

**N.B.**—The words "And it is hereby further enacted, that" at the commencement of S. 5, were repealed by Act XII of 1891.

**6. \* \* \*** A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

Dower may be barred by a declaration in a deed,

(Note).

General.

**N.B.**—The words "And it is hereby further enacted, that" at the commencement of S. 6, were repealed by Act XII of 1891.

**7. \* \* \*** A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land or out of any of his land.

or by a declaration in the husband's will.

(Note).

General.

**N.B.**—The words "And it is hereby further enacted, that" at the commencement of S. 7, were repealed by Act XII of 1891.

**8. \* \* \*** The right of a widow to dower shall be subject to any conditions, restrictions or directions which shall be declared by the will of her husband duly executed as aforesaid.

Dower shall be subject to restrictions.

(Note).

General.

**N.B.**—The words "And it is hereby further enacted, that" at the commencement of S. 8, were repealed by Act XII of 1891.

**9. \* \* \*** Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Devise of real estate to the widow shall bar her dower.

(Note).

General.

**N B**—The words " And it is hereby further enacted, that" at the commencement of S 9, were repealed by Act XII of 1891

**10** \* \* \* \* No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower unless a contrary intention shall be declared by his will

Bequest of personal estate to the widow shall not bar her dower

(Note)

General

**N B**—The words " And it is hereby further enacted that " at the commencement of S 10, were repealed by Act XII of 1891

**11** Provided always \* \* that nothing in this Act contained shall prevent any Court of Equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands or any of them

Agreement not to bar dower may be enforced

(Note)

General

**N B**—The words and it is hereby further enacted ' in this section were repealed by Act XII of 1891

**12** \* \* Nothing in this Act contained shall interfere with any rule of equity or of any Ecclesiastical Court by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies

Legacies in bar of dower still entitled to preference

(Note)

General.

**N B**—The words And it is hereby further enacted that ' at the commencement of S 12 were repealed by Act XII of 1891

**13** [*Certain dowers abolished*] *Rep by the Repealing and Amending Act, 1891 (XII of 1891)*

**14** \* \* This Act shall not extend to the dower of any widow who shall have been or shall be married on or before the 1st day of July one thousand eight hundred and forty, and shall not give to any will, deed, contract, engagement or charge executed, entered into or created before the said first day of July one thousand eight hundred and forty the effect of defeating or prejudicing any right to dower

. Act not to take effect before the 1st July, 1840.

(Note).

General.

N.B.—The words “ And it is hereby further enacted, that ” at the commencement of S. 14, were repealed by Act XII of 1891. M

18. \* \* \* \* This Act shall not be construed to affect any  
 right of property in land otherwise than by  
 Saving of certain right and jurisdic- modifying the law of dower in cases governed by  
 tion. the English law of dower, or to extend or alter  
 the jurisdiction of any of Her Majesty's Courts of Justice.

(Note).

N.B.—The words “ And it is hereby provided that ” at the commencement of S. 15, were repealed by Act XII of 1891.

# THE CASTE DISABILITIES REMOVAL ACT, 1850.

(ACT XXI OF 1850.)

[Passed on the 11th April 1850.]

*An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.*

WHEREAS it is enacted by section 9, Regulation VII, 1832 of the Bengal Code <sup>1</sup> that “ whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasions, the laws of those religions <sup>2</sup> shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company; It is enacted as follows —

Preamble.

(Notes).

General.

## (1) Act, where declared in force.

This Act has been declared in force in the whole of British India except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared in force in the Santhal Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Santhal Parganas Laws and Justice Regulation, 1899 (III of 1899), Ben. Code, Vol. I; in the Arakan Hill District (with modifications) by the Arakan Hill District Laws Regulation, 1874 (IX of 1874), S. 3, Bur. Code.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), Gen. Acts, Vol. II, to be in force in the following Scheduled Districts, namely :—

Sindh	...	See Gazette of India, 1880, Pt. I, p. 672.
West Jalpaiguri	...	Do. 1881 Do. 74.
The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum and Pargana Dhalbhum and the Kolhan in District of Singhbhum	...	Do. 1881 Do. 504.



## General—(Continued).

The Scheduled portion of the Mirzapur District			
Jaunsar Bawar	...	See Gazette of India, 1879, Pt. I, p. 383.	
	...	Do.	1879 Do. 882.
The Districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan (Portions of the Districts of Hazara Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat, now form the North-West Frontier Province, see Gazette of India, 1901. Pt. I, p. 857 and <i>ibid.</i> , 1902, Pt. I, p. 575, but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900, S. 3), Punjab and N.W. Code)			
	...	Do.	1886 Do. 48.
The District of Lahaul	...	Do.	1886 Do. 301.
The Scheduled Districts of the Central Provinces	...	Do.	1879 Do. 771.
The Scheduled Districts in Ganjam and Vizagapatam	..	Do.	1898 Do. 870.
Coorg	.	Do.	1879 Do. 747.
The District of Sylhet	...	Do.	1879 Do. 631.
The rest of Assam (except the North Lushai Hills)	...	Do.	1897 Do. 299.
The Porahat Estate in the Singbhum District	...	Do.	1897 Do. 1059.
It has been extended, by notification under S. 5 of the last mentioned Act, to the following Scheduled Districts, namely :—			
Upper Burma generally (except the Shan States)			
	...	See Gazette of India, 1898, Pt. I, p. 89.	
	...	and <i>ibid</i>	1899 Do. 98.
Kumaon and Garwal	...	Do.	1876 Do. 606.
The Tarai of the Province of Agra	...	Do.	1876 Do. 505.A.

## (2) History of the Act—Reasons for the passing of Act XXI of 1850.

At an early date of the British administration of this country, "English Law was introduced into India by the Charters under which courts of justice were established for the three presidency towns of Madras, Bombay, and Calcutta. The charters introduced the English common and statute law in force at the time, so far as it was applicable to Indian circumstances.

George II's charter of 1758, which reconstituted the Mayors' court in the three presidency towns of Madras, Bombay, and Calcutta, expressly excepted from their jurisdiction all suits and actions between the Indian natives only, and directed that such suits and actions should be determined among themselves, unless both parties should submit them to the determination of the Mayor's court. But, according to Mr. Morley, it does not appear that the native inhabitants of Bombay were ever actually exempted from the jurisdiction of the Mayor's court, or that any peculiar laws were administered to them in that court.

General—(Continued).

It was not, however, until the East India Company took over the active administration of the province of Bengal that the question of the law to be applied to natives assumed a seriously practical form. In 1771 the Court of Directors announced their intention of "standing forth as Diwan"; in other words, of assuming the administration of the revenues of the province, a process which involved the establishment, not merely of revenue officers, but of courts of civil and criminal justice. In the next year Warren Hastings became Governor of Bengal, and one of his first acts was to lay down a plan for the administration of civil justice in the interior of Bengal.

With respect to civil rights, Warren Hastings' plan of 1772 directed, by its twenty-third rule, that 'in all suits regarding marriage, inheritance, and caste, and other religious usages and institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentus (Hindus) shall be invariably adhered to.' Moulavies or Brahmins, were directed to attend the courts for the purpose of expounding the law and giving assistance in framing the decrees." The principle laid down by the above rule of Warren Hastings was recognised and confirmed by the Code of Regulations issued by the Government of Bengal in 1780, as also by the British Parliament in 1881 by the provision contained in S. 17 of 21 Geo. III, c. 70. Enactments to the same effect have been introduced into numerous subsequent English and Indian enactments. [See, e.g., 37 Geo. III, c. 142 (relating to the recorders' Courts at Madras and Bombay), Ss. 12 and 13, Bombay Regulation IV of 1827, S. 26, Act IV of 1872, S. 5 (Punjab) as amended by Act XII of 1878, Act III of 1876, S. 3 (Oudh), Act XII of 1887, S. 37 (Bengal, North-Western Provinces, and Assam); Act XI of 1889, S. 4 (Lower Burma), and clauses 19 and 20 of the Charter of 1865 of the Bengal High Courts, the corresponding clauses of the Madras and Bombay Charters, and clauses 13 and 14 of the Charter of the North-Western Provinces High Court.]

The provisions of the Act of 1781, and the corresponding provisions of the Act of 1797 relating to the recorders' Courts of Madras and Bombay (afterwards superseded by the Supreme Courts, and now by the High Courts), are still in force, but are not included in the list of English statutory provisions which, under the Indian Councils Act of 1861 (24 & 25 Vict. c. 67), Indian legislatures are precluded from altering

Consequently they are alterable, and have in fact been materially affected, by Indian legislation. For instance, the native law of contract has been almost entirely superseded by the Contract Act of 1872 and other Acts. And the respect enjoined for the rights of fathers and masters of families and for the rules of caste did not prevent the Indian legislature from abolishing domestic slavery or suttee.

A Bengal regulation of 1832 (VII of 1832), whilst re-enacting the rules of Warren Hastings which had been embodied in previous regulations, qualified their application by a provision which attracted little attention at the time, but afterwards became the subject of considerable discussion. It declared that these rules are intended and shall be held to apply to such persons only as shall be *bona fide* professors of

## General—(Continued).

those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suits may be of different persuasions, where one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience; it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles.'

In the year 1850 the Government of India passed a law (XXI of 1850) of which the object was to extend the principle of this regulation throughout the territories subject to the Government of the East India Company.

This Act, which was known at the time of its passing as the *Lex Loca Act* excited considerable opposition among orthodox Hindus as unduly favouring converts, and has been criticized from the Hindu point of view with respect to its operation on the guardianship of children in a case where one of two parents had been converted from Hinduism to Mahomedanism

It will have been observed that Warren Hastings' rule and the enactments based upon it apply only to Hindus and Mahomedans. There are, of course, many natives of India who are neither Hindus nor Mahomedans, such as the Portuguese and Armenian Christians, the Parsees, the Sikhs, the Jains, the Buddhists of Burma and elsewhere, and the Jews. The tendency of the courts and of the legislatures has been to apply to these classes the spirit of Warren Hastings' rule and to leave them in the enjoyment of family law, except so far as they have shown a disposition to place themselves under English law.' See Ilbert's Government of India, 2nd Ed., 1907, pp. 323 to 329. B-D

## (3) Title of Act.

- (a) For the short title "The Caste Disabilities Removal Act, 1850;" see the Indian Short Titles Act (XIV of 1897).
- (b) This Act was originally known as the *lex loca Act*, and is even now generally cited under the same designation. That title is, however, a misnomer. It was properly applied to other provisions which were subsequently dropped. See the Evidence of Mr. Cameron before the select committee of the House of Lords in 1852; Ilbert's Government of India, 2nd Ed., 1907, p. 328 Note. E

## (4) Object of the enactment and construction of the Act.

- (a) Prior to the passing of Act XXI of 1850, there was in force in the Presidency of the Fort William, Bengal, a Regulation known as Regulation VII of 1832. Speaking broadly, S. 9 of that Regulation was passed to relieve Hindus and Muhammadans in that Presidency from any disability with regard to the rights of property under Hindu or

General—(Continued).

Muhammadan law, which might have arisen by reason of a Hindu or Mahomedan having changed his religion, or by reason of a Hindu being out of caste. The intention of the present Act, as stated in the preamble, is to extend the principle of S 9 of the Regulation VII of 1832, which was then in operation in the Provinces subject to the Presidency of Fort William, throughout the territories of the East India Company. 11 A. 100=8 A.W.N. 288. **F**

(b) The words of the preamble seem to prove conclusively that the one object which the Legislature had in view in passing the Act was to extend the principle of religious toleration. 19 W.R. 367 (378). **G**

(c) The construction of the Act ought to be limited to the furtherance of the great principle enunciated in its preamble 19 W.R. 367 (378). **H**

(d) Act XXI of 1850 cannot possibly give to any party any right higher than that to which he or she is entitled under the law from which that right is derived. Such a construction would be directly contrary to the principle laid down in the preamble. 19 W.R. 367 (378). **I**

(e) The Act provides for the cases of those who (1) have renounced, or (2) have been excluded from the communion of any religion, or (3) have been deprived of caste—meaning those who by their own choice, or by the action of their caste fellows, have been finally shut out, or temporarily deprived though capable of being restored on the making of proper expiation 19 W.R. 367 (406) **J**

(5) Construction of Act-- Conflict to be avoided.

In construing any enactment such construction should be adopted which avoids any conflict. 77 P.W.R. (1907). See, also, 11 A. 100. **K**

(6) Retrospectivity of Act

The Act cannot be given retrospective effect so as to abrogate the Hindu Law as to the consequences of apostasy, where the apostasy took place before the enactment. 4 A.L.J. 365. **L**

(7) Conversion in 1839, effect of, on rights of inheritance

In one case, a Hindu who had become a Muhammadan in 1839 sued for his inheritance after 1850. The Madras Sudder Court rejected his claim, holding that Act XXI of 1850 was not retrospective. *Nagammal v. Karebhasappa*, Mad Dec. of 1858, 250 cited in Mayne's Hindu Law and Usage, 7th Ed., P. 605. **M**

(8) Conversion in 1845, effect of, on rights of inheritance.

(a) By S. 9 of Reg. VII of 1832, the Legislature virtually set aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste; and Act XXI of 1850 extended the principle of that enactment, which applied only to the Bengal Presidency, throughout the territories subject to the Government of the East India Company. 15 C.W.N. 545 (P.C.)=8 A.L.J. 552=13 Bom. L.R. 427=18 O.L.J. 575=10 M.L.T. 25=21 M.L.J. 645=33 A. 356=10 Ind. Cas. 477=(1911) M.W.N. 432. **N**

(b) By reason of that enactment, a Hindu who became a convert to Islam in 1845 did not forfeit his rights in joint-family property. 15 C.W.N. 545 (P.C.)=8 A.L.J. 552=13 Bom. L.R. 427=13 C.L.J. 575=10 M.L.T. 25=21 M.L.J. 645=33 A. 356=10 Ind. Cas. 477=(1911) M.W.N. 432. **O**

## General—(Concluded).

## (9) Loss of caste—No forfeiture of rights of property.

Since this Act came into force, mere loss of caste does not occasion a forfeiture of rights of property. 1 B. 559 (4 Bom. H. C. 25, F.). F

## (10) Oudh—Application of Act.

This Act was not first introduced into Oudh by Act XV of 1874 but was in force there since 1856 when the spirit of the Bengal Regulations was declared to be the law of Oudh. S.C. 171 (Oudh). Q

## 1.—“Regulation VII, 1832, of the Bengal Code.”

N.B.—Bengal Regulation VII of 1832 is repealed by the Bengal Civil Courts Act, 1871 (VI of 1871), which was repealed by the Bengal, N.W.P. and Ansam Civil Courts Act, 1887 (XII of 1887).

## 2.—“When one party shall be of the Hindu and the other of the Muhammadan persuasion ... the laws of those religions.”

## (1) Degradation by apostacy does not dissolve marriage tie among Hindus.

(a) “Among Hindus the degradation of apostacy does not of itself dissolve the marriage tie” 9 M 466 (470). See, also, 18 C. 264; 17 M 235; 23 M. 171; 25 B 644. 49 P R. 1907=83 P.L.R. 1908=110 P.W.R. 1907. R-S

(b) This is also assumed to be the case by the Legislature in enacting Act XXI of 1866. (*Ibid*) See, also, Preamble to Act XXI of 1866. T

(c) The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband. 4 B. 330. U

(d) Excommunication from caste *per se* does not deprive a Hindu wife of her right of joint enjoyment of her husband's house, so as to make her a trespasser if she enters the house to claim maintenance. 4 M. 243. V

## (2) Provisions of the Hindu Law as to the effect of conversion on the status of marriage.

(a) It is a general principle of Hindu law that the degradation of the husband from caste does not dissolve the marriage tie. 2 N W.P. 300. W

(b) The following observations from the judgment are worthy of being noted.—  
“We find a distinction taken between excommunication for different caste offences. In some cases the out-caste can never be restored to his caste privileges, but in the majority of instances he can procure absolution and restoration to caste (Strange's Hindu law, Chap. VII). No authority is cited in support of the contention that by reason of such a transgression of the rules of caste as the plaintiff has been held guilty, if, he forfeits all rights to restoration to caste, and, consequently, restoration to those rights which he would enjoy as a member of the caste. It would be extremely inconvenient to hold that by a deprivation of caste which may be temporary, a member of a caste loses his marital rights, so as to confer on his wife the power of forming a second marriage; for if the husband were restored to caste, he could not be restored to the enjoyment of his marital rights if his wife had availed herself of her liberty to re-marry. But, further, no authority has been cited from the Shastras to show that the wife of a person excommunicated from caste thereby obtains a dissolution of the matrimonial tie, while authority to the contrary

**2.—“ When one party shall be of the Hindu and the other of the Muhammadan persuasion .... the laws of those religions ”—(Continued)**

appears to us to be inferable from the following passage in the “ Mitacshara .”—“ The wives of those persons (i.e. out-castes) ” being destitute “ of male issue and being correct in their conduct, or behaving virtuously, must be supported or maintained.

It being, in our opinion, a general principle of Hindu law that the degradation of the husband from caste does not dissolve the marriage tie, unless the defendant can establish that, by the custom of the caste to which she belongs, divorce is, under such circumstances as are found to be proved in this case, permitted to a wife, the utmost which she could claim, as it appears to us, is this, that she may be relieved from consorting with her husband so long as he remains out of caste, but she must return to his house and remain under his protection.”  
2 N W.P. 300 (301-302)

(c) Sir Thomas Strange has recorded his opinion that divorce would appear to be generally, by Hindu law, “ marital ” only not competent to the wife “ unless by custom in contradistinction to the Shashtra.” Strange’s Hindu law, p. 52. Cited at 3 N.W P. 300 at p. 302. **X**

**(3) Effect of degradation among Hindus prior to the passing of this Act.**

“ In *Doe dem Radamoney Raur v. Neelmoney Doss*, decided so long ago as 1792 the lessor of plaintiff a Hindu widow on proof of her incontinency after her husband’s death, was non-suited. (Mort Dec) In the case of *Maharanees Bussunt Coomaree v. Maharanees Cummul Coomaree and others*—7 S D A Rep (144) the Sudder Court expressly held that the appellant (who was the widow of the late Maha Rajah Tej Chunder, Rajah of Burdwan) had by reason of elopement with a person named Dukinartunjun Mookerjee, forfeited all her legal rights according to the Hindu Shasters, and her suit was accordingly dismissed—Prior therefore to the passing of Act XXI of 1850 it appears to have been clearly the law among Hindus,—that if a Hindu widow in the possession of land as heiress of her husband lived incontinently, the Hindu law disinherited her ” See 2 Taylor and Bell 301 Note (a), also reported in the Indian Decisions (Old Series), Vol. II, p. 757, Note. **Y**

**(4) Provisions of Hindu Smritis relating to the effect of degradation as causing forfeiture of right of inheritance**

(a) “ Of him who has been formally degraded, the right of inheritance, the funeral cake, and the libation of water, are extinct.” Sanc’ha and Lie’hita, Colebrooke’s Digest, 1874, Vol. II, p. 423. **Z**

(b) “ A professed enemy to his own father, a degraded man, one deprived of virility, and a man formally expelled by his kinsmen, shall not inherit, though begotten by the deceased; much less if begotten on his wife by a kinsman legally appointed.” Nareda, Colebrooke’s Digest, 1874, Vol. II, p. 425. **A**

(c) “ On the death of a father, or other owner of property, neither an impotent man, nor a person afflicted with elephantiasis, nor a madman, nor an idiot, nor one born blind, nor one degraded for sin, nor the issue of a degraded man, nor a hypocrite or impostor, shall take any share of his

2.—“When one party shall be of the Hindu and the other of the Muhammadan persuasion . . . the laws of those religions”—(Continued).

heritage. For such men, except those degraded, let food and clothes be provided; and let the sons of such as have sons take the shares of their parents, if themselves have no similar disability.” Devala, cited in Colebrooke’s Digest, 1874, Vol. II, p. 426. B

(d) “They who have committed crimes in the first degree, are considered as degraded persons” Brahme Purana cited in Colebrooke’s Digest, 1874, Vol. II, p. 431. C

(e) “Of degraded persons there shall be no cremation, nor funeral sacrifice, nor gathering of their bones.” Brahme purana cited in Colebrooke’s Digest, 1874, Vol. II, p. 431. D

(f) “Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage.” Menu cited in Colebrooke’s Digest, 1874, Vol. II, p. 434. E

(g) “An outcaste and his son, an eunuch, one lame, a madman, an idiot, one born blind, and he who is afflicted by an incurable disease, must be maintained, without any allotment of shares.” Yajñawalkya cited in Colebrooke’s Digest, 1874, Vol. II, p. 434 F

(5) Effect of change of religion on the claim for restitution of conjugal rights among Hindus—Act XXI of 1850.

“A party who has renounced Hinduism is not entitled to enforce a claim for restitution of conjugal rights against a husband or a wife who remains a Hindu. The Hindu Law allows one to forsake a degraded husband, or a degraded wife, and degradation from caste is a natural consequence of apostasy. Act XXI of 1850 by enacting that loss of caste by change of religion shall not inflict on any person forfeiture of rights or property, seems to throw some doubt on the point. But the remarks of Mr. Justice Campbell in *Muchoo v. Arzon Sahoo* (5 W.R. 236) go a great way in support of, the rule stated above. After holding that the right to the custody of children is a right within the meaning of Act XXI of 1850, the learned Judge observed :

“The pleader for the appellant further argued that no one can be permitted so to use his right as to deprive any other person or persons of *their* rights. For instance, he says, a husband who becomes a Christian will not be permitted to claim the person of a wife who remains a Hindu. This is so far true; and in this case, the claim to the wife was rightly dismissed, but was, I think, dismissed simply for the reason that, admitting the husband’s *prima facie* claim to the custody of the wife, that claim may be defeated by a reasonable plea. If a wife pleads that her husband beats and ill-uses her in such a way that she cannot reasonably be required to leave with him, and that plea is made out, doubtless the Court will not enforce a restitution of conjugal rights. So also, if she pleads that the husband, by change of religion, has placed himself in that position that she cannot live with him without doing extreme violence to her religious opinions and the social feelings in which she has been brought up, and in the enjoyment of which she married, that plea would also be a good plea.”

2.—“When one party shall be of the Hindu and the other of the Muhammadan persuasion....the laws of those religions”—(Continued).

So, Sir Adam Bittleston on one occasion said :

“So far, however, as Hindu Law is concerned, it seems to be enough to say that, in my opinion, a Hindu married woman who deserts her husband, becomes a convert to Mahomedanism, and adopts the habits and lives as the wife of a Mussalman, is altogether out of the pale of Hindu Law, that she ceases to have any recognized legal status according to that law, which counts her as one dead, or at least recognizes her existence only as an object of charity. This is not inconsistent with such passages as that cited from Manu .

‘That neither by sale nor desertion can a wife be released from her husband ;’ which certainly have reference to persons still within the pale of Hindu Law. It seems to me, however, at variance with the spirit of Hindu law that it concerns itself with a woman in such case, as far as to impose on her any obligation not to marry again, *provided the second husband be not a Hindu*, and if she does marry again, the validity of that marriage must, I think, depend upon the law of the sect to which she has become a convert.”

But I must tell you that the decisions of our Courts have not been uniform on this point. Thus in one case, Sir W. Burton is reported to have ordered the wife of a converted Brahman to be restored to him upon *habeas corpus* ; and in another case, the Agra Sudr Court held that

- loss of caste by a husband could not dissolve his marriage, or bar his claim to the possession of the wife's person.

See, however, the case of *Paigi v. Sheonaman*, (8 A. 78), in which the husband's restoration to caste was made a condition precedent to the decree in his favour for restitution of conjugal rights taking effect.

Considering, however, the feelings of those who really profess the Hindu faith, it would be a matter of extreme hardship, to say the least, to enforce restitution of conjugal rights in such cases ; and I should therefore venture to affirm that the view taken by Mr Justice Campbell is the proper view of the matter.

“The case in which a Hindu husband or wife becomes a convert to Christianity, is provided for by Act XXI of 1866. Under that Act, a convert can sue a native husband or wife for conjugal society, and in case of refusal by such husband or wife to co-habit with the convert, on the ground of change of religion, the marriage between the parties shall be declared dissolved.” The above extract has been taken from Gooroodas Banerjee's *Marriage and stridhana*, Tagore Law lectures for 1878, 2nd Ed., 1896, pp. 122 to 125. G

“Upon a literal construction of Act XXI of 1859, S. 1, which provides that loss of caste or excommunication shall no longer occasion any forfeiture of rights, it might seem as if a degraded or excommunicated wife was not any longer liable to be deprived of her conjugal rights. But this Act must receive a more limited construction in order to be reconciled with reason and justice As has been well observed in *Muchoo v. Arsoon Sahoo* (5 W. R. 235) though a person who is excommunicated is not on that account to be deprived of his or her rights, yet such person must not be empowered to deprive others of their right to the freedom of conscience, and the liberty of withholding communion with interdicted persons.” *Ibid*, pp. 182, 183. H



2.—“ *When one party shall be of the Hindu and the other of the Muhammadan persuasion . . . the laws of those religions* ”—(Continued).

(C) Change of religions by either spouse justifies desertion by the other—Hindus.

- (a) “ Change of religion in either spouse would justify desertion by the other and Act XXI of 1850 would not interfere with such desertion. In such cases the convert partner is regarded in Hindu law as civilly dead. But that is so only as regards the convert's civil rights; and there is no authority in Hindu law for the position that a degraded person or an apostate is absolved from all civil obligations incurred before degradation or apostasy.” See Gooroodass Banerjee's *Marriage and Stridhana*, Tagore Law Lectures for 1878, 2nd Ed., 1896, p. 186. I
- (b) “ Act XXI of 1866 has made some important provisions for dissolution of marriage when either spouse becomes a convert to Christianity. It authorizes the convert to sue his or her non-converted partner for conjugal society, and it gives the latter the option of agreeing or refusing to cohabit with the former; and in case of his or her refusal on the ground of change of religion, it directs the Court to declare the marriage dissolved ” (*Ibid*), pp. 187, 188. J
- (c) Where a Hindu husband became a convert to Christianity and then died, his marriage with his Hindu wife had become dissolved, and she was not entitled to inherit his estate as his widow. See 8 M. 169. But see 4 B. 330; 9 M. 266, 18 C. 264. K

(7) Position of the wife lawfully deserts or is deserted by her husband

“ The position of the wife who lawfully deserts her husband, or is lawfully deserted by him, is in some respects rather anomalous. So long as both parties remain Hindu, desertion does not dissolve their marriage. See Manu, IX. 46. L

In the case of desertion of the husband by the wife, she must remain under the care of her grown-up sons, if any, or under the care of other kinsmen; for her state is one of perpetual tutelage. As a rule she is entitled to maintenance from her husband. Where degradation of the husband is the cause of desertion, the Hindu law, which excludes the degraded husband from inheritance, imposes upon the person taking his share of the patrimony the obligation of maintaining his wife if chaste, and now as by Act XXI of 1850 degradation or loss of caste no longer occasions any forfeiture of rights or property, it would follow that the wife is entitled to maintenance from her degraded husband, though she may not live with him.

When change of religion by the husband is the cause of desertion, the case seems to stand on somewhat different grounds. Change of religion, as observed by the Judicial Committee in *Abraham v. Abraham* (1 W. R. P. C. 5), would release the convert from the trammels of the Hindu law, and his rights and duties would have mainly to be determined by the law of the sect to which he becomes a convert; and such law in some cases, as where the conversion is to Mahomedanism, would declare the former marriage dissolved. Nevertheless the adoption of a new religion ought not to have the effect of sweeping away all existing obligations. Considering that, by Act XXI of 1850, the Hindu convert is no longer to be deprived of his rights or property by reason

**3.—“ When one party shall be of the Hindu and the other of the Muhammadan persuasion....the laws of those religions ”—(Continued).**

of change of faith, and considering the feelings and helpless condition of the Hindu wife, and the prohibition against her re-marriage, it would be a matter of extreme hardship if she is to be deprived of her right to claim maintenance from her husband, whom, owing to religious feelings, she may be obliged to forsake. The question is not one of Hindu law, but involves important general principles. The decision of the Madras High Court reported in 4 M.H.C.R., p. 2, may be referred to, as favouring the wife's claim in such cases.” See Gooroodas Banerjee's marriage and *Stridhna*, Tagore Law Lectures for 1878, 2 Ed., 1896, pp. 188, 189. **M**

**(8) Effect of conversion on right of inheritance under Mahomedan Law—Act XXI of 1850.**

One of the causes which precludes a person from inheriting is, according to the Mahomedan jurists, *kufi* (infidelity). “*Kufi* means the denial of the unity of God (*wahlaniet*) and of Mahomed's messengership (*risalat*), the two cardinal principles on which Islam is founded. Every person who acknowledges divine unity and the messengership of the Arabian Prophet is regarded as within the pale of Islam; nothing more is required. Those, however, who deny these cardinal principles are considered beyond the benefit of its rules. Accordingly, when a person died leaving an heir who by birth or apostasy is a “*donier*,” i.e., repudiates God's unity and Mahomed's ministry, such heir would be excluded from succession in preference to another who does accept those doctrines. Consequently, those who profess a different faith from Islam have no title to the inheritance of a deceased Mussulman. So that if a Mussulman die leaving behind him an heir who does not profess the Islamic faith, he is debarred from inheriting, even though he be nearest to the deceased. For example, if a man die leaving behind him a son who is a non-Moslem, and a grandson who is a Moslem, the son would be evicted from the succession, and the grandson would take the inheritance to the absolute exclusion of his own father.

This Act has made a variation in the Mahomedan Law of Inheritance. The principle by which non-Moslems were excluded from the inheritance applied equally to those who were born in a different faith, and those who abjured Islam.

For example, an apostate from Islam and an original non-Moslem came equally within the purview of this rule, so that if a deceased Moslem left behind him three heirs, one of whom was a non-Moslem, the other an apostate, and the third a Moslem, the first two, under the Mahomedan law, would be excluded absolutely from the succession, and the inheritance would go entirely to the Moslem heir, though he may be the remotest of all of these in the degree of proximity to the deceased. The change effected by this Act is most important.

The effect of this enactment has been to do away with the provision of the Mahomedan Law by which apostates were excluded from the inheritance of deceased Moslems. But the prohibition against the succession of original non-moslems remains intact. So that, if an apostate

**2.—“ When one party shall be of the Hindu and the other of the Muhammadan persuasion . . . the laws of those religions ”—(Continued).**

were to die leaving children brought up in his or her own creed, they would have no right of succession to the inheritance of their Moslem relation, though had their apostate parent been alive, he or she would have been entitled under the Act to succeed.

If the apostate die after the inheritance has opened up, and the right of succession has vested in him, then the succession of his own children, though non-Moslems, would not be prevented by the evicting provision of the Mahomedan law.

Under the Sunni Law, a Moslem does not inherit from a non-Moslem, nor does a non-Moslem inherit from a Moslem.

When either of the parents is a Moslem, the law presumes the child to be a Moslem (until it is able to make a choice), and the right to its succession is regulated by the laws of Islam.

The Moslems inherit from each other though they may belong to different sects.

Among the Hanafis, in the case of a male apostate, a distinction is made regarding the time when the property was acquired.

For example, if the property was acquired before apostasy, it goes to the Moslem heirs, but if it was gained subsequent to the apostasy, then it escheats to the *Bait-ul-Mal* (i.e.) the public treasury. In the same way, the portion which was acquired before apostasy goes to the Moslem heirs, and the portion acquired afterwards goes to the *Bait-ul-Mal*. This is the view of Abu Hanifa, and principle laid down by him is followed in most Mahomedan countries. But Abu Yusuf and Mohammed differ from Abu Hanifa on this point, and agree with the Shiaks in holding that the entire estate of an apostate descends to his Moslem heirs. In the case of a female apostate, however, her entire property, whether acquired before or after apostasy goes to her Mussulman heirs. See Ameer Ali's Mahomedan Law, second Ed. 1894, Vol. II, pp. 85, 87 citing Futawa Alamgiri, pp. 631, 633 and Sirajia, p. 58. N

N. B.—“ These provisions do not owe their origin to religious exclusiveness, but to the political necessities of the early commonwealth, when a “donor” was an inveterate enemy, and an “apostate” a traitor. They have their counterpart in Christian communities. In Russia, even now a convert from the orthodox church is debarred from the right of inheritance.” See Ameer Ali's Mahomedan Law, 2nd Ed., 1894, Vol. II, p. 85 Note.

**9) Provisions of Mahomedan Law as to the effect of change of religion on the status of marriage.**

**(1) General rule laid down.**

(a) “ It seems that the effect of either or both of the parties to Mahomedan Marriage renouncing the Mahomedan Religion is to dissolve the marriage *ipso facto*, so far as the British Courts are concerned, leaving it open to the parties to solemnize a fresh marriage under the Christian Marriage Act XV of 1872, or under Act VI of 1872, according to circumstances ” See 2 N.W.P. 370; Wilson's Digest of Anglo Mahomedan Law, S. 78-A. Q

2.—“ *When one party shall be of the Hindu and the other of the Muhammadan persuasion . . . the laws of those religions* ”—(Continued).

- (b) There can be no question that on the apostasy of either of the parties to a marriage under Mahomedan law the marriage-contract is *ipso facto* cancelled. Baillie's Digest, 182, Baillie Imamees, 30, 266; Hidayah Book II, Chapter 5, cited in 2 N.W.P. 370 at p. 373. P
- (c) When both of the parties to the marriage-contract apostatize at the same time, and at the same time return to the faith of Islam, then, by a favourable construction of law their marriage is permitted to endure. Q  
2 N.W.P. 370 at p. 374.
- (d) But where after their joint apostasy either the husband or the wife singly returns to the faith, the marriage is dissolved, because one persists in apostasy, and that forbids the continuance of marriage. (*Ibid.*) R
- (e) If the apostasy of the husband and wife took place at different dates it would be necessary for them on returning to the faith of Islam to renew their marriage. (*Ibid.*) S
- (f) A male apostate loses on his apostasy all civil rights. (*Ibid.*) T
- (g) His property at once becomes divisible among his heirs. (*Ibid.*) U
- (h) He is regarded as *civilitur mortuus*, and may by strict Mahomedan law be put to death (*Ibid.*) V
- (i) A female apostate, on the other hand, is not immediately deprived of all civil rights. Her property is not divisible among her heirs until her natural death; her life is not held forfeited. (*Ibid.*) W
- (j) If words of infidelity come to the wife's tongue in anger against her husband, or, in order to extricate herself from the net of his authority, or to entitle herself to a dower against him, by a new marriage (by which we understand that, if she does not in good faith apostatize), she is unlawful to her husband, but she must be compelled to return to the faith, and her husband can renew the marriage at the lowest rate of dower whether she desires it or not, and she cannot marry another man. (*Ibid.*) X
- (k) Hence apostasy on the part of the husband or the wife cancels the marriage-contract, and a mere profession of apostasy on the part of the wife invalidates it to such an extent that it requires to be renewed. (*Ibid.*) Y

(ii) *Strict view of the old Muhammadan Lawyers modified.*

“ Some of the old lawyers, like the author of the Hedaya, hold that apostasy from the Mussulman Faith of either husband or wife dissolves the marriage-tie. This view, however, has been modified in modern times, and the jurists of Bulkh and Samarkand, whose enunciations are regarded as binding in India, have decided as follows—(See Handbook of Mahomedan Law by Ameer Ali, 5th Ed., 1906, pp. 80-92. Z

(iii) *Mussulman married couple simultaneously renouncing Islam.*

When a (Mussulman) married couple simultaneously renounce Islam the marriage remains intact,

**2.—“ When one party shall be of the Hindu and the other of the Muhammadan persuasion ...the laws of those religions ”—(Continued).**

**(iv) Wife adjuring Islam for revealed religion.**

When the wife adjures Islam for a revealed religion, like Judaism or Christianity, her renunciation of the Faith does not dissolve the marriage.

**(v) Husband renouncing Islam and wife continuing in the faith.**

“ When the husband renounces Islam and the wife continues in the Faith the effect on the marriage is different. The accepted doctrine is that the connection becomes unlawful, but if the man were to return to Islam, before the expiration of the period of probation (*iddat*) when the dissolution becomes absolute, there would be no need for a re-marriage between the parties ” See *Handbook of Mahomedan Law* by Amir Ali, 5th Ed, 1906, pp 80-82. **A**

**(vi) Conversion to Islam of a man following any of the revealed religions.**

Conversion to the Islamic Faith on the part of a man following any of the revealed religions (Judaism, Christianity or Zoroastrianism) does not lead to a dissolution of his marriage with a woman belonging to his old creed

For example, if a Hebrew or a Christian husband were to adopt Islam and the wife were to continue in the religion of her race, the marriage would remain lawful and binding. (*Ibid*) **B**

**(vii) Non-scripturalist husband married to a non-scripturalist wife adopting Islam.**

When a non-Scripturalist husband married to a non-Scripturalist wife adopts Islam, the marriage would not be dissolved unless there is a refusal on the part of the wife to adopt the Mussulman Faith. If she adopts Islam the marriage will remain intact. If she does not, the parties are to be separated. But during its subsistence the connection becomes invalid, but not void, and will have all the consequences of an invalid marriage. The latter doctrine is recognised as authoritative. (*Ibid*.) **C**

**(viii) Non-Moslem female married to a non-Moslem husband adopting Islam.**

When a non-Moslem female, whether a Scripturalist or non Scripturalist, married to a husband who also is a non-Moslem, adopts Islam, her marriage would become dissolved under the following circumstances ;

- (a) If the conversion takes place in an Islamic country (Dar-ul-Islam) where the laws of Islam are in force, she will have to apply to the Kazi to summon the husband to adopt the Moslem Faith, and on his refusal to do so the marriage would be dissolved (*In re Ram Kumari*, 18 C. 264.) (*Ibid*.) **D**

- (b) Should the conversion take place in a non-Islamic or alien country (Dar-ul-Harb), the marriage would become dissolved on the expiration of three months from the date of the woman's adoption of Islam? The Calcutta High Court has held in the matter of Ram Kumari (18 C. 264) that India is not a non-Islamic country, and that consequently when a married non-Moslem woman adopts the Mahomedan Faith and thereafter contracts a fresh marriage without applying to a Judge or a Magistrate to call upon the husband to adopt Islam, she is guilty of bigamy. But it does not say what would happen if the Judge or

**2.—“When one party shall be of the Hindu and the other of the Muhammadan persuasion....the laws of those religions”**—(Continued).

Magistrate refused to listen to the prayer of the woman, or the husband declined to accede to her demand. It is to be presumed, however, that the Court's conscience would be satisfied on her making the application, and the first marriage would be regarded as dissolved on the expiration of three months (*Ibid.*) **E**

**(ix) Right of second marriage after dissolution of first marriage.**

When a non-Moslem female married to a husband, who also is a non-Moslem, adopts Islam, and her union becomes dissolved under the provisions of the Mahomedan Law, as stated above, she is entitled to contract a valid marriage in accordance with the Mussulman rites. The issues of such second marriage are legitimate. The decision, therefore in *Sundari Letani v. Petambari Letani* (9 C W.N. 1003) is in conflict with the recognised rule of the Mahomedan Law. (*Ibid.*) **F**

**(x) Non-Moslem husband and wife adopting Islam.**

When a non Moslem husband and wife, married according to the rights of their professed faith, subsequently adopt Islam, their marriage remains intact; but in practice, it is considered expedient to contract a fresh marriage according to Mahomedan rights. After their adoption of the Mussulman religion their rights and status are subject to the Mussulman law. This principle has been enforced by the Judicial Committee in the case of *Skinner v. Skinner*. See 25 I.A. 34=25 C. 531=2 C W N. 219. (*Ibid.*) **G**

**(10) Effect of conversion on the status of marriage according to the Mahammadan Law—Extracts from the writings of Muslem jurists.**

(a) “When the parties are *Mustamins* (non-Moslems who have taken up their abode in an Islamic country under the guarantee of protection), an absolute separation is effected between them by presenting Islam to the other, or by the expiration of three terms. The terms in these instances do not constitute an *iddat*, and for that reason there is no difference between a wife with whom co-habitation has taken place and one with whom it has not, and whenever a separation takes place on this account before consummation, there is no *iddat*, nor is there any, though the separation should take place after consummation, if the woman be an alien non-Moslem, and even though she were a Moslemah, the result would still be the same, according to Abu Hanifa. If the woman, from extreme youth or advanced age, is not subject to the courses, the separation cannot be effected except by the expiration of three months, and if the woman be the convert to Islam, and her husband should come from the *Dar-ul-Harb* as a *Mustamin*, there can be no separation, except by the completion of three terms. And in like manner if he should become a *summi*, after having come out a *Mustamin*, so that if his wife should afterwards follow him, Islam is to be presented to him; and if he adopt it, no separation is to be made between them. And so also if the husband be the convert, and the wife comes out as a *summa*, there is no separation till she has had her *terms*, and should separation take place by the completion of three terms, it is reported in the *Syar Kabir* that this would amount to a separation by *talak*, according to Abu Hanifa and Mohammed”. See *Dar-ul-Mukhtar cited in Ameer Ali's Mahomedan Law*, 2nd. Ed., Vol. II, pp. 345, 346. **H**

**2.—“When one party shall be of the Hindu and the other of the Muhammadan persuasion... the laws of those religions”—(Concluded).**

- (b) “Apostasy from Islam, by either of a married couple, is a cancellation of their marriage, which takes effect immediately without requiring the decree of a Judge, and without being a *talak*, whether it takes place before or after consummation; yet, if the husband be the apostate, the wife is entitled to the whole dower when consummation has taken place, and half when it has not”. See *(Ibid)*. I

**(11) Divorce Act (IV of 1869) not applicable to Mahomedan converts to Christianity.**

The Indian Divorce Act was intended to apply to such marriages as are recognized as marriages by Christians, and not to polygamous contracts, such as are the unions known as marriages to the Mahomedan law. Such Polygamous contracts are not a subject to the jurisdiction of the Courts created by the Indian Divorce Act of 1869, 2 N W.P. 370. J

**(12) Suits for restitution of conjugal rights by a Mahomedan convert to Christianity.**

Where persons of the Mahomedan faith are married according to the Mahomedan law, and either party becomes a convert to Christianity, a claim for restitution of conjugal rights cannot be supported. 2 N. W.P. 370. K

**(13) Effect of change of religion on the obligation to maintain relatives under the Mahomedan Law.**

As to whether, the obligation to maintain relatives is not, in British India, affected by either party ceasing to profess the Mahomedan religion the case stands thus —“The Mahomedan Lawyers say, that maintenance is not where there is a difference of religion, except to a wife, both parents, grandfathers and grandmothers, a child and the child of a son. But Act XXI of 1850 has abrogated it to the extent, that if a Mahomedan becomes a christian and afterwards falls into poverty and infirmity, while his brother remains a Mahomedan and rich, the latter must maintain the former. But if the apostate becomes rich while the mo-lem brother remains poor and infirm, this is not contemplated by Mahomedan Law, since by it, the apostate is to fly for his life. Nor is such a case covered by the words of the Act. But the legislature cannot have intended that a man should be able by changing his religion to relieve himself of responsibilities while retaining the corresponding right. Again, if one of two brothers originally christians become a Mussalman, no obligation would exist in either way. For the Mahomedan Law had no application to either when the relationship commenced, and there is no reason or authority to allow a person, by changing his own religion, to impose a new personal law upon another person.” See Wilson’s Digest of Anglo Mahomedan Law, S. 156 and Notes. L

**(14) Apostasy—Dissolution of marriage—Singha Jats of Tarn Taran—Custom in Punjab.**

In a suit the parties to which were Singha Jats of Tahsil Tarn Taran, District of Amritsar, found that no custom had been established whereby apostasy caused a dissolution of marriage. 152 P.R. 1890. M

1. So much of any law or usage now in force within the territories subject to the Government of the East-India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of caste to cease to be enforced.

(Notes).

General.

(1) **Loss of Caste—Succession under Oudh Estates Act (I of 1869)**

S. 22 of the Oudh Estates Act contains a complete Code of Succession *ab intestato* and the person designated as next heir by that section does not forfeit his inheritance by having changed his religious faith. S.C. 171. (Oudh). N

(2) **Estate of deceased widow who lived a life of unchastity—Right of step-son to inherit—Right to inherit estate of degraded person.**

(a) The step-son of a deceased Hindu widow sued as heir for possession of certain property. The defence was that the widow had deserted her husband in his lifetime and lived a life of unchastity and that the plaintiff's right of inheritance was in consequence destroyed. *Held*, that assuming the widow to have been guilty of unchastity and to have been actually degraded for it, plaintiff's right to inherit her property in the absence of nearer heirs could not be affected by such degradation. 23 M. 171. O

(b) The Act does not apply where the question is not as to the rights of a degraded person, but as to who is entitled to the property of a degraded person. 23 M. 171. P

(3-4) **Act how far has affected rules of Hindu Law.**

Having made the observations cited above, their Lordships Subramaniya Iyer and Boddam, JJ., went on to state.—“Having thus determined to what persons the Act is applicable, we have to consider how and to what extent the Act has affected the Hindu Law applicable to those persons. Under the Hindu Law a person who lost caste by being expelled therefrom for specified reasons forfeited whatever rights he might have had if he had remained in caste. That loss of caste created in him a disability to enjoy the rights incident to his relationship with those who remain within the caste. But it never broke that relationship. Whether the relationship be one of husband and wife or any other, it was too sacred to be dissolved, by the disabilities imposed on the out caste few or many as may be inferred from *Bisheshur v. Mata Chulam*, 2 N.W.P.H.C.R. 300, *Queen Empress v. Marimullu*, 4 M. 249 and *Administrator-General of Madras v. Anandachari*, 9 M. 466, which show that the degradation of either spouse does not dissolve the marriage, and the circumstance that, in general, it is open



**General—(Continued).**

to an outcaste, on his undergoing expiation, to resume his former position, strongly points to the view that degradation had the effect of rendering the tie of kindred but dormant. It is almost impossible to construct out of the *smritis* and commentaries a consistent doctrine of 'civil death' or as it has been called "fiction of death." Now turning to the language of the Act itself, it clearly indicates that all that the Legislature intended to do was only to remove some of the disabilities which pre-existed under Hindu Law. Here, we must not be understood as laying down that the Act places the outcaste in every respect in the position which he could occupy if he had not been put out of caste or restores to him all the rights which he as a casteman could have civilly enforced. It does not contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste. Nor does it interfere with the forfeiture of rights such as were in question, in *Venkatachallapathi v Subbrayadu*, 13 M. 293 at p. 299 and in *Krishnasami v. Vrasami*, 10 M. 133. As was pointed out by Muttusami Iyer, J., in the former case "a right consisting in the participation along with other members of a caste in the benefits of a religious institution appropriated to the members of the caste is not within their (Acts XXI of 1850 XV of 1856) purview."

Such being the construction of the Act it is obvious that the Act is inapplicable to cases where instead of a degraded person's right being in question, the Courts have to ascertain who is entitled to the property of a degraded person. 23 M. 171 (174—176). Q

**(5) Scope and application of the section.**

Though Act XXI of 1850 gives relief against the forfeiture of rights of persons deprived of caste on other grounds besides that of renouncing or being excluded from the Hindu religion, it does not restore to an outcaste all the rights which he, as a casteman, could have civilly enforced. 23 M. 171. R

**(6) Privileges of convert which would interfere with the autonomy of caste.**

The Act does not contemplate the restoration of privileges the granting of which would amount to an interference with the autonomy of caste 23 M. 171. S

**(7) Right to participate in benefit of religious institution.**

Nor does it interfere with the forfeiture of such a right, as, e g, to participate with other members of a caste in the benefits of a religious institution appropriated to the members of the caste, or to participate jointly with fellow casteman in the benefit of a caste institution. 23 M. 171. T

**(8) Effect of conversion on relationship of parties—Hindu Law.**

(a) Though, under the Hindu law, a loss of caste by expulsion for specified reasons causes forfeiture of rights, it has never broken the relationship of the person expelled to those who remain within the caste, degradation having merely the effect of rendering the tie of kindred but dormant; and, e g, the degradation of either spouse does not dissolve the tie of marriage. It is impossible to construct out of the *smritis* and commentaries a consistent doctrine of "civil death" or "fiction of death". 23 M. 171. U

General —(Continued).

- (9) Act intended to prevent the forfeiture of rights of others than those who are put out of caste on account of their renouncing or being excluded from religion— Case-law on the point reviewed.

(a) The following observations of Subramaniya Iyer and Boddam JJ., throw light on the above point :—“ There is no reason to suppose that in the face of the clear and unmistakable language of the Act, it was intended to prevent the forfeiture of rights of only those who are put out of caste on account of their renouncing, or being excluded from, the Hindu religion. Though, in favour of this view there is the solitary opinion of Mitter, J, in *Key, Kolitany v. Moneeram Kolita*, 13 B L R 1, yet the preponderance of authority is in favour of the conclusion that the Act relieves the forfeiture of rights of those who are deprived of caste on other grounds as well. In *Srimathi Matangini Debi v. Srimathi Jaya Kali Debi*, 5 B.L.R. 466 at p 493. Sir Barnes Peacock, C J., with whom Macpherson, J, concurred, went very fully into the question of the construction of the Act and following the decision of Sir Lawrence Peel in *Doed Sammonney Dossee v Nemy Churn Doss*, 2 T & B 300, but dissenting from *Rajkoonwaree Dossee v. Golabee Dassee*, (1858) S.D A., 1891 at p. 1895, arrived at the conclusion that the Act “ was an enactment, that, in suits between Hindus, loss of property by deprivation of caste should not be enforced.” In the North West Provinces the above case was followed in *Bhujjaun Lal v Gya Pershad*, 2 N.W.P. H.C. 446, and in another case also, *Taj Singh v. Musst. Kousilla*, 1 Agra H.C.R. 90, the same construction was put. In the Bombay case, *Parvati v. Bhuhu*, 4 Bom. H.C.R. (A.C.), 25, Westropp, J., in consultation with the other Judges of the Court, decided that by Act XXI of 1850 deprivation of caste was no longer capable of working a forfeiture of any right or property or affecting any right of inheritance whatever may be the cause. The same view was reiterated in *Honamma v Timunnabat*, 1 Bom 559. Turning to the Madras Presidency, a view as to the meaning of the Act similar to that taken elsewhere has been more or less explicitly adopted. As pointed out by Sir Barnes Peacock in the case already cited, the observation of Sir C. Scotland in *Pandasya Telaver v. Puli Telaver*, 1 M H.C.R. 478 at p 482 implies that he was inclined to construe Act XXI of 1850 as Sir Barnes Peacock did. In *Karuthedatta v. Mele Pullakkat Vasudevan Nambudri*, 1 Ind. Jur. N.S. 236, Holloway and Collett, JJ, held that a Nambudri who had been put out of caste for adultery did not, in consequence of Act XXI of 1850, lose his right to deal with, hold or inherit property. 23 M. at pp. 174, 175. V

- (b) “ Nor is there good foundation for the suggestion that the Legislature could not have intended by Act XXI of 1850 to provide for other than degradation on the ground of change of religion. The acts which, under the Hindu Law, would have rendered a person ‘*paththa*’, ‘fallen’ or ‘degraded’, were by no means few. And even such among these as would exclude the ‘*paththa*’, from inheritance consisted, not of heinous offences and sins only, but also of such as would hardly be considered in the present state of society as deserving forfeiture of rights. To take an illustration,

**General—(Continued).**

among the '*mahapathakas*' on account of which an out-caste may be excluded is '*surapana*' or drinking liquor. Can it be held that because a person drinks liquor, his property is forfeited to him? Indeed, such a system must be, as a writer observes, "altogether impracticable in any conceivable state of society." No wonder, therefore, that even before the advent of the British rule, Hindu society was silently freeing itself from the trammels of the peculiar branch of the law as will be seen from Sri Krishna Tarakalankara's observations on the term '*fullen*' quoted in page 426 of the Tagore Lectures of 1884—85. These observations clearly suggest, as pointed out by the learned author of the lectures, that the loss of proprietary rights had become almost obsolete even in the days of that commentator on the *Dayabhaga*. (*Ibid.*) **W**

**(10) Scope of Act—Rule to regulate succession of Hindu after conversion.**

(a) As explained in the preamble, the plain object of the Act is not to confer on any party the benefit of the provisions of Hindu or Muhammadan Laws, but is to prevent the provisions of such laws from depriving any party or parties of any property which, but for the operation of such laws, they would be entitled to receive. 36 P.R. 1909. **X**

(b) In other words, the Act repeals and abrogates so much of the provisions of the laws as by reason of change of religion deprives any party from continuing to hold property held before conversion or from succeeding to property as an heir after conversion. This is what is expressly enacted in S. 1 of the Act, and the section leaves entirely untouched the question, as to what rule of law is applicable to regulate succession after conversion (*Ibid.*) **Y**

(c) This rule of law may be Hindu law, if adhered to despite conversion; but if so, it would be *minus* the rule which causes the forfeiture or excludes from inheritance by reason of change of religion. Or the rule of law might be as contained in some positive enactment of the Legislature. But these are matters altogether beside the scope of this Act. (*Ibid.*) **Z**

**(11) Application of the Act to heirs of convert.**

(a) The Act applies not only to the convert himself, but also to the heirs of the convert 21 P.L.R. 1903 But see 32 C. 871=9 C.W.N. 1003=2 C.L.J. 97. **A**

(b) Although the wording of S. 1 of the Act seems to contemplate the relief of the convert himself, rather than of his descendants, yet these latter may be considered within its scope as persons excluded from the communion of any religion; and this construction avoids any conflict with the preamble which states that the principle of Regulation VII of 1832 is intended to be extended to the other provinces. 77 P.W.R. 1907 See also 11 A. 100. **B**

(c) A Mahomedan convert is entitled to challenge the alienation of ancestral holding made by his Hindu collateral even if remotely related to him. 77 P.W.R. 1907. **C**

**(12) Suit by person born a Mahomedan claiming right as reversioner in Hindu family.**

(a) Where a person born a Mahomedan, his father having renounced the Hindu religion, claimed by right of inheritance under the Hindu law a share in his father's family, held that the Act applied to him also, although

**General—(Continued).**

he had not directly renounced his religion ; and that he was, therefore, entitled to the inheritance. 11 A. 100. See, also, 23 P.L.R. 1903 ; 77 P.W.R. 1907. But see 32 C 871=9 C.W.N. 1003=2 C.L.J. 97. D

(b) Mr. Mayne, in his Hindu Law and usage expresses his inability to support the above decision in 11 A 100 He says —

“ Even with the aid of the Statute it seems difficult to see how a purely personal law, such as the Hindu or Muhammadan law, can be applied in favour of a person who has renounced it.” See Mayne’s Hindu Law and Usage, 7th Ed., P. 806 E

**(13) Construction of the section.**

(a) The operative portion of the section relates to different classes of persons. In the earlier portion, it protects any person from forfeiture of right of property by reason of his or her renouncing their religion or being excluded from caste. This refers to the rights of the *actual* persons renouncing their religion. The latter portion of the section protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This refers to the rights of persons who have not although directly renounced their religion, still are not members thereof owing to their father or some other having previously renounced his religion. Thus the Act protects both classes of persons. 11 A. 100=8 A.W.N. 248. See, also, 77 P.W.R. 1907. But See 32 C 871=9 C.W.N. 1003=2 C.L.J. 97 F

(b) This construction, besides being the natural reading of the section, also gives effect to the intention of the legislature in passing the Act, which is found expressed in the preamble, and to the principle of S 9 of Regulation VII of 1832. (*Ibid*) G

(c) It is wrong to construe the section as applying only to a person who has *himself or herself* renounced his or her religion or been excluded from caste, for, if such a construction is adopted, the Act, instead of extending the principle of S 9 of Regulation VII to the other Provinces, would have limited the relief it was intended to extend. (*Ibid.*) H

**(14) Section applicable to all excommunications from caste—Cause of excommunication immaterial.**

(a) Since the passing of the Act, exclusion from caste, whether by renunciation of religion or from any other cause, is no longer a ground for exclusion from inheritance. 2 N.W.P. 446. I

(b) A Hindu who had been excommunicated from caste by reason of his having cohabited with a Mahomedan girl was held not to forfeit any rights of inheritance possessed by him before such excommunication. (*Ibid.*) J

**(15)\* Degradation of caste—No ground of exclusion from inheritance.**

The mere fact that the plaintiffs (whose near relationship to maintain the suit was established), are out of caste, and that the men of pure blood of their tribe do not eat with them is, of itself, no ground of exclusion from inheritance, Act XXI of 1850, having annulled any such disqualification. 1 Agra 90. K

## General—(Continued).

## (16) Hindu widow—Excommunication for unchastity causes no forfeiture of her rights.

In the case of a Hindu widow mere excommunication from caste although it be for incontinency, cannot effect a forfeiture of any of the rights which she had possessed before such excommunication. 1 B. 559 (4 B.H.C. 25, R). L

## (17) Applicability of Act—Disqualification to inheritance resulting from in chastity—Effect—Hindu Law

(a) Act XXI of 1850 applies only to cases where a person is disqualified from inheriting by reason of change of religion, and not to a case where the disqualification arises from a different cause. 32 C. 871=9 C.W. N. 1003=2 C L J 97 M

(b) It was, therefore, held that a married daughter of a Hindu who, during the life-time of her husband, contracted a marriage with a Mussalman and had sons by him, was not entitled to inherit any share in her father's property, as her disqualification did not arise from her renouncing her religion, but from what the Hindu law considered as in chastity, a position in which she cannot, according to the Hindu law, inherit a share in her father's property. (Ibid.) N

## (18) Effect of Hindu widow's in chastity on her rights of inheritance

(a) "The incontinence of a Hindu widow is a bar to her claiming the estate of her husband." See Mayne's Hindu Law and Usage, 7th Ed, P 80. O

(b) "If her incontinence is of a very aggravated character—as, for instance, the union of a Brahman with a Sudra man, it would involve loss of caste. But that circumstance would not be an element in deciding whether her rights of inheritance were lost. It would not enhance the effect of her in chastity. Nor would the fact that the loss of caste was cured by Act XXI of 1850 remove the effect of the antecedent incontinence." (Ibid.) See, also, 5 B.L.R. 446; 13 B.L.R. 1, 25, 75 P

(c) There seems to be nothing even in the body of the Act, which can render it applicable to the case of a Hindu widow who is guilty of unchaste conduct. 19 W.R. 367 (379). Q

(d) The case of an unchaste widow does not fall within any of the three contingencies contemplated by this section. That it is not a case of renunciation of religion, or of exclusion from the communion of any religion, is almost self-evident, nor can it be said to be a case of loss of caste. Loss of caste might be in some cases the consequence of loss of chastity, but it is not a necessary consequence. The guilty parties might both belong to the same caste, and in such a case there need not be any loss of caste at all; nor is there anything in the Hindu law which says that an unchaste widow forfeits her right, because she has lost her caste. She forfeits it because she is not a 'shadhee' or chaste woman, and there is nothing in Act XXI of 1850 to provide for her case. 19 W.R. 367 (379). R

(e) For an old case in which it was held that a Hindu widow's estate is preserved to her by force of Act XXI of 1850—notwithstanding forfeiture of it according to Hindu law, by reason of her in chastity and consequent loss of caste See *Doe Dem Saummoney Dossee v. Nemychurn Doss*, (1851) 2 Taylor and Bell 300; also reported in the Indian Decisions Old Series, Vol. II, P. 757. S

**General—(Continued).**

**(19) Hindu widow remarrying after she ceases to be a Hindu—Effect on her rights of inheritance.**

There was a conflict of decisions in Calcutta, as to whether a Hindu widow, who had ceased to be a Hindu at the time of her second marriage, loses her rights of inheritance in the estate of her husband by reason of her second marriage. It has now been decided by a Full Bench of that Court that it does. Sec 19 C 289. **T**

**(20) Exclusion from caste for intrigue—Effect on civil rights.**

Exclusion from caste of a Hindu for an alleged intrigue does not involve deprivation of his civil rights to hold, deal with, and inherit property. 1 Ind. Jur. N.S. 236. **U**

**(21) Loss of caste—Hindu convert to Mahomedanism—Succession**

The Mahomedan son of a Hindu father has the same rights of property as if he had remained a Hindu with reference to Act XXI of 1850. Old S. C. 51 (Oudh). **Y**

**(22) Effect of conversion under Hindu Law prior to Act.**

"Whatever property a Hindu who has become a convert to the Mahomedan faith was possessed and seized of previously to his conversion will devolve on his nearest of kin professing the Hindu religion, and whatever he acquired subsequently to his conversion will go to the person who, according to the Mahomedan Law, becomes his legal heir." Case No. 4, p 131, Vol II, Macnaghten's Hindu Law, and cited with approval in 3 Agra 311. **W**

**(23) Loss of caste - Right to give son in adoption.**

(a) A Hindu father not a Brahmin, does not lose his capacity to give his son in adoption by reason of his conversion to Mahomedanism. 25 B. 551=3 Bom. L. R. 89. **X**

(b) But in the case of a Brahmin father, the performance of *Datta homa* being necessary for the validity of the adoption, it is doubtful whether loss of caste does not deprive him of his right to give his son in adoption. (*Ibid*). **Y**

(c) Thus, where a Rajput, whose natural mother was dead and whose natural father had become a convert to Mahomedanism, was given in adoption by his uncle to whom the natural father had given the necessary authority, held that the adoption was valid. (*Ibid*). **Z**

**(24) Right of guardianship, if within purview of Act.**

Rights of guardianship over infants, are rights within the purview of this Act. Held, therefore, the fact that a Mahomedan father had embraced Christianity, did not deprive him of his rights of guardianship of his minor children. 167 I' L R 1901. **A**

**(25) Hindu Law—Loss of caste - Effect on right of guardianship of father.**

(a) A Hindu who is outcasted by his community for attempting to marry his daughter, eleven years old, for a money consideration, to an impotent old man of seventy, does not thereby, according to the Hindu law, lose his right to her custody as guardian. 1 A. 549. **B**

(b) Even assuming that he would lose the right under the Hindu Law, such rule cannot be enforced in the face of this enactment. (*Ibid*). **C**

## General—(Continued).

- (c) But he would lose the right if his change of religion were attended with circumstances of immorality, which showed that his home was no longer fit for the residence of the child. See *R. v. Besonji*, Perry's Oriental Cases 91, cited in Mayne's Hindu Law and Usage, 7th Ed., P. 275. **D**
- (d) Again if the father were applying to the Court for assistance in regaining possession of a child, whom at the time of conversion, he had voluntarily given up to his relation for the purpose of being brought up in the Hindu religion, the Court would not always afford him relief by enforcing his parental rights 25 C. 881. **E**
- (e) The Court would in the above case consider whether the granting of his request would be for the benefit of the infant. 25 C. 881. **F**
- (f) "The right of a father to direct the religion in which his children shall be brought up is so inseparable from his character as parent, that he cannot be bound by an agreement renouncing the right, even though the agreement is made before marriage and was a *sine qua non* to the marriage taking place." *Re Agra Ellis*, 10 Ch. D. 49 **G**
- (g) "But where the father has allowed his agreement to be acted on during his life, and has died without expressing any contrary wish, these circumstances will be taken into consideration as showing that he had abandoned any desire that his children should be brought up in his own religion, especially if it appears that it would be for their temporal benefit to continue in the religion of their mother. *Re Clarke*, 21 Ch. D. 817, *Re Violet Nevill*, 2 Ch. (1891), 299. **H**
- (h) A Hindu father's inherent right to the custody of his children, not only as guardian, but by nature, is a right which is preserved to him by Act XXI of 1850, even though he has renounced the Hindu religion. 5 W.R. 235, 1 Morris Sel. Rep. (1850-51), p. 61 **I**

## (26) Hindu Law—Loss of caste - Right of guardianship of mother.

- (a) "The case of a change of religion by the mother might, however, be different. The religion of the father settles the law which governs himself, his family, and his property. From the very necessity of the case, a child in India, under ordinary circumstances, must be presumed to have his father's religion, and his corresponding civil and social status, and it is, therefore, ordinarily, and in the absence of controlling circumstances, the duty of a guardian to train his infant ward in such religion. Therefore, where a change of religion on the part of the mother would have the effect of changing the religion, and therefore the legal status of the infant, the Court would remove her from her position as guardian." See Mayne's Hindu Law and Usage, 7th Ed., p. 275. **J**
- (b) In the above circumstances "the asserted wish of the minor also, to change his religion, in conformity with that of the mother, would not necessarily alter the case, unless, perhaps, where the advanced age of the minor, and the settled character of his religious convictions would render it improper, or impossible, to attempt to restore him to his former position." 14 M I A. 809 = 10 B L.R., 125. **K**

**General—(Concluded).**

- (c) The fact that a Hindu woman has been outcasted would not deprive her of any right of guardianship of her infant daughter, which she would have otherwise 28 A. 239 = A W.N. (1905), 205 = 2 A.L.J. 663 (1 A. 549, R.) L

**(27) Act, not to affect usage of Hindu temple or other religious institutions.**

- (a) The provisions of this Act were not intended to repeal the usage of Hindu temples or of religious or of *quasi*-religious institutions controlling and regulating their management and prescribing rules as to the place where offerings are to be made and persons from whom they are to be accepted 13 M. 293 (293). M

- (b) "Her Majesty's Privy Council observed with reference to the right of succession to management, that the law to be applied to *mutts* which are *quasi*-religious institutions is what is indicated by their usage. A rule of determination is looked for in the case of such institutions in their usage, because it is an index to the intention of those who founded and endowed them and who have since kept them up. A compliance with such intention is the accepted basis on which those who claim the benefit of worshipping in those institutions can sustain their right to such benefit and unless a person retains his status as a Brahmin or a member of that section of the community for whose benefit Hindu temples exist, he cannot be regarded as coming within the object with which they are founded and maintained." 13 I.A. 105, 11 M.I.A. 405, cited in 13 M. 293 at pp 298, 299 N

**(28) Widow re-marriage - Exclusion from temple—Ex-communication—Jurisdiction.**

Thus, in this case, the plaintiff, who was a *Smarta* Brahmin, but had married a widow (whose first marriage had not been consummated), alleged that he had made a vow to present an offering in a certain temple, and that the defendants, who were the committee of the temple, had obstructed and prevented him from entering the inner shrine (where orthodox Brahmins usually make their offerings), asserting that he was disqualified to enter by reason of his having married a widow contrary to Hindu *sastras*, and he sued for damages for the above obstruction and imputation, for a declaration that he was entitled to enter the shrine as a Brahmin, and for an injunction restraining the defendants from interfering with his exercise of this right *Held*, (1) that the right claimed was of a civil nature and within the cognizance of the Civil Courts; (2) that the question to be determined was not a question of the plaintiff's legal *status* since a Brahmin widow is at liberty to re-marry under Act XV of 1856, but it was a question of caste *status* in respect of a caste institution, (3) that in order to determine the above question, the Courts must inquire (a) what was the usage of the temple as regards admission into the inner shrine for the purposes of worship at the date of the suit, or the presumable intention of the religious foundation as regards such admission, and (b) whether according to such presumable intention of the foundation those who secede from the caste custom as to re-marriage of women are outside the class of beneficiaries as regards the right of admission into the inner shrine as above. 13 M. 293. O





# THE HINDU WIDOWS' RE-MARRIAGE ACT, 1856<sup>1</sup>.

(ACT XV OF 1856.)

[*Passed on the 25th July, 1856.*]

*An Act to remove all legal obstacles to the marriage of Hindu Widows.*

WHEREAS it is known that, by the law as administered in the  
Preamble<sup>2</sup> Civil Courts established in the territories in the  
possession and under the Government of the East  
India Company, Hindu widows with certain exceptions are held to  
be, by reason of their having been once married, incapable of con-  
tracting a second valid marriage, and the offspring of such widows  
by any second marriage are held to be illegitimate and incapable of  
inheriting property ;

and whereas many Hindus believe that this imputed legal in-  
capacity, although it is in accordance with established custom, is  
not in accordance with a true interpretation of the precepts of their  
religion, and desire that the civil law administered by the Courts of  
Justice shall no longer prevent those Hindus who may be so minded  
from adopting a different custom, in accordance with the dictates  
of their own conscience ,

and whereas it is just to relieve all such Hindus from this legal ,  
incapacity of which they complain, and the removal of all legal  
obstacles to the marriage of Hindu widows will tend to the promo-  
tion of good morals and to the public welfare ; It is enacted as  
follows :—

(Notes).

## 1.—“ *The Hindu Widows' Re-marriage Act, 1856.*”

**Act, where declared to be in force.**

. This Act has been declared to be in force in :—

- (a) The whole of British India, except as regards the Scheduled Districts ; *See*  
Laws Local Extent Act XV of 1874, S. 3.
- (b) The Santhal Parganas ; *see* Santhal Parganas Settlement Regulation (III  
of 1872), S 3, as amended by the Santhal Parganas' Justice and  
Laws Reg. (III of 1899).
- (c) The Arakan Hill District ; *See* the Arakan Hill District Laws Regulation,  
1874 (IX of 1874).

**1.—“The Hindu Widows' Re-marriage Act, 1856”—(Concluded).**

(d) Angul District, by the Angul District Regulation I of 1894.

(e) It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act XIV of 1874 to be in force in the following Scheduled Districts, namely :—

(i) Sindh	...	See Gazette of India, 1880, Pt. I, p. 672.		
(ii) West Jalpaiguri	...	Do.	1881	Do. 74.
(iii) The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singbhum	...	Do	1881,	Do. 504.
(iv) Kumaon and Garhwal	...	Do.	1876	Do. 605.
(v) The Scheduled portion of the Mirzapur District	...	Do	1879	Do. 383.
(vi) Jaunsar Bawar	...	Do.	1879	Do. 382.
(vii) The Districts of Hazara, Peshawar Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan Portions of the Districts of Hazara, Bannu, Dera Ismail Khan, Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province, see Gazette of India, 1901, Pt. I, p. 857, and <i>ibid</i> , 1902, Pt. I, p. 575; but its application to that part of the Hazara District known as the Upper Tanawal has been barred by the Hazara (Upper Tanawal) Regulation II of 1900	...	Do.	1886	Do. 48.
(viii) The District of Lahaul	...	Do.	1886	Do. 301.
(ix) The Scheduled Districts of the Central Provinces	...	Do.	1879	Do. 771.
(x) The Scheduled Districts in Ganjam and Vizagapatam	...	Do.	1898	Do. 870.
(xi) Coorg	...	Do.	1878	Do. 747.
(xii) The District of Sylhet	...	Do	1879	Do. 681.
(xiii) The Districts of Kamrup, Nalgong, Darrang, Sibsagar, Lakhimpur, Golpara (excluding the Eastern Dyars) and Cachar (excluding the North Cachar Hills).	...	Do.	1878,	Do. 583.
(xiv) The Garo Hills, the Khasi and Jaintia Hills, the Naga Hills, the North Cachar Hills in the Cachar District and the Eastern Dyars in the Goalpara District	...	Do.	1897	Do. 299.
(xv) The Porahat Estate in the Singbhum District.	...	Do.	1897.	Do. 1059.

(f) It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely :—

(i) The Tarai District	..	See Gazette of India, 1876, Pt. I, p. 505.		
(ii) The Andaman and Nicobar Islands	...	Do.	1882	Do. 148.

**2.—“Preamble.”**

**(1) Construction of statutes—Preamble, reference to.**

Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down.  
16 C.P.L.R. 99 (11 A. 262, 14 C. 176, R) **A**

**(2) Construction of the Act—Punjab Laws Act, 1872, S. 5—Effect on custom.**

“Act XV of 1856 is an authoritative interpretation, as regards the Courts, of the Hindu Law on the subject of the remarriage of a Hindu widow, and the consequences and incidents of such a marriage. In any case in the Punjab to which the Hindu Law is to be applied in furnishing the rule of decision under cl. (b) of S. 5 of the Punjab Laws Act, 1872, Act XV of 1856, must receive full effect as being a legislative exposition of the Hindu Law. But this is quite consistent with the view that the Act does not alter or abolish any custom regarding succession or marriage which is not at variance with S. 1 of the Act, and which, that Act apart, is the rule of decision prescribed by cl. (a) of S. 5 of the Punjab Laws Act” 46 P.R. 1891 **B**

**(3) To whom Act applies**

The words of this preamble show clearly, to my mind, to whom the Act applies, that is to say (upon the narrowest view), to all Hindu widows other than those referred to under the words ‘with certain exceptions,’ who could without the aid of the Act marry according to the custom of their caste. With the latter class of widows we have no concern in the present case. 19 C. 289 (293). (*Per Wilson, J.*) **C**

**(4) Preamble, difficulty arising from terms of.**

The wording of this preamble has given room for the contention that only widows not previously allowed to re-marry were intended to be affected by the enacting sections. In fact the words used in the enacting sections could hardly have been more general or explicit. 16 C.P. L.R. 99 **D**

**(5) Re marriage according to custom and independently of Act—Applicability of Act.**

As to whether the Act is inapplicable to the case of a Hindu widow who could have married apart from the provisions of the Act, See 9 C.P.L.R. 47. **E**

**(6) What is the nature of a Hindu widow's estate under the Hindu Law, apart from statutory enactments—Is it an estate during widowhood and liable to forfeiture upon a second marriage, or is it free from any such restriction.**

On the above point the following observations of Wilson, J. may be noted:—

“It is the general rule of Hindu Law, as stated by the Privy Council in *Moniram Kohla v. Keri Kohlani*, 5 C. 776 (788) ‘that an estate once vested by succession or inheritance is not divested by any act or incapacity which, before succession, would have formed a ground for exclusion from inheritance,’ and it was therefore held not to have been established that the estate of a widow formed an exception to the rule. But it is equally clear that there were grounds, which, under the Hindu Law, caused a forfeiture of a vested estate. Change of religion did so before Act XXI of 1850 and the Regulations that preceded it. Degradation from caste had the same effect as is pointed

**2.—“Preamble”—(Continued).**

out by the Privy Council in the case above referred to at page 792. We have to say whether a second marriage is a circumstance, like those just mentioned, which determines a widow's estate.

We cannot expect to find express texts on this point in the usual authorities on Hindu Law, because second marriage was a thing they did not contemplate. We cannot expect more than an indication of the view they took of the nature of a widow's estate

The view is clearly expressed in the text of *Vrhaspati* which *Jimutavahana* makes the basis of his reasoning on the subject of a widow's estate (*Dayabhaga* XI, 1), “of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive?” This is difficult to reconcile with a right in a widow who ceases to be the wife or half of the body of her late husband, and becomes the wife and half of the body of another man, to keep the estate of her late husband. The view that on principle a second marriage determines a widow's estate is strengthened by the fact that where second marriages were sanctioned by custom, the further rule seems almost always to have followed, that such re-marriage entailed a forfeiture of the first husband's estate. See the cases cited in Mayne's Hindu Law, section 512, and in West and Buhler, Bk I., ch 2, S 7, Q. 1 (3rd ed., p 429) and again the adoption of the rule of forfeiture on second marriage in the Hindu Widow's Marriage Act (XV of 1856) seems to be an indication that the Legislature considered that rule to be in accordance with the principles of Hindu Law. It, therefore, we had to decide this case upon the principles of Hindu Law, and without reference to express legislative enactments, I should be disposed to hold that the widow's estate was determined by her marrying a second time, and I do not think this would be in any way inconsistent with what was held in *Moniram Kolta v. Keri Koltani*, 5 C. 766, namely, that a widow's estate is not forfeited by unchastity during widowhood, for there seems to me to be a very broad distinction between misconduct on the part of a widow, as a widow, and her ceasing to be a widow.” 19 C. 289 (292)—(*Per Wilson, J*) **F**

**(7) Act was passed on the request of the Hindus themselves.**

“Our Legislature has on principle been slow to interfere with the marriage laws of India, and in the legalizing of widow marriage, its interference was not gratuitous, but was sought by the Hindus themselves. Pandit Iswar Chandra Vidyasagar, pointed out in his celebrated tract, that the remarriage of widows was not unauthorised by the sastras; and his opinion was accepted by a considerable body of his educated countrymen. And it was to meet their wishes that the Legislature felt induced to pass Act XV of 1856. This we learn from the preamble to that Act.” See Gooroodass Banerjee's Marriage, and Stridhana, Tagore Law Lectures for 1878, 2nd Ed., 1896, p. 256. **G**

**(8) Remarks on the provisions of the Act.**

(a) The Act does not give any rules for determining the eligibility of parties for marriage (*Ibid.*), p 258. **H**

(b) It is clearly its intention that this matter should be governed by the ordinary rules of Hindu law. (*Ibid.*), p. 258. **I**

2.—“*Preamble*”—(Continued).

- (c) “But these rules are not sufficient to meet every point which might arise in connection with the re-marriage of widows. Thus, one of these rules of selection requires that the parties to marriage should be of different *gotras*; but what is to be regarded as the *gotra* of a widow—the *gotra* of her father, in which she was born or that of her deceased husband, to which she has been transferred by marriage? *Vidyasagara* maintains that her father's *gotra* is to be deemed the *gotra* of a widow for the purposes of her re-marriage; and, considering that her father or some other paternal relation is still her guardian in marriage, I think that view is in accordance with the intention of the Act. Again, the ordinary rules about prohibited degrees do not prohibit the marriage of a man with the mother of his wife, however repugnant to our feelings it may be. No express rule for the prohibition of such marriage is, however, necessary in the Hindu law, as it prohibits widow marriage altogether. But now that widow marriage has been legalised, the want of such prohibition may be deemed a defect in the law in theory, though, in practice, the universal feeling of repugnance to such improper unions would be sufficiently to supply the place of prohibitory rules.” (*Ibid.*), p 259 J

(9) Remarks on the provisions of section 2.

- (a) “S. 2, which is a very important one, may call for some explanation. In the first place, its language is not free from ambiguity, and a literal construction involves an anomaly.” (*Ibid.*), p 259. K
- (b) “Thus, suppose that a Hindu dies, leaving a son and a widow. The son takes his estate, and the widow is entitled only to maintenance. Upon the death of the son, in the absence of any nearer heir, his mother would succeed to the property which he inherited from his father. If now the mother were to remarry, this section would clearly divest her of the property, and her son's next heir would take it. But suppose that the mother had remarried previous to her son's death. Would she be entitled to succeed to the property in that case? This question arose before the High Court of Bengal in the case of *Akorah Sooth v Boreani*. Mr. Justice Kemp answered it in the affirmative, holding (upon a literal construction of the section) that, at the time of her re-marriage, the widow had no rights in her deceased husband's property by inheritance to him or his lineal successor, which could cease and determine, and that, under the saving clause in S. 5, she does not by re-marriage forfeit any right, which she may subsequently acquire over it. But his colleague Mr. Justice F. Jackson differed from him, and in delivering judgment said: ‘But it is said that the widow had no such rights at the time of her re-marriage, and such rights did not, therefore, cease and determine, that the law, in fact, alludes only to such property as the widow had inherited before her re-marriage. I think that the words of the Act bear a more extended signification and that ‘upon her re-marriage’ should not be read as at the date of such re-marriage but with reference to such re marriage. All rights which the widow has in her deceased husband's property, by inheritance to him or to his lineal successor, ceases by reason of her re-marriage, and in consequence of her re-marriage, as if she had then died, and, thereupon, that is, when her right has ceased the next heir shall inherit. The policy of the law appears to me to be one

2.—“*Preamble*”—(Continued).

which is generally acknowledged in all society, and which is, perhaps, more especially required to be put in force in Hindu society, *viz.*, that the widow by re-marriage shall not take her late husband's property away from his family, and into the hands of her new husband." On appeal under S 15 of the Letters Patent, the decision of Mr. Kemp was upheld, but Mr. Justice Louis Jackson observed,—“The words of S. 2 are somewhat embarrassing, and the impression left on my mind is, that the Legislature had an intention which it has failed to carry out in words. I can hardly suppose that the Legislature intended a Hindu widow to be capable of inheriting the property of her son, she having previously remarried, when, if she had remarried while in the enjoyment of such property, she would have been by such re-marriage entirely divested of that property. For although it is true that if the son had been living at the time of her re-marriage, in certain circumstances, he would have had the option of depriving her of the succession, or confirming it on her, still it might, and probably would in most instances, happen that at the time of re-marriage, the son was an infant. But it is not our province to set aside the clear meaning of the words of the Legislature merely for the purpose of getting rid of apparent inconsistencies.” (*Ibid.*), pp. 259-261. **L**

(c) “In the second place, you will observe, that it is only with reference to the property of her deceased husband, that re-marriage deprives a widow of her rights; so that, if her son acquires any other property besides that inherited from his father, her right to such acquired property, as heir to her son would not be affected by her re-marriage” (*Ibid.*), p. 261. **M**

(d) In the third place, the widow's right as regards her share of her late husband's estate on partition among her sons not coming within the scope of S 2, would not, it seems, be affected by her re-marriage, though it may, on the other hand, be contended that her right to such share is by way of maintenance (*Ibid.*), p. 261. **N**

(e) Though re-marriage under Act XV of 1856 would deprive a widow of her rights in her husband's estate, the question may arise, how far section 2 of the Act would affect the rights of a Hindu widow remarrying according to the custom of her caste, tribe or sect, which sanctions such re-marriage independently of Act XV of 1856. (*Ibid.*), pp. 261, 262. **O**

**N.B.**—All the case-law bearing on the above point has been noted under S. 2, *infra*.

**N.B.**—2. But the question is practically of little importance, as is generally found that, wherever the re-marriage of widows is allowed by custom, their rights to the estate of their deceased husbands are taken away by the same custom. (*Ibid.*), p. 262.

(f) A further question may arise touching the effect of re-marriage upon a widow's right in her late husband's property. Suppose that a Hindu widow renounces her religion (a circumstance which by Act XXI of 1850 would not affect her rights), and suppose that she then re-marries according to the law of the sect to which she becomes a convert or according to Act III of 1872, if it applies to her. Would such re-marriage divest her of her rights in the property from her deceased

2.—“*Preamble*”—(Concluded).

husband? Clearly section 2 of Act XV of 1856 is inapplicable to such a case; and accordingly it was once held that her re-marriage in such cases would not deprive her of the estate inherited from her deceased husband. But the correctness of this decision seems to be open to question. For though the enjoyment of the deceased husband's estate by the widow may not be conditional upon her continuing chaste it seems to follow from the spirit, if not from the letter, of the Hindu law, that it is conditional upon her remaining a widow.

The decision above referred to has since been overruled by a Full Bench, the majority of the Full Bench being of opinion that the case comes under section 2 of Act XV of 1856. 19 C. 289. (*Ibid*). pp. 262, 263 P

1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed<sup>1</sup> to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Marriage of Hindu  
widows legalized

(Notes)

General

(1) **Validity of widow re-marriage—Question to be decided not by custom but by the Act.**

• It is not open to the Courts after the enactment of this Act, to discuss the question of the validity of a widow's marriage, as if determined by custom, in the face of the clear provision of law, in S 1 of the Act. 61 P R. 1905=155 P L R 1905 See, also, 15 P.L R. 1907. Q

(2) **Re-marriage of widow with cousin of deceased husband—Presumption of legality.**

Where a Hindu widow belonging to the Gaur Rajput caste re-married a cousin of her deceased husband, held that under the Act the presumption was in favour of the legality of such marriage, until the contrary was shown that according to the custom of that caste such a marriage was prohibited. 8 A. 143. R

(3) **Marriage by *chadar andazi* between a *Khatril* and a *Khatrani* widow—Legitimacy of children of such marriage**

A marriage by the *chadar andazi* form between a *khatril* and a *khatrani* widow is valid and legal under the provisions of Act XV of 1856 as a form of marriage giving the status to the woman of a lawful wife, and making the offspring legitimate and entitled to inherit. 4 P.R. 1905=20 P. L.R. 1905. S

(4) ***Ibid*.—Marriage in *karewa* form.**

A marriage in the *karewa* form between a *khatril* and a *khatrani* widow is valid, and their offspring legitimate. 61 P.R. 1905=155 P L.R. 1905. T



**General—(Concluded).****(5) Hindu Law--Rights of re-married widow against distant kindred of husband.**

In the case of the widow of a Hindu who died without any heirs of distinct right, it was *held* that the widow was his absolute heir, and the claim of remote relations of her husband, of a degree not precisely ascertained, to property not descended from any common ancestor on the ground of the re-marriage of the widow was overruled. Old S.C. 82 (Oudh).      **U**

**(6) Hindu Law contemplates no re-marriage—*Mitakshara* and *Dayabhaga*.**

The two leading commentaries, the *Mitakshara* and the *Dayabhaga*, and the other commentaries, do not contemplate the case of a widow marrying and getting a son whilst enumerating the heirs of a deceased person; and this indicates that the custom of invalidating such marriages is at least as old as the period of the digests during which the Hindu law as deduced from diverse sources was consolidated by a process of interpretation into a homogeneous system. 13 M. 293.      **Y**

**(7) Custom against re-marriage of widow—Concurrent finding of lower Courts—Finding cannot be questioned in second appeal.**

Where both the lower Courts found as a fact that the general custom among the Brahmin community as it stood prior to Act XV of 1856, forbade the re-marriage of widows, and condemned those who infringed it to exclusion from caste, *held* that this finding could not be questioned in second appeal. 13 M. 293.      **W**

**1.—“Betrothed”****(1) Betrothment, what is.**

- (a) “The betrothment generally precedes marriage, but is not a necessary part of the nuptial rite.” (Gooroodass Banerjee's *Marriage and Stridhana*, Tagore Law Lecture for 1878, 2nd Edition, 1896, p. 82. **X**)
- (b) “Betrothment is a promise to give a girl in marriage. It is called *vagdana*, or gift by word, as distinguished from gift by actual delivery of the bride, and its form is that of a promise by the father or other guardian of the bride in favour of the bridegroom, to give him the bride in marriage. After betrothal, and separated from it by a variable interval, there comes the marriage ceremony.” (Gooroodass Banerjee's *Marriage and Stridhana*, 2nd Edition, 1896, p. 83. **Y**)

**(2) Legal effects of betrothal in Hindu Law.**

“Regarding the legal effects of betrothment, there is some difference of opinion. Some hold that betrothment, even in its strict and correct sense, constitutes marriage, and it has been accordingly sometimes contended that it is irrevocable, and that a suit would lie to compel specific performance of a contract of betrothal. There seems to be some authority in the Hindu law for such a contention. Thus a text of Manu declaring that “the damsel indeed whose husband shall die after troth verbally plighted, but before consummation, his brother shall take in marriage, &c,” shows that after betrothment the bridegroom is considered as the husband of the bride. So again, a girl betrothed to one person, but subsequently married to another, is regarded by some sages as a twice-married girl, and Raghunadana, in the *Suddhantia*, holds that, on the death of a damsel

**1.—“Betrothed”—(Continued).**

verbally betrothed, the families, both of her father and her husband, contract impurity for three days. There are also cases decided by the Sudder Dewani Adalat at Bombay, which seem to support this view. But the more correct view is that which regards betrothment as a revocable promise of marriage not constituting actual marriage, though such revocation would be improper if without a just cause, and this is the view which is in conformity with actual practice, and has received judicial sanction. It is amply supported by texts, of which the following may be cited as instances. —

- (a) “The nuptial texts are a certain rule in regard to wedlock, and the bridal contract is known by the learned to be complete and irrevocable on the seventh step of the married pair hand in hand, after those texts have been pronounced.”—Manu, VIII, 227. **Z**
- (b) “If her husband die after a damsel has been given to him with water poured on his hands, and troth verbally plighted, but before she has been contracted to him by holy texts, that virgin belongs to her father alone.”—Vasistha. **A**
- (c) “Previous to the union of man and wife, the betrothal takes place, the betrothal and the marriage ceremony together constitute lawful wedlock.”—(Narada, XII, 2.) **B**
- (d) “Once is a damsel given in marriage he who detains her shall incur the punishment of a thief, but if a worthier bridegroom offer, he may take the damsel, though given away.”—(Yajnavalkya I, 65.) **C**

**N.B.**—This last text is cited in the *Mitakshara* as authority for the position that one does not incur any penalty for retraction of a promise of betrothal if there be just cause, and the case of retraction of such promise without sufficient cause is thus provided for in that treatise.

- (e) “One who has verbally given a damsel in marriage, but retracts the gift, must be fined by the king in proportion to the amount of property or the magnitude of the offence, and according to the rank of the parties, their qualities and other circumstances. This is applicable if there be no sufficient motive for retracting the engagement.” Gooroodass Banerjee's *Marriage and Stridhana*, 2nd edition, 1896, p. 85. **D**
- (f) According to Raghunandana, marital dominion over a damsel results not from *vaqdana*, but from the actual gift of the bride in marriage. Gooroodass Banerjee's *Marriage and Stridhana*, 2nd edition, 1896, p. 85. **E**

**(3) Specific performance of contract of betrothal, if can be granted.**

“The question whether specific performance of a contract of betrothal can be enforced by a suit has been sometimes raised. Sir T. Strange was of opinion that it could be so enforced. In some of the earlier cases, it may at first sight appear as if specific performance of the promise of betrothal had been decreed. When examined, however, they amount merely to this, that the Court directed the betrothal or promise of marriage to be carried into effect, and decreed that if it was not carried into effect within a certain limited period, the defendant should pay a certain sum by way of damages. But in a later case, the Bombay High Court held, chiefly upon the authority of a passage of the *Mitakshara*, that betrothal not being complete marriage, specific

**1.—“ Betrothed ”—(Concluded).**

performance of it could not be enforced ; and this decision was followed by the High Court of Bengal in the case of Gunput Narain Singh, 1 C. 74. The point has now been settled by the Legislature, and it has been provided by the Specific Relief Act (Act I of 1877), section 21 clause (b), as explained by the illustrations to that clause, that a contract of betrothal cannot be specifically enforced. But though specific performance cannot be enforced, the party injured by the breach of a contract of betrothal is entitled to recover compensation for any pecuniary damages that might have been sustained, and also for any injury to character or prospects in life which may naturally arise in the usual course of things from such breach ” Gooroodas Banerjee's Marriage and Stridhana, Tagore Law Lectures for 1878, 2nd edition, 1896, p. 86. **F**

**2.** All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died ; and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Rights of widow in deceased husband's property to cease on her re-marriage.

**(Notes).**

**General.****(1) Object of section—Lost right of widow on re-marriage cannot revive.**

(a) Act XV of 1856 was intended to remove all doubts about the legality of marriage of widows, and thereby to allow people to act in accordance with the dictates of their conscience without being troubled by anxiety as to the legitimacy of the children of such connection and the status of the wife. 6 N L.R. 103. **G**

(b) But to be fair to all parties concerned, S. 2 enacted that the rights, of the widow re-married, in her husband's property by inheritance to him or to his lineal successors would upon such re-marriage cease as if she had then died. (*Ibid.*) **H**

(c) It would frustrate the object of the Legislature to hold that the rights thus lost would revive if in the fortuitous sequence of events the succession to the husband again opened out by reason of the next heir after the widow happening to be a female and that female dying in the lifetime of the widow. (*Ibid.*) **I**

(d) Though not expressly yet impliedly, the legislature meant that the marriage, which is a sacrament under the Hindu system, became dissolved, thereby effecting a severance of the connection with the husband, when the widow by re-marriage passed into the family of another person. (*Ibid.*) **J**

**General—(Continued).**

- (e) A Hindu governed by the *Mitakshara* died leaving a widow and his mother. Soon after his death, his widow re-married, and in consequence of such re-marriage, his property passed to his mother, as his next heir. *Held* that on the death of the mother during the lifetime of the widow, the property passed to the nearest *gotraja sapinda* of her deceased son, and not to the widow as next reversioner. (*Ibid.*) **K**

**(2) Scope and effect of the section.**

- (a) This section contemplates the case of the widow's mother, grandmother and great-grandmother re-marrying. Rights of inheritance or of maintenance which the female heir possesses in the property of the late owner at the time of her re-marriage shall cease and determine upon her re-marriage. But a right of property conferred by will which is larger than the widow's estate under the Hindu law, shall not so determine. See Trailokya Nath Mitra's Tagore Law Lectures on Hindu Widow (for the year 1879) Lecture V. **L**
- (b) Where a widow re-marries, and after her re-marriage succession opens as by the death of her son or other descendant. It will not prevent her from inheriting. (*Okhorah Soot v. Dheden Baranee*, 10 W.R. 34). According to this case she only forfeits her rights to property which she has inherited, not her rights of inheritance. See Trailokya Nath Mitra's Hindu Widow (Tagore Law Lectures for the year 1879), Lecture V. **M**
- (c) Again suppose in a province governed by the *Mitakshara* Law the mother, then a *wife* succeeded to the property of her son, and subsequently became a widow and remarried. What will be the effect upon the property which she has inherited from her son? As she did not get the property as a *widow* she ought not to be deprived of it. On the other hand it may be said that she was holding the property as a widow and therefore, she ought to be deprived of it under this section. See Trailokya Nath Mitra's Hindu Widow, Tagore Law Lectures for the year 1879, Lecture V. **N**

See, also, extract from Gooroodas Banerjee's, Marriage and Stridhana, noted under Preamble.

**(3) Forfeiture of right which widow had not at time of re-marriage, if contemplated by section.**

- (a) It was not the intention of the Legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. 2 B.L.R. A.C.J. 199. **O**
- (b) A Hindu died, leaving a widow, a minor son and a minor daughter. The widow re-married after her husband's estate had vested in the son. The son subsequently died, and his step-brother took possession of the property. The widow then sued the step-brother for recovery of the property. *Held* that she could properly succeed as heir to her son, notwithstanding her second marriage. (*Ibid.*) **P**

**(4) Widow's succession, principle of—Effect of re-marriage.**

The principle on which a widow takes the life interest in the property of her deceased husband, when there is no male heir, is that she is a surviving portion of her husband (see *Smith Chandrick* Ch. XI, S. 1, sub sec. 4). And, where the rule as to re-marriage is relaxed and a

**General—(Continued).**

second marriage is permitted, it cannot be supposed that the law which these castes follow would permit of the re-married widow retaining the property in the absence of all basis for the continuance of the fiction upon which the right to enjoyment is founded. 1 M. 226. Q

**(5) Re-married widow, position of—*Mitakshara***

(a) According to *Mitakshara*, a woman who broke through the rule of perpetual widowhood by re-marriage was not a *sadhvi* or chaste woman, nor a woman who could be said to have preserved undefiled the bed of her husband, to have devoted herself to the sacred duty (*vrita*) of honouring his memory, and to have retained her competency to perform the religious acts conducive to his happiness in the next world. 6 N.L.R. 103. R

(b) And these were according to the *Mitakshara* the qualifications pre-requisite to her inheriting her husband's wealth. (*Ibid*) S

**(6) Re-marriage of widow, effect of—Hindu Law—*Dayabhaga*.**

The effect of re-marriage by a Hindu widow according to the principles of Hindu law is to make her forfeit her interest in her first husband's estate in favour of the next heir. According to the text of *Brahmapatna*, which *Jimutavahana* makes the basis of his reasoning on the subject of widow's estate, "of him whose wife is not deceased, half the body survives, how then should another take his property while half his person is alive," *Dayabhaga*, Ch. XI, Sec. 1, if, therefore, a widow ceases to be the wife or half of the body of her late husband, it is difficult to perceive how she can keep the estate of her late husband, and in this view of the matter, re-marriage would entail a forfeiture of the first husband's estate. 8 C.L.J. 542. T

**(7) No analogy between alienation by widow before adoption and alienation before re-marriage.**

(a) There is no analogy between a Hindu widow alienating without legal necessity a part of her husband's immoveable property and then adopting a son, and a widow thus alienating and then re-marrying. 8 C.L.J. 542. U

(b) In the former case, the alienation is valid till the death of the widow, and the adopted son cannot sue to recover possession of the property till her death. (*Ibid*) Y

(c) But, in the latter case, as the very fact of the re-marriage operates as her death in the eye of the law so far as her husband's estate is concerned, the purchaser's title ceases on the re-marriage at once, and the next reversioners are entitled to sue for the recovery of the property without waiting till the time of the widow's natural death. (*Ibid*) W

**(8) Effect of re-marriage on alienations made before re-marriage—Legal necessity**

(a) S. 2 of the Act enacts that the effect of re-marriage of a widow is that her interest ceases and determines, as if she had then died, and the reversionary heir who would be entitled to succeed on her natural death, takes the property at once. 8 C.L.J. 542. X

(b) If the alienation was for legal necessity at a time when the widow had not re-married, the purchaser has obviously acquired a good title, and the reversioners are not entitled to succeed. (*Ibid*). Y

**General—(Continued).**

(c) If, on the other hand, the transfer was without legal necessity, then, the purchaser would have a good title till the death of the widow, natural or civil. And as re marriage effects her civil death so far as her first husband is concerned, the purchaser's title also ceases on her re-marriage, and the next reversioners are entitled to succeed to the property at once (*Ibid*) **Z**

**(9) Alienation by widow not binding on reversioners—Validity during widow-hood—Effect of re-marriage on alienee's rights.**

An alienation made by a Hindu widow which is not for purposes binding on the reversioners, is good only during her widowhood, and only to the extent of her limited interest as widow. Such alienation ceases to be binding on the reversioners on her re-marriage, the widow's life interest also lapsing on that event. 8 Ind. Cas. 269. **A**

**(10) Rights of widow and mother compared.**

A widow's connection with the family of her husband is through and by means of her marriage. When that tie is dissolved, the connection is also dissolved and the legal consequences dependent on it can no longer come into existence. A mother stands on an altogether different footing. She succeeds her son because he is part of her body. This connection through body or blood cannot be put an end to by the mother re-marrying. She remains a mother despite re-marriage, and succeeds as such under S. 3 of Ch. II of the *Mutakshara*. 6 N. L. R. 103 (5 C. P. L. R. 85, 28 M. 425, 26 B. 348, 29 B. 91, F. B. R.). **B**

**(11) Right of re-married mother to succeed to son by former husband.**

(a) S. 2 of the Act does not preclude a Hindu widow who has re-married during her son's life-time from inheriting his property after his death. 28 M. 425 = 15 M. L. J. 245 (2 B. L. R. 199, R.). **C**

(b) The object of the Act was to remove all legal obstacles to the marriage of Hindu widows. Looking to the words of S. 2, it is apparent that it was not the intention of the legislature to deprive a Hindu widow, upon her re-marriage, of any right or interest which she had not at the time of her re-marriage. (*Ibid*) **D**

(c) In the present case, at the time of her re-marriage, the property belonged to her son and she had no right or interest in that property. It came to her by inheritance from her son, who died after her re-marriage. If the son had pleased, he might have given the property to his mother, notwithstanding her re marriage. She had no interest in her deceased husband's property by inheritance to her husband or to his lineal successors. It could not, therefore, cease or determine upon her re-marriage, and if she had died at the time when she re-married the property would never have descended to her. (*Ibid*.) **E**

(d) A Full Bench of the Bombay High Court held that a re-married Hindu widow was entitled to succeed to the property left by her son by her first marriage, who died after her contracting the re-marriage. 29 B. 91 = 6 Bom. L. R. 779. **F**

(e) However, it was observed by Jenkins C. J., (the other concurring) as follows —“ Whatever might have been my view had the matter been uncovered by authority, it would (in my opinion) be wrong to

**General—(Continued).**

disregard a rule affecting rights of property established as far back as 1868 by the decision of a Full Bench of the Calcutta High Court in *Akora v Boreanee* (11 W.R. 82)." (*Ibid.*)      **G**

(f) A Hindu widow after her re-marriage, may inherit property from her son by her first marriage, and it is impossible to avoid the clear language of Ss. 2 and 5 of the Act. 26 B. 388=4 Bom. L R. 73.      **H**

(g) The Hindu law does not exclude a mother who had re-married during the life-time of her son, from inheriting his estate on his death, by reason of such re-marriage. S. C. 253 (Oudh).      **I**

**(12) Hindu widow re-marrying according to custom—Right to succeed to her son's estate.**

(a) A Hindu belonging to a tribe in which re-marriage of widows was allowed by custom, died leaving a mother who had during his lifetime, after his father's death contracted a re-marriage. *Held* that the mother was entitled to succeed notwithstanding her re-marriage. S.C. 253 (Oudh).      **J**

(b) *Held* also that Act XV of 1856 did not apply to this case, that even if it did apply, it would not debar the mother from inheriting her son's estate. *Held* also that there was no tribal custom by which the mother's right of inheritance to her son's estate was forfeited by her previous re-marriage. (*Ibid.*)      **K**

**(13) Power of re-married widow to give in adoption—Son by former husband.**

The right to give a boy in adoption is a right of disposition a portion of *patria potestas* which comes to the widow by reason of her connection with her deceased husband's estate, and being a part of the rights and interests she acquires as a widow, it is included within the provisions of Ss. 2 and 3 of the Act. *Held*, therefore, that a giving in adoption of a son by her former husband, by a re-married widow, rendered the adoption invalid 21 B. 89=1 Bom. L R. 543. But see 10 Bom. L.R. 1134.      **L**

**(14) Arrangement between re-married widow and next reversioner—Whether heirs of such reversioner bound by such arrangement**

Where a re-married widow who had forfeited her rights in her deceased husband's property, was permitted by some arrangement with the next reversioner to retain possession of such property, *held* that on the death of the next reversioner his heirs were entitled to sue for the possession of the property, and that they were not bound by the said arrangement. 1 Agra 140      **M**

**(15) Practice in Deccan—Sudra castes—Forfeiture by widow of husband's estate on re-marriage.**

So far as the inquiries extended which are embodied in Steele's *Hindu castes* it appears that it is the practice of a wife or widow among the Sudra Castes of the Deccan on re-marriage to give up all property to her former husband's relations, except what had been given her by her own parents. 1 M. 226      **N**

**(16) Re-marriage, if to be as Hindu—Re-marrying under Act III of 1872—Forfeiture, if effected.**

(a) In this case a Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of

## General — (Continued).

1872, having first made a declaration, as required by S. 10 of the Act, that she was not a Hindu. The question was whether, by that marriage, she forfeited her interest in her first husband's estate in favour of the next heir. *Held* by the Full Bench (*Prinsep, J.*, dissenting), that under S. 2 of Act XV of 1856, she forfeited her interests in the property of her deceased husband. 19 C 289 (F.B.) (*Overruling* 3 W.R. 206). O

- (b) *Prinsep, J.*, (dissenting) *held* that S. 2 of the Act was not of general application to all Hindu widows re-marrying, but was limited only to the cases provided for by the Act, *viz*, Hindu widows re-marrying as Hindus under Hindu law as provided by the Act (*Ibid.*) P

## WIDOW RE-MARRYING ACCORDING TO CUSTOM, IF FORFEITS HER ESTATE.

### 1 — ALLAHABAD.

#### (1) Custom permitting re-marriage—Applicability of Act.

- (a) This Act was not intended to place under disability or liability persons to whose re-marriage there was no obstacle or hindrance, either by law or custom, or otherwise, before the Act was passed. 11 A 330. Q
- (b) The Act was passed for the purpose of enabling persons to marry *who could not re-marry before the Act*, and S. 2 applies only to such persons. (*Ibid*) R
- (c) *Held*, therefore, that a widow belonging to the sweeper caste, which allowed re-marriage even before this Act was passed, did not forfeit her rights and interests in the property of her first husband on her re-marriage. (*Ibid.*) S
- (d) A Hindu widow belonging to the *Kumri* caste, in which re-marriage was permitted by custom, apart from the Act does not forfeit her right to her former husband's property, by reason of such re-marriage. 20 A. 476. T

#### (2) Widow of *Kumri* caste—Re-marriage permitted by caste—Applicability of section.

A Hindu widow of the *Kumri* caste in which the re-marriage of widows is permitted by custom of the caste independently of the Act, is not by reason of her re-marriage deprived of her right in her deceased husband's property. 20 A. 476 (11 A 330, A W.N. 1889, p. 78, F.) U

#### (3) Widow of the *Ahir* caste re-marrying according to the custom of her caste.

- (a) Act XV of 1856 is an enabling and not a disabling statute. It did not interfere with the rights and status of women who, before its passing, were entitled to marry, but dealt with the case of persons not previously entitled to re-marry, and whom it declared to be entitled to re-marry, subject to the forfeiture provided for in S. 2. 9 A W.N. 78. Y
- (b) *Held* that a widow belonging to the *Ahir* caste in which the re-marriage of widows was, independently of Act XV of 1856, a valid and legitimate proceeding, was not, by reason of her re-marriage, deprived of her right to remain in possession of her deceased husband's estate during her life-time; and that a suit brought during her life-time by the reversioners to the estate of her husband to obtain immediate possession of such estate, could not succeed. 9 A.W.N. 78. W



**General—(Continued).****WIDOW RE-MARRYING ACCORDING TO CUSTOM,  
IF FORFEITS HER ESTATE—(Continued).****I—ALLAHABAD—(Concluded).**

- (4) **Re-marriage permitted by caste—Widow not deprived of property of her first husband.**

Where the rules of her caste recognize the right of a Hindu widow to re-marry, a re-marriage has not the result of divesting her of the property of her first husband. The parties in this case belonged to the *kasodhan* caste. 29 A 122=A.W.N. (1906), 279=3 A.L.J 729.      **X**

- (5) **Re-marriage of widow according to custom—Relationship with family of first husband does not cease.**

The effect of the Allahabad rulings is that the relationship with the family of her first husband does not come to an end, when the Hindu widow is permitted by the custom of her caste to re-marry. 6 A.L.J. 107=31 A 161.      **Y**

- (6) **Custom allowing re-marriage—Decree for maintenance charged on first husband's estate—Effect of re-marriage**

A Hindu widow who according to the custom of her caste is allowed to re-marry, does not forfeit upon re-marriage her right to maintenance decreed to her against the estate of her first husband. 6 A.L.J. 107=31 A. 161.      **Z**

- (7) **Re-marriage valid according to custom and independent of Act—Section does not apply.**

(a) Where according to the custom of the caste and independent of the provisions of the Act, a re marriage is valid, the Act has no application, and there is no forfeiture of her rights to the estate of her first husband under S 2 of the Act. 32 A. 489=7 A L J. 417=6 Ind. Cas. 116.      **A**

(b) *Per Banerje, J.* "This has been the course of rulings in this Court, and although personally we may have hesitation in accepting the view adopted in those rulings, we think we are bound by the uniform course of decisions in this Court, and must therefore hold that S. 2 of Act XV of 1856 is inapplicable to a case like this." (*Ibid*)      **B**

**II.—BENGAL.**

- (1) **Widow re-marrying according to custom forfeits husband's estate—Principle of rule.**

(a) A Hindu widow after her re-marriage forfeits her deceased husband's estate, even though there is a custom of re-marriage in her caste. And this is in accordance with the principle of Hindu law that a Hindu widow is part of her husband, so to speak, and continues his existence for the purpose of representing the property of which he died possessed. 14 C.W.N. 346=5 Ind Cas. 710. (22 C. 589, 22 B 321, *R*); See, also, 19 C. 289 (292).      **C**

(b) *Held*, therefore, that in a suit on a mortgage the mortgagor's widow who had re-married before the institution of the suit could not represent the estate, as the legal representative of her deceased husband. (*Ibid.*)      **D**

## General—(Continued).

WIDOW RE-MARRYING ACCORDING TO CUSTOM,  
IF FORFEITS HER ESTATE—(Continued).

## II.—BENGAL—(Continued).

## (2) Custom of re-marriage in caste—Forfeiture.

(a) A Hindu widow, on re-marriage, forfeits the estate inherited from her former husband, although according to custom prevailing in her caste, a re-marriage is permissible 22 C 589 (1 M. 226, F.; 19 C 289, R.; 11 A. 330, Diss).

(b) The following observations of *Banerji, J.* may be noted —

"The widow's right of succession is based, according to the *Dayabhaga*, on the ground that she is half the body of her deceased husband, and is capable of conferring by her acts spiritual benefit on him. The widow takes her husband's estate, not because of past relationship, not because she was the wife of the deceased, but because of the continuing relationship, because she is still the *patni* (wife) of the deceased. This is abundantly clear from Chapter XI, section I of the *Dayabhaga*, and in particular from paragraph 2 of that section, and, if that is so, it follows, as a necessary consequence, that the estate of a Hindu widow can last only so long as she continues to be the wife and half the body of her deceased husband, that is, only so long as the relationship, by reason of which she inherits, continues, and the estate must be held to determine when she must cease to be the wife of her late husband and half his body, by marrying another person. In other words, the Hindu widow's estate must be taken to be an estate during widowhood. This view has been recognized in the Hindu widows' Marriage Act (XV of 1856), section 2 which declares that a widow re-marrying loses all her rights in her deceased husband's estate. It is also recognized in cases where the marriage of Hindu widows is allowed by custom *Munujay v Veeramakali*, 1 M 226. See also the case cited in West and Buhler's Digest of Hindu Law, Bk. I, ch. 2, S. 7, Q. 1 (3rd Ed., p. 429). The widow's change of religion cannot, I think, in any way affect the present question. It is true that by Act XXI of 1850 abjuration of Hinduism cannot cause forfeiture of the widow's estate, but it can neither, on the other hand, have the effect of enlarging or altering the nature of that estate. The widow therefore, by re-marrying must, I think, be taken to have lost the estate that she inherited from her deceased husband. I should here add, however, that I am not prepared to hold that section 2 of Act XV of 1856 governs this case. Though S. 2 taken alone may be general in its terms, it must be read along with the other provisions of the Act, and the words 'any widow' occurring in the section must be taken to mean any widow to whom the Act applies and for whom it was intended, that is, any widow who is a Hindu, not only at the time of her succession, but also at the time of her re-marriage, and the word "re-marriage" in the section must be taken as meaning re-marriage contracted under the Act in accordance with Hindu ceremonies. And as the re-marriage in this case was not contracted in accordance with Hindu ceremonies, but under Act III of 1872, and after the widow had ceased to profess the Hindu faith, section 2 \*

**General—(Continued).****WIDOW RE-MARRYING ACCORDING TO CUSTOM,  
IF FORFEITS HER ESTATE—(Continued).****II.—BENGAL—(Concluded).**

of Act XV of 1856 cannot have any application to her. I think it also necessary to add that the case of *Moniram Kohita v. Keri Kohitani*, 5 C. 776, so much relied upon on behalf of the respondents, does not at all touch the present question. All that was decided in that case was that chastity is not a continuing condition for the subsistence of a Hindu widow's estate. That does not show that the continuance of widowhood or of the relationship by reason of which the widow succeeds is not necessary for the continuance of the widow's estate." 19 C. 289 (295, 296) — *Per Banerje, J*      **F**

- (c) The question is, "I think, concluded by S 2 of the Hindu Widows' Marriage Act, XV of 1856, and I do not think it necessary to express any opinion on the other points which have been mentioned in arguments and which are discussed in the judgment of the Judges who constituted the referring Bench. Section 1 no doubt relates to marriages between Hindus, but S. 2 includes all widows who are within the scope of the Act, that is to say, all persons who being Hindus become widows, and it must follow from this that if any such widow marries, she is deprived by the section of the estate which she inherited from her Hindu husband. The words are clear—"All rights which any widow may have in her deceased husband's property by inheritance to her husband," the estate which a Hindu widow takes upon her husband's death in his property is an estate which she takes by inheritance to him, and such estate is expressly determined by the section."

My answer to the question is, that by marriage the widow forfeited her estate in her first husband's property in favour of the next heir." 19 C. 289 (299) — *Per Petheram, C J.*      **G**

**III —BOMBAY.****(1) Widow re-marrying according to the custom of her caste—Effect on her rights.**

- (a) Under S 2 of the Widow Re-marriage Act (XV of 1856) a Hindu widow belonging to a caste in which re-marriage has been always allowed, who has inherited property from her son, forfeits by re-marriage her interest in such property in favour of the next heir of the son. 22 B 321.      **H**

- (b) The following observations of Ranade, J. are worthy of being noted —

"The learned counsel on both sides in the argument before us admitted that the preamble to the Act was at variance with its enacting clauses. The preamble evidently favours the view that the Act was not intended for all classes of Hindu widows. It recognizes the fact that there were certain exceptions to the custom prohibiting the re-marriage of widows, and it goes on to state that, with a view to relieve persons who were inclined to disapprove the customary prohibition, the Act was promulgated. The enacting clauses, however, observe no such reserve, and the words used are as general as they can well be, and there is no special section preserving to the castes in which re-marriage was permitted full recognition of their customary rights."

**General—(Continued).****WIDOW RE-MARRYING ACCORDING TO CUSTOM,  
IF FORFEITS HER ESTATE—(Continued).****III.—BOMBAY—(Concluded).**

It appears to me that this variation between the preamble and the enacting clauses was not the result of any oversight, but that the Legislature deliberately used the more general words in section 2 of the Act, because it found that, while the custom of prohibiting re-marriage obtained in certain castes, and did not obtain in others, in the matter of forfeiture by the widow of all interest in her first husband's estate, there was no such divergence. So far as this Presidency is concerned, this is obvious from the information collected by Government, and published in Steele's Law and Customs of Indian castes. At pages 364-65 the names of the castes in the Dekkhan, among whom Pat marriages were allowed or forbidden, are given, and at page 424, mention is made of the castes in which, when a widow performed Pat, her husband's relatives succeeded to her husband's estate. This last list includes some sixty castes, the great *Kunbi* caste to which the parties here belong, and all castes which are usually engaged in agriculture and manual industry. There is not a single caste mentioned in which any custom to the contrary prevailed. If with this information before it, the Legislature enacted sections 2, 3, 4 in very general terms, thinking thereby to declare what was in fact a general practice, it cannot be said that any new disability was created thereby. The words used in the preamble are no doubt to some extent misleading. As far as section 2 is concerned, the law has only declared what was an universal practice, and this fact must have been present to the mind of the Legislature, and explains the omission of all qualifying words." 22 B 321 (330, 331). *Per Ranade, J.*

**IV.—CENTRAL PROVINCES.****(1) Widow able to re-marry apart from Act—Applicability of section.**

(a) The forfeiture mentioned in S. 2 of the Act applies to all Hindu widows, including those who apart from the Act would be able to re-marry. 16 C.P.L.R. 99. J

(b) Independently of this Act, the re-marriage of a widow has always entailed a forfeiture of her late husband's estate and no inconvenience or anomaly is, therefore, the result of regarding S. 2 as applicable to all Hindu widows whomsoever. On the other hand, there is a clear gain of convenience in subjecting all widows alike to the same rules. (*Ibid*) K

**(2) Ordinary holding—Extinction of holding on re-marriage of widow—Landlord's right to enter upon land.**

On the re-marriage of a Hindu widow who had inherited her husband's ordinary holding, held that the tenancy was extinguished, and in default of reversioners the landlord had a right to enter upon the land. 15 C.P.L.R. 89. L

**General—(Concluded).**

**WIDOW RE-MARRYING ACCORDING TO CUSTOM  
IF FORFEITS HER ESTATE—(Concluded).**

**IV.—CENTRAL PROVINCES—(Concluded).**

**(3) Re-marriage independently of Act—Forfeiture—Onus of proof.**

(a) Independently of Act XV of 1856, the re-marriage of a Hindu widow has always entailed a forfeiture of her late husband's estate. 9 C. P.L.R. 47. M

(b) And a party setting up a custom at variance with this general rule, has to prove such custom. (*Ibid*) N

**V.—MADRAS.**

***Maravar* caste—Effect of re-marriage—Forfeiture.**

Applying the principles of the Hindu law, it was held that a widow of the *maravar* caste who had re-married had no claim to the property of her first husband, notwithstanding that the re-marriage was permitted by that caste. 1 M. 226. O

**3** On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grand-mother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother; and in making such appointment the Court shall be guided, so far as may be by the laws and rules in force touching the guardianship of children who have neither father nor mother:

<sup>1</sup>Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

(Notes).

General.

(1) Application of section—Widow permitted to re-marry by custom of caste.

*Held* that the provisions of S. 3 of the Act did not apply when the widow belonged to a caste in which re-marriage is permitted. 11 B. 119 at p. 180. But see 22 B 321. See, also, notes under S. 2, *supra*, see, also, 15 C.W.N. 579 (583) = 13 C.L.J. 558 = 10 Ind. Cas. 69. **P**

(2) Scope and effect of the section.

(a) There is nothing in Hindu Law itself to make it obligatory upon the Court to remove a Hindu widow from the guardianship of her minors by her first husband merely because she has re-married. 15 C. W N. 579 = 13 C.L.J. 558 = 10 Ind. Cas. 69. **Q**

(b) S. 3 of Act XV of 1856 deprives a Hindu widow of her preferential right to act as a guardian of her children by her first marriage, but it does not compel the Court to remove her from such guardianship. 15 C.W.N. 579 = 13 C.L.J. 558 = 10 Ind. Cas. 69 **R**

(c) The disability imposed on the Hindu widow by S. 3 of Act XV of 1856 does not apply to cases where re-marriage is recognised by the caste to which the widow belongs. 15 C.W.N. 579 = 13 C.L.J. 558 = 10 Ind. Cas. 69 **S**

(3) Exercise of discretion under the section

(a) The Court under that section has a discretion to remove a Hindu mother from the office of guardian of the children of her first marriage when she has re-married. But the exercise of such discretion must be regulated from the point of view of the welfare of the infants. 15 C.W.N. 579 = 13 C.L.J. 558 = 10 Ind. Cas. 69 **T**

" (b) Any circumstance which would disqualify a person from appointment as a guardian would also justify the removal of such person from guardianship. 15 C.W.N. 579 = 13 C.L.J. 558 = 10 Ind. Cas. 69. **U**

*I. — "Provided that, etc . . ."*

(1) Scope of proviso.

(a) The proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children, and secondly, even where there is property of the children, the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother. 10 Bom. L.R. 1131. **Y**

(b) Thus it will be seen that her right as mother to act as guardian of her children not possessed of property, is but slightly affected by the Act (*Ibid*) **W**

(2) Re-marriage of Hindu widow—Guardianship of children of deceased husband

(a) Where a Hindu widow who has re-married or any other person has been expressly appointed by the will of the deceased husband as the guardian of his child, and where such child has sufficient property of its own for its support and education during minority, then such child should ordinarily be regarded as a child "who has neither father or mother" within the meaning of S. 3 of the Act. 4 A 195. **X**

1.—“*Provided that, etc....*”—(Concluded).

- (b) And in such a case a proper male relative of the deceased father would presumably by the child's guardian in preference to his re-married mother; and the Court's power to appoint him, which is no doubt discretionary, should ordinarily be exercised failing good cause shown to the contrary. (*Ibid.*) Y

4. Nothing in this Act contained shall be construed to render any widow who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Nothing in this Act to render any childless widow capable of inheriting.

## (Notes).

## General.

N.B.—See Notes under S. 5, *infra*.

**Remarks on the provisions of S. 4.**

“By the Law of the Bengal school, the daughter's right of succession to her father's property being founded on her offering funeral oblations by means of her son, a daughter who is a sonless widow is not entitled to inherit to her father. But the re-marriage of a widow being now legal, no daughter, though a childless widow at her father's death, can be said to have become a childless widow for ever. She may marry and have male issue; so that, unless she is passed the age of child-bearing, she would come under the description of a daughter likely to have male issue, and accordingly, it might be argued that she would be entitled to inherit. It is in anticipation of such an argument that section 4 of the Act provides that, if a woman is a childless widow, and incompetent to inherit by reason of her being so at the time when the succession opens, the provisions of this Act shall not be construed to give her an heritable right. But a widowed daughter, by re-marrying before her father's death, would, under the provisions of S. 5 of the Act, be entitled to inherit her father's estate along with other married daughters

The operation of S. 4 may sometimes be attended with anomalous consequences. Thus, if a man dies leaving two daughters, the first, a sonless widow, and the second having, or being likely to have, male issue, the latter alone succeeds to his estate. Suppose that the former now re-marries, and that both the sisters have sons; upon the death of the second daughter, who should succeed to her father's estate?—Her sons only, or the sons of both the sisters? The latter view seems to be correct, but it involves the anomaly that the sons of the first daughter, who are born subsequent to the death of the second daughter, would get no share of their maternal grandfather's estate.” See Gooroodas Banerjee's *Marriage and Stridhana*, Tagore Law Lectures for 1878, 2nd Ed., 1896, pp. 263, 264. Z

**General—(Concluded).**

**N.B.**—"No doubt, the anomaly here pointed out is not without a parallel in the Hindu law. The case of the sister's sons would furnish such a parallel. But I may add, that the anomaly noticed above is avoided in the ordinary Hindu law by recognizing the doctrine of survivorship among daughters, and postponing the succession of the daughter's sons till the death of the last of the daughters in whom the succession might have vested." (*Ibid.*), See 23 W.R. 214.

**5.** Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

Saving of rights of widow marrying, except as provided in Ss. 2 and 4.

**(Notes).**

**General.**

**(1) Scope and effect of Ss 4 and 5**

(a) From these two Ss. (4 and 5), it follows that a daughter who is a childless widow at the time of her father's death, will not in Bengal, succeed to her father's property by the operation of the Act. She will not be considered in the light of a daughter capable of having male issue. But supposing a childless widowed daughter marries during her father's lifetime, she will on her father's death, succeed to his property as a daughter likely to have male issue. This will follow from the 2nd part of S. 5. It will follow therefore that of two childless widowed daughters of a Hindu, one who marries during her father's lifetime will be entitled to succeed to his property in preference to her sister who chooses to remain a widow until his death. Why the legislature has made this distinction, it is difficult to see. The truth is, that this Act is a sort of compromise between the existing Hindu Law and the wish of the legislature not to change that law, but at the same time to legalise the marriage of widows. The existing Hindu law is based on the assumption that the marriage of widows is illegal, when such marriages are legalized, and made part of the existing Hindu Law, the consequence is that startling anomalies appear. The Act does not fit into the existing frame work of Hindu Law, in which there is no place for it. See Trailokya Nath Mitra's Hindu Widow, Tagore Law Lectures for 1879, Lecture V. A

(b) Again suppose a Hindu dies leaving two daughters, A, a childless widow, and B having or likely to have male issue. In this case B succeeds to her father's property. Supposing the other daughter A, after her father's death, re-marries and has sons, and then B dies leaving sons. In this case who will succeed to the property? By S. 2 of the Act the sons of A are all legitimate, and therefore the correct view would be that the sons of A and B will succeed simultaneously. This involves the anomaly that the sons of A succeed to her father's property while



**General—(Concluded).**

she herself is living. The Hindu Law does not allow the daughter's sons to succeed in supercession of their mother who is living. See Tralokya Nath Mitra's Hindu Widow, Tagore Law Lectures for the year 1879, Lecture V. **B**

**(2) Operation of section—Power of re-married widow to give in adoption, son by former husband, validity of.**

It is true that S. 5 of the Act reserves to the widow certain rights of inheritance not covered by the exceptions in Ss. 2, 3 and 4. It cannot, however, be contended that the right of giving a son in adoption is of the nature of a right reserved to her by S. 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both which rights are excepted by name in Ss. 2 and 3 of the Act. 24 B. 89 (94)=1 Bom. L. R. 543. But see 10 Bom. L. R. 1134. **C**

**(3) Re-married mother—Power to give in adoption son by former husband.**

(a) The right of guardianship which under the provisions of section 3 (one of the sections excepted in S. 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not vary with it the right to give in adoption, for that is a right which can only be exercised by a parent. 10 Bom. L. R. 1134. **D**

(b) There is nothing in the Act to show that it was the intention of the legislature to deprive the re-married widow of the power to give in adoption her son by her first husband, and such an adoption was held valid (*Ibid*). **E**

**(4) Right of re-married widow to succeed to son by former husband.**

The right of inheritance of a re-married Hindu widow to her son by the former husband, does not fall within any of the exceptions referred to in this section, and so, she is entitled to succeed to him, notwithstanding her re-marriage. 28 M. 425=15 M. L. J. 245. (2 B. L. R. 199, R.) **F**

**(5) Operation of section—Usages of religious institutions not affected.**

(a) The section was clearly not intended to repeal the usage of Hindu temples or of religious or *quasi* religious institutions controlling and regulating their management and prescribing rules as to the place where offerings are to be made and persons from whom they are to be accepted. 13 M. 293. **G**

(b) Hence a right consisting in the participation, along with the other members of a caste, in the benefits of a religious institution appropriated to the members of the caste was held to be not within the purview of the section. (*Ibid*). **H**

**(6) Widow re-marriage—Exclusion from temple—Suit for declaration of right.**

Where a Brahmin who had married a widow was obstructed by the defendants from entering the inner shrine of a temple on account of his re-marriage, and where he sued the defendants for a declaration that he was entitled to enter the inner shrine as a Brahmin, and for an injunction and damages, *held* that the question to be determined was not a question of the plaintiff's *legal status* since a Brahmin widow is at liberty to re-marry under Act XV of 1856, but it was a question of *caste status* in respect of a caste institution, and that there was nothing in the Act which could apply to the determination of this question. 13 M. 293. **I**

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have the same effect if spoken, performed or made on the marriage of a Hindu widow, and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.

Ceremonies constituting valid marriage to have same effect on widow's marriage.

(Notes).

General.

Scope and effect of the section—*Gotra* of the widow re-marrying.

(c) From this section it would appear that the same ceremonies which render the first marriage of a woman valid will also be effectual in making the re-marriage of a widow valid. A question may arise as to what is the *gotra* of the widow at the time of her marriage. Is it the *gotra* of her father, or the *gotra* of her deceased husband? Pandit Ishwar Chandra Vidyasagar has pointed out that at the time of her marriage, the father's *gotra* of the widow is to be mentioned as her *gotra*, and that a female even after marriage retains the *gotra* of her marriage. This latter proposition seems opposed to the weight of authorities which declare that a woman after her marriage passes into the *gotra* of her husband which from that time becomes her *gotra*. If Vidyasagar's proposition is correct a widow can lawfully re-marry a person who belongs to her deceased husband's *gotra*, for instance of her husband's elder brother, or even her own father-in law. There is nothing in the rules of prohibited degrees in marriages which can bar such marriages, if those persons belong to a different *gotra* from the widow. Thus marriages would be sanctioned which according to Hindu law would be *Mahapathakam* (great sin). These difficulties would be avoided if the widow is treated as still belonging to the *gotra* of her deceased husband. See Trailokya Nath Mitra's Hindu Widow, Tagore Law Lectures, 1879, Lecture V. J

(b) The following observations of Chandavarkar, J. regarding the retention by a Hindu married woman of the *gotra* of her father are worthy of being noted —

“According to the Hindu Shastras, a woman by marriage in the approved form loses the *gotra* of her birth and acquires that of her husband. Vyaneshwara points out in the 10th Chapter on “Funeral Ceremonies,” (*Shraddha Prakaranam*) in the Section on “Rituals” (*Acbara*) of the *Mitakshara* (page 76 of Bapu Shastri Moghe's publication 3rd Edition) that there are texts to be found, some supporting the view that the death ceremonies of a married woman should be performed by the members of her husband's *gotra* and others maintaining that they should be performed by her relations in the *gotra* of her birth. He cites a text, upholding the former view. Translated into English, it is as follows —

By marriage, after the seven steps, a woman loses her own *gotra*; her funeral oblation and other ceremonies should be performed by the

**General—(Concluded).**

*gotra* of her husband." " (The death ceremonies) should not be performed by the members of (her) husband's *gotra*, setting aside the *gotra* of her father, by birth and in death the family of a woman is her father's."

*Vijnaneshwara* reconciles these two apparently contrary views in this wise. Where a woman was married according to the *Asura* or the like inferior forms of marriage, or where she was married with the special object that a son born of her should be treated as the son of her father, her death ceremonies should be performed by her father's *gotra*, the reason being that, in the case of such marriages, there is no giving away of the girl by the parents to the husband, and the woman, notwithstanding her marriage, continues to belong to her father's *gotra* or family. Where the marriage was according to the approved, that is, the *Brahma* or the like form, her death ceremonies may be performed either by her husband's or her father's—it is left to option (*Vikalpa*). That is, she may be treated as if she were of her father's *gotra* and her death ceremonies may be performed by the members of his family. It would appear from this discussion by *Vijnaneshwara* that he did not think that a married woman was entirely deprived of her father's *gotra* by her marriage in the approved form. If that is so, it will not be inconsistent with his theory to hold that a sister shares in a way the *gotra* of her brother, even though she be married in the approved form, and it is not unreasonable, on *Vijnaneshwara's* showing, to infer that she may be deemed to be a *sagotra sapinda* of her brother.

*Vijnaneshwara* cannot, therefore, be regarded as being opposed to *Nilakantha's* doctrine as to the right of a sister to inherit to her brother as a *gotraja sapinda*; on the other hand, the sidelights of the *Mitakshara*, to which we have referred in this judgment, bring about a harmony between the two and warrant our assigning to her the same place in the line of heirs under the *Mitakshara* which is given to her in the *Vyavahara Mayukha*. 32 B. 300 (312, 314).—*Per Chandavarkar, J. K*

**N.B.**—On this point, see, also, extract from *Gooroodass Banerjee's Marriage and Stridhana* noted under Heading (8) *Remarks on the provisions of the Act* noted under the Preamble.

7. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, or her paternal grandfather, or if she has no such grandfather, or her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative.

Consent to re-marriage of minor widow.

All persons knowingly abetting a marriage made contrary to the provisions of this section shall be liable to imprisonment for any term not exceeding one year or to fine or to both.

Punishment for abetting marriage made contrary to this section. \*

And all marriages made contrary to the provisions of this section may be declared void by a Court of law :  
 Effect of such marriage. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated.  
 Proviso.

In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.  
 Consent to re-marriage of a major widow.

(Notes).

General.

Scope and effect and applicability of the section.

- (a) S. 7 enumerates the persons whose consent is necessary to render the marriage of a minor widow valid. In the case of a widow whose marriage has been consummated her own consent alone would be sufficient. Now, seeing the very early age in which marriages of girls in this country are consummated, the propriety of allowing girls of such tender years to dispose themselves of in marriages, unrestrained by the wishes of their relatives seems extremely questionable. See Trailokya Nath Mitra's Hindu widow, Tagore Law Lectures for 1879, Lecture V. L
- b) Act XV of 1856 applies to all cases of the re-marriage of Hindu widows. 9 P L R 1912. M
- c) The marriage of a minor widow is not valid unless there has been consent of the persons enumerated in S. 7 of the Act. 9 P.L.R. 1912. N
- (d) But if the first marriage has been consummated, then the consent of the minor widow herself is sufficient. 9 P.L.R 1912. N-1
- (e) Custom can only take effect within the four walls of that Act. 9 P.L.R., 1912. O

Customs as to widow Marriages in the Several Provinces of India.

N.B.—As there is a difference of opinion between the Allahabad High Court and the other High Courts indicated under S. 2, *supra* as to the effect on proprietary right of a widow re-marrying, not under the provisions of this Act, but according to the custom of the caste to which she belongs, it is proposed to collect herein the several customs prevailing in the different parts of the country with regard to the widow's right to re-marry.

## I.—GENERAL

(1) General rule as to the prevalence of the practice of widow re-marriage—Effect of Brahminic influence.

- (a) "The degree in which divorce and widow marriage prevails is probably in the direct ratio to the degree, in which the respective castes have imitated Brahmin habits." Mayne's Hindu Law and Usage, 7th Ed., p. 115. P

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).****I.—GENERAL—(Concluded).**

(b) "The Brahman marriage system, which requires that every girl should be married before puberty, prohibits the re-marriage of widows, and allows a dissolution of marriage only on the ground of the adultery of the wife, has been adopted in its entirety by many Telugu and a few other castes, and there is hardly a caste or tribe in which its influence has not been felt to some extent." (*Ibid.*), p. 116.      **Q**

(c) "The prohibition against second marriages of women, either after divorce or upon widowhood, has no foundation either in early Hindu law or custom. Passages of the Vedas quoted by Dr. Mayr sanction the re-marriage of widows. And the second marriage of women who have left their husbands for justifiable cause, or who have been deserted by them, or whose husbands are dead, is expressly sanctioned by the early writers." Mayr, Narada, xii, Mayne's Hindu Law and Usage, 7th Ed., p. 112.      **R**

(d) But at some later period the practice of widows re-marrying seems to have fallen out of use. It is probable that the change of usage on this point arose from the influence of Brahmanical opinion, marriage coming to be looked upon as a sort of sacrament, the effect of which was indelible. Mayne's Hindu law, 7th Ed., 1906, p. 113.      **S**

**(2) Extent of the practice.**

"We shall probably not be far wrong, if we assume that the marriage of widows is permitted and practised by about 60 per cent. of the total population." Census of 1891, XIII, 148—151, (General Report, 264 T

**II.—BERAR****(1) Custom in Berar—Banjaras and Maunbhaus.**

The following are extracts from the Gazetteer for the Hyderabad Assigned Districts, commonly called Berar, by A.C. Lyall, Commissioner of West Berar Bombay, 1870 —

"The custom of widow marriages prevails universally among the agricultural communities, and perhaps more or less among all others, except the Brahmans, the north country trading classes, and the highest families of any caste. Divorce by mutual consent and deed of separation is also permitted, and the divorced woman marries again. These irregular unions are called *pat* marriages, but they are quite reputable, and the off-spring is legitimate. Very primitive and grotesque connubial rites prevail among the Banjaras and Maunbhaus, who have strongly coloured their ceremonial with that shade of mockery which still tinges slightly all marriage rejoicings." See Berar Gazetteer, Bombay, 1870, p. 186.      **U**

**(2) *Pat* marriages**

"Widows can, on the death of their first husband, marry again by a *pat* marriage. A man can at one and the same time have only one 'lagan' wife alive, but he can have several *pat* marriage wives." (*Ibid.*), p. 201.      **Y**

## Customs as to widow Marriages in the Several Provinces of India—(Ctd.).

## II.—BERAR—(Concluded).

## (8) Difference between the first marriage of a woman and her second marriage

"Except the Brahmanas, the Vaisya Sonars, and one or two other castes, all Hindu woman here are allowed to make a second marriage. Some of the *deshmukh* families, who hold their heads high, forbid it also. There is this difference between a first and second marriage. In the former, if a woman goes wrong, her husband can give her a *sarkhatti-nama* or bill of divorce, whilst if he goes wrong, she has redress. But in the second either may dissolve the marriage." (*Ibid.*), p. 211. **W**

## III.—NORTHERN INDIA—BENGAL

(1) Custom among the *Kulins* of the Northern India.

(a) "There is no limit to the number of wives a *Kulin* may have. The Deputy Collector reported to me in 1871 that there was then in Bikrampur a man of this class with upwards of a hundred wives, while his three sons had fifty, thirty-five, and thirty respectively. Those *Kulins* who make marriage a profession do not maintain their wives, but leave them and their children to be provided for by the respective fathers-in-law. They are, however, bound to provide dowers for their female children. The sons are raised to the fathers's rank, the daughters take that of the mother and a portion is required to get them eligibly married. Few *Kulins*, however, have the means of endowing their daughters, and the consequence is that a large proportion of the female children of *Kulins* by *Bansaj* wives remain unmarried." See the Statistical Account of Bengal by Dr. W.W. Hunter, Vol. V, p. 55. **X**

(b) Further on the following remarks occur in regard to marriages among certain Vaishnavas in this part of Bengal —

"Owing to this disparity in the number of the sexes a large proportion of the women have to remain single. The men often join the fraternity for the sake of concubinage. A man happens to fall in love with a widow or with a woman of a different caste. As a consequence they are both persecuted by society, and become Vaishnavas, when they can marry without molestation. The marriage ceremony is very simple, the man and woman exchange garlands, make a small present in money to the goswami or spiritual guide, and a feast to the neighbouring Vaishnavas according to their means." See (*Ibid.*), Vol. V, p. 57. **Y**

(2) Marriage custom among the *chakmas* of the Chittagong Hills

"If a man runs away with another man's wife, he has to repay to the injured husband all the former expenses of marriage, and is in addition fined from £4 to £6. Divorce is not difficult of attainment, and is awarded by a jury of village elders, the party adjudged to be in fault being fined heavily." (*Ibid.*), Vol. VI, p. 47. **Z**

(3) Custom among the *Tepperahs* of Chittagong.

"Divorces are obtained only on an adjudication of the village elders. Captain Lewin instances one case, which he witnessed himself, in which a

## Customs as to widow Marriages in the Several Provinces of India—(Ctd.).

## III.—NORTHERN INDIA—BENGAL—(Concluded).

divorce was sued for by the wife on the ground of habitual cruelty. The jury deliberated, and found that the cruelty was proved, and that the divorce should be granted." (*Ibid.*), Vol. VI, p. 52. **A**

## (4) Custom in the Naokall District

"Widow marriages take place among the Chandals, barbers, washermen, fishermen, and shoe-makers of the district. They are marriages of mutual inclination, and require no ceremony, but though excommunication is not incurred thereby, and the children are considered legitimate, such marriages are exceedingly rare." See (*Ibid.*), Vol. VI, p. 282. **B**

## (5) Custom among the Koch or Rajbansi tribe in Kuch Behar.

"This marriage, [*i.e.*, widow marriage] if it deserves to be called by that name, takes place without any ceremonies whatever, but the children of the union are acknowledged as heirs and successors to the property of their father. Such children, however, are not recognised as legitimate children in Hindu society, and the women are always looked down upon even by the Rajbansi. The peculiar circumstances under which widows are received by men as wives have given rise to different names by which such women are known, such as *dangua* wife, *dhoka* wife, *pashua* wife. *Dang* means a stick or a blow dealt with a stick; when a widow lives by herself and a man goes to the house with a *Dang* or stick in his hand, and strikes a blow with it on the roof of the house, and so enters in, and takes possession of the woman, such woman is called *dangua* wife. This mode of union is naturally only resorted to under previous arrangement between the parties. *Dhoka* means 'to enter into', when a widow of her own accord enters into the house of a man, she is denominated a *dhoka* wife. *Pashua* or *pash* means 'afterwards', a woman that is taken afterwards, that is, after she has been once before married, is called a *pashua* wife. *Pashua*, in fact, is the general name for widow marriage." (*Ibid.*), Vol. X, p. 377. **C**

## (6) Custom among the Santals.

"Polygamy is allowed and practised, and if a man dies leaving several widows, they can become the wives of his brothers or cousins, I find no information, except that a man may not marry a near relation." (*Ibid.*), Vol. XIV, p. 298. **D**

## (7)—NOMOSUDRAS.

The Bengal High Court has recognised the validity of a widow marriage among the Nomosudras. 10 C 138. **F**

## (8) Brahmins and castes which imitate Brahminism.

"In the Lower Province of Bengal, and in Eastern and Western Bengal, widow-marriage is not practised by Brahmans, or those castes which aim at imitating them." Mayne's Hindu Law and Usage, 7th Ed., p. 116. **E**

## IV.—BEHAR.

## (1) Baniyas in Behar.

"In Behar the whole sub-castes of Baniyas adopt widow marriage." Mayne's Hindu Law and Usage, 7th Ed., p. 116. **G**

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).**

**V.—BOMBAY.**

**(1) Extent of the practice in the Bombay Presidency.**

(a) In regard to second marriages the following information gives some of the current views —

“ To the men of almost all classes of Hindus a second marriage is allowed. But except in some families among the higher castes of specially good position, and in cases where the first wife dies or proves to be barren, a second marriage is unusual. On the question whether women may marry a second time Hindus, are divided. All except the higher castes allow and practise it. But the Brahmans, Waniyas, Sonis, and some sub-divisions of Suthar, in fact all who wear the sacred thread, are strongly opposed to it, and visit with ex communication from their caste any one bold enough to break through the rule. Among lower classes the practice of giving divorce is in existence. See the same cited in Mandlik's Edition of the *Vyavahara Mayukha*, Bombay, 1880, p. 444. **H**

(b) Divorce is not known to the *Smriti* writers. But usage has superseded texts in the case of almost all the lower castes. See Mandlik's Edition of the *Vyavahara Mayukha*, Bombay, 1880, p. 428. **I**

**(2) Custom among the lower classes**

(a) “ A man may marry a second or a third wife in the lifetime of the first. A woman marries again, not only if her husband dies, but if she gets tired of him, and can bring another man to take her and pay her husband his marriage expenses. The children, if there are any, stay with their father.” (*Ibid* ), p. 445. **J**

(b) “ In Western India, the second marriage of a wife or widow (called *Pat* by the Mahrattas, and *Natra* in Guzerat) is allowed among all the lower castes.” See Mayne's Hindu Law and Usage, 7th Ed., p. 114. **K**

**(3) Grounds on which divorce is obtained among the lower classes.**

(a) The cases in which a wife may re-marry are stated by Mr Steele as being, if the husband prove impotent, or the parties continually quarrel; if the marriage were irregularly concluded, if by mutual consent the husband breaks his wife's neck-ornament, and gives her a *chorchittee* (writing of divorcement), or if he has been absent and unheard of for twelve years. (*Ibid* ) **L**

(b) Should he afterwards return, she may live with either party at her own option, the person deserted being reimbursed his marriage expenses (*Ibid* ) **M**

(c) A widow's *pat* is considered more honourable than a wife's *pat*. But children by *pat* are equally legitimate with those by a first marriage Steele, 26, 159, 168 (*Ibid*.) **N**

(d) “ Among the lower castes widows and wives under certain circumstances are allowed to form the inferior contract termed *Nikah*, *Pat* or *Oorkee*. These circumstances are if the husband proved impotent or the parties continually quarrel if the marriage were irregularly concluded, if by mutual consent the husband breaks his wife's neck-ornament, and give a *chorchittee*. After which divorce, with the concurrence of



## Customs as to widow Marriages in the Several Provinces of India—(Old.).

## V.—BOMBAY—(Continued).

the caste, the wife may form *Pat* with another man, sometimes even without their concurrence. And if after 12 years' absence a husband continue unheard of, his wife may form *Pat*: should he afterwards return, she must return to her first husband; or live with either at her option, the party deserted being reimbursed his marriage expenses Steele's Customs, p 170 O

- (e) "In the lower castes, besides adultery, etc., above mentioned, the husband's impotence or simple disagreement of the parties, even against the advice of the caste, is sufficient to cause a divorce. The husband breaks his wife's *Mungalsootr*, and tears her saree, when she is at liberty to form *Pat* with another." Steele's Customs, p. 174. P

**N B**—The grounds above set forth are in many respects the same as the grounds on which a second marriage is allowed to a woman by the Hindu Sastras. The following texts may be noted.—

- (a) As cited in the *Kalpataṇu*, Devala says—"A woman may abandon her husband, if he happens to be missing, or to become votary of the fourth order, or to be one impotent or degraded, or an offender against the king, or when he is dead. A woman may, for the continuance of the line and not out of wantonness, take to another husband whether the first husband is alive or dead."
- (b) Narada says—A Brahmani ought to await (the return of) her husband, who has gone abroad, for eight years, a woman who has become a mother, for four years, and one not a mother, for two years. No period of waiting is laid down for a Sudra woman, nor is there any transgression of duty in her marrying again, particularly in the case of one not a mother. In the case of women of the remaining classes (i.e., the intermediate two) the period of waiting is one year. If (the first husband) is reported to be living, the period of waiting is double. This is the rule laid down by Prajapati for women in respect of procreation. Therefore, in resorting to another (husband under the said circumstances) there is no sin.

(4) Examples of cases in which courts have recognized the custom in the Bombay Presidency.

(i) *Gujarathi Kasara caste.*

- (a) In one case from the Gujarathi Kasara caste, wherein a wife, it seems, can get a divorce from her husband on the ground of ill-usage, one Kasiram sued his father-in-law, complaining that he neglected to send his wife *Ilcha* with her dower to his house. It was alleged that ill-usage had compelled her to leave her husband. A decree was passed directing her to return, and this was upheld in appeal. But "on a petition from *Ilcha* complaining of ill-usage, the court of appeal, called up the Patels of the caste, some of whom declared that ill-usage was by the rules of the caste a valid ground of divorce." This was opposed by the husband and by some Patels; but the court finding the ground to be sufficient pronounced a divorce. See 1 Borradaile's Reports 387 cited in Mandlik's Edition of *Vyavahara Mayukha*, Bombay, 1880, p 428. Q

Customs as to widow Marriages in the Several Provinces of India—(Ctd.).

V.—BOMBAY—(Continued).

(b) "In another Gujarathi case, one Kasee sued to get possession of his wife, who pleaded that a divorce had been made between herself and the plaintiff by the caste in consequence of the latter's drunkenness and depraved conduct. And the Court held that the divorce pronounced by the caste was a valid one. It is thus clear that caste sanction according to some usages suffices for a divorce, and it is reasonable that it should be so." 1 Borradaile's Reports 410 cited in Mandlik's Edition of *Vyavahara Mayukha*, Bombay, 1880, p. 428. R

(c) The right of a divorce and second marriage has been repeatedly affirmed by the Bombay Courts. 1 Bor., 387 (429); 1 Bor. 410, 2 Bor. 524, Bellasis 36; 2 B.H.C. 124; 1 B. 347, 6 B. 126. S

(ii) *Talapda Koli caste.*

In the case of *Karsan Goja* 2 B.H.C. 124, the High Court, before deciding the case, called for the finding of the Sessions Judge on the following questions:—

(1) Is it permitted to a woman in the Talapda Koli caste, for any and what reasons, to leave the husband to whom she has been first married, and to contract a second marriage (*natra*) with another man in his lifetime and without his consent?

(2) Is the permission of the caste necessary as a preliminary to such second marriage (*natra*) or is such permission ever given subsequent to the contract, and if so, what is the mode in which it is given, and what is the effect which, when given, it is considered in the caste to have?

(3) Quote any instances which may have occurred in the caste, within your own experience, in which a woman has contracted a second marriage in the lifetime of her first husband and without his consent; and mention the position which such a woman has occupied in the caste since such second marriage.

The Session Judge reported as follows:—"My finding on the first question is that it is proved by the depositions of the witnesses recorded that it is permitted to a woman in the Talapda Koli caste to leave the husband to whom she has been first married, and to contract a second marriage (*natra*) with another man in his lifetime without his consent.

"My finding on the second question is that the permission of the caste is not necessary as a preliminary to such a contract of second marriage (*natra*), that permission is sometimes given or withheld subsequently to the contract, i.e., on the complaint of the first husband, if she restore to him any property she may have acquired by her first marriage, she does not lose her position in the caste.

"My finding on the third issue is that the instances quoted support the view contained in the two preceding questions." See 2 B.H.C. 124 T

(iii) *Tel caste in Khandesh.*

(a) In another case in 1876, the Bombay High Court appears to have gone a step further, and ruled that "Courts of Law will not recognise the

**Customs as to widow Marriages in the Several Provinces of India—(Cont.).****V —BOMBAY—(Concluded)**

authority of a caste to declare a marriage void, or to give permission to a woman to remarry." This was in a Telh caste from Khandesh. See 1. B 347. **U**

(b) The Judgment in appeal says —

"The court does not find it established that there is any valid custom by which a woman of the caste of the first accused can claim a right to marry again, because her husband is a leper, and without having obtained a release from him. The Court does not recognise the authority of the caste to declare a marriage void or to give permission to a woman to remarry. The wife in this case, and the appellant who performed the ceremony of re-marriage, probably acted in a *bona fide* belief that the consent of the caste made the second marriage valid, but though that circumstances may be taken into account in mitigation of punishment, it does not constitute a defence to a charge under S. 494 of the Indian Penal Code, or under that section combined with S. 109 of the Code. The Court confirms the conviction, but as the Appellant has already undergone imprisonment for 25 days, it remits the remainder of his sentence." (*Ibid.*) **Y**

**VI.—BURMA.****Custom in Burma.**

"In Burma divorce is available to both classes alike, and is apparently more often initiated by the wife than by the husband." Census of 1891, General Report, 269. **W**

**VII.—CENTRAL PROVINCES.****(1) Custom in Bhandara.**

(a) Women divorce themselves at pleasure, and marry several husbands in succession (in Bhandara) See Central Provinces Gazetteer, 1870, p. 62. **X**

(b) As to widow marriages, the widow simply walking over to the man's house; or marrying her husband's younger brother. (*Ibid.*), pp. 276, 277; In reference to the same, see, also, "Papers relating to the aboriginal tribes of the Central Provinces," by the Rev. S. Hislop, edited by R. Temple, C.S.I., 1866. **Y**

**(2) Custom in Hoshangabad among Kooroos.**

There are five forms of marriage among Kooroos (1) *Shuds* (regular marriage), (2) *Lumyuna* (where the bridegroom works and lives in his father-in-law's house), (3) *Boloni* (where the girl goes to her lover's house), (4) *Pat* (Widow-marriage), and (5) marrying another man's wife by mutual consent. See Report of the Land Revenue Settlement of Hoshangabad, by C A Elliott, Bengal C S. Allahabad, 1867, pp. 259 to 262. See, also, Journal of the C B. Antiquarian Society, pp. 45 to 48, Vol. I. **Z**

**(3) Custom in the Narmada Division, Narsingpore District.**

Here widow marriage with a younger brother of the husband is allowed. See Report on the Land Revenue Settlement of the Narsingpore District, by C Grant, Esq., L C S., 1866, Nagpore, paras 21-24, p. 27. **A**

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).**

**VII.—CENTRAL PROVINCES—(Concluded).**

**(4) Custom in Mandla.**

(a) Widow marriages with the deceased's younger brother allowed here. See paper relating to the Settlement of Mandala Districts by Cap. H. C. F. Ward, 1870 (pp. 140-141). **B**

(b) Marriages consummated in jungles and not in houses. (*Ibid*), p. 157. **C**

**(5) Custom in Raipore.**

Widow marriage is almost universal here, and conjugal fidelity is little thought of. See Paper relating to the Settlement of the Raipore District, Chittigarh Division, 1869, by J F K. Hewitt, Esq., B. C. S. Nagpore. **D**

**(6) Custom in Jubbulpore.**

Here a brother marries the widow of a younger brother. See papers relating to the Settlement of Jubbulpore District by Major W. Nembhard, Nagpore, 1869. **E**

**VIII.—MADRAS PRESIDENCY.**

**(1) Custom of Nairs in Malabar.**

(a) "The Nairs marry before they are ten years of age, but the husband never cohabits with his wife. He allows her oil, clothing, ornaments and food, but she remains in her mother's house, or after her parents' death with her brothers, and cohabits with any person she chooses of an equal or higher rank than her own. In consequence of this strange arrangement, no Nair knows his own father, and every man considers his sister's children as his heirs." See Hamilton's History of Hindustan, Vol II, p 280, see also page 293 of the same volume also a more detailed account of the customs in Buchanan's "Journey from Madras through Mysore, Canara and Malabar," Vol II, pp. 410—412. The consequences of these extend to other castes, see pp. 423—427 of the same volume of Buchanan. **F**

(b) The following are among the rules extracted from a translation of *Bhatalapandya's Law of Alyasantana* by B Ramaswamy Nayadu, B.A., Madras, 1872, pp 20—23 — **G**

*Bhatalapandya* records certain rules to the following effect "If a married woman find her husband to be an adulterer, and the husband finds her to be adulteress, and he takes her and delivers her over to her parents, she may be wedded to another person."

"If the husband forsaking his wife takes another woman (into his keeping, and fails to treat his wife properly) the members of her family may recall her from her husband, and get her wedded to another person."

"Moreover, if the husband ill-treats (the wife by striking and abusing her as he likes), a reconciliation may be effected between them three or four times, but should there be a recurrence of disagreement even afterwards, the members of her family may recall her from her husband, and get her married to another person."

"If a girl who has arrived at puberty as aforesaid elopes with anybody before her marriage, she may be married to him if he be of the same caste, or abandoned if he be of an inferior caste, or placed in his keeping if he be of a superior caste."

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).****VIII.—MADRAS PRESIDENCY—(Continued).**

"If a married woman leaves her husband, and elopes with a man of the same caste, she may be wedded to the latter. If he be of a superior caste she may be placed in his keeping; if he be of an inferior caste she may be abandoned."

**(3) Custom in Cochin and Travancore.**

In Southern India, including Cochin and Travancore, "the re-marriage of widows is not forbidden by either religious or caste custom to the majority of the population. The prohibition exists among the Brahmans and among castes desirous of obtaining a high relative position by close observance of Brahmanical customs, but the restriction is entirely foreign to Dravidian ideas." Census of 1891, xiii, 128; Mysore Census of 1871, p. 71, of 1891, xxv, 226, 229.      H

**(3) Custom among Kuravars**

"In cases where separation occurs, the sum given as the nuptial present should be returned, and any one willing to pay the same amount may take her again in marriage. See Kalyana Satanku on the Marriage Ceremonies of the South of India, by the Rev. J.F. Kearns, Madras, 1875, pp. 34, 35.      I

**(4) Vellalans of the Palanis, Maravars, Kallans, Pallans, etc., of South India.**

(a) "Widow marriage and divorce is common among many of the lower castes, such as the Vellalans of the Palanis, the Maravars (except in the case of the women of the Sambhu Nattan division), the Kallans, the Pallans, the tank-diggers, the potters, the barbers, and the pariahs generally." Mad. Manual, Pt. II, 33, 40, 58, 6 M.H.C. 329, 1 M. 226; Madras Census Report 157, 159, 164, 171; 17 M. 479.      J

(b) So in numerous castes in North Arcot, in South Canara and in Cochin. N. Arcot Man., I. 204, 227, 229, 236.      K

(c) "In many such cases, what is called a divorce is really nothing more than an abandonment by one party or the other of a marriage union which, from the first, was merely an agreement to live together as long as the arrangement suited both parties." Census of 1891, XIII, 216, 219, 230, 243, 245, 257, 304.      L

**(5) Malayalis of North Arcot.**

Among the Malayalis of North Arcot "a wife may, at her pleasure, desert her lawful husband, and live with any other man of the caste, but all her children are considered to be those of her husband alone." N. Arcot Man., I, 213.      M

**(6) Oil-Mongers, Weavers, etc.**

In the better classes, such as the oil-mongers, the weavers, and a wandering class of minstrels, called the Bhat Rajahs, who claim to be Kshatriyas, divorce is found in some localities, and not in others. Madras Census Report, 141, 143, 155.      N

**(7) Brahmans, Kshatriyas, and the better classes of Sudras.**

"It is not practised at all among the Brahmans and Kshatrias or among the higher classes of Sudras, such as the shepherds, the Komaty caste,

Customs as to widow Marriages in the Several Provinces of India—(Ctd.).

VIII.—MADRAS PRESIDENCY—(Concluded).

the writers or the five artisan classes, who claim equality with the Brahmans and wear the thread." Mad. Census Report, 181, 140, 143, 149, 152. O

(8) Custom among the Dravidian races.

- (a) "The *Thesawaleme* treats widow marriage as a matter of course and we may fairly assume that it was so originally among all the Dravidian races " *Thesawaleme*, i, 10. P
- (b) "In Western Bengal the Dravidian tribes, whether Hinduized or not, adopt widow marriage " Mayne's Hindu Law and Usage, 7th Ed., p. 116.Q

IX.—N. W. PROVINCES.

(1) Re-marriage of widow with brother of deceased husband

Re-marriages with the deceased husband's brother allowed. See the Gazetteer of the North West Provinces by Edwin T. Atkinson, p. 401. R

(2) Custom in the Aligarh district.

Caste-Panchayats arrange divorces and re-marriages of divorced women in the Aligarh District. (*Ibid*). S

(3) Custom in Bulandar District.

Caste-Panchayats act in marriage and divorce questions in the Bulandshahar district. See Atkinson's N W. Gazetteer, Vol. III, Part II, p. 51; as to intermarriages between different Brahmana tribes, in Meerut district. See (*Ibid*), p. 256. T

(4) Custom among the Karas in the Muzafarnagar District.

Among the Karas concubinage or marriage with the widow of a deceased brother is allowed in the Muzafarnagar district. See (*Ibid*), pp. 505, 511. U

X.—RAJPUTANA.

(1) Natha marriages—Ajmere.

- (a) Brothers marry the widow of the elder brother in Ajmere. See Rajputana Gazetteer, Vol I, 1879, Calcutta, p. 80. Y
- (b) Again the widow goes to any man she pleases, but he must be "of a different caste to her father." (*Ibid*), p. 121. W
- (c) As to sale of widows in marriage. See (*Ibid*), p. 161. X
- (d) Polygamy and left-handed marriage between different castes held binding. (*Ibid*). p. 161. Y

(2) Custom in the Ulwar State.

"A good deal, however, is spent by the poorer classes on marriages, and though boys often remain long unmarried owing to poverty, few grow old single, for Meos allow concubinage without bastardising the issue of it, and the lower castes of Hindus can make *daricha* marriages, that is, marry the widows of their brethern by the marriage of their daughters. Even Banyas now often do this." See Gazetteer of Ulwar by Major P.W. Powlett, London, 1878, p. 44. Z

**Customs as to widow Marriages in the Several Provinces of India—(Old).****X.—RAJPUTANA—(Concluded).****(3) Custom in Mairwara.**

"The Mairs consider themselves Hindus; but are regardless about forms and ceremonies. They worship some of the national deities. Their marriages are conducted after the customs of the Hindus. Their widows can marry a younger brother of the deceased, but not an elder. There is no form. The widow can select any one she likes with the above single reservation." See sketch of Mairwara by Lieut. Col. C. J. Dixon, London, 1850, pp. 28, 29, 81, 82 cited in Mandlik's Edition of *Vyavahara Mayukha* 1880, Bombay, p. 453. A

**XI.—PUNJAB.****(1) Rains of Sirsa District—Marriage of widow of donee to donor.**

The widow was among—by custom entitled to remain in possession of the land notwithstanding her second marriage. 100 P.R. 1899. B

**(2) Ghumman and Chimmah Jats of Siolkot—Re-marriage of divorced wife—Legitimacy of off-spring.**

(a) Found, that by the custom of the Ghumman and Chimmah Jats of Siolkot, a woman who has received a written divorce from her husband, is free to contract a valid marriage. 84 P.R. 1889. C

(b) And the issue of the second marriage will be considered the legitimate children of their father. 84 P.R. 1889. D

**(3) Validity of marriage of a woman whose husband was alive, though insane.**

A custom that a married woman may, in the lifetime of her first husband, contract a second marriage with another man, and which recognizes the issue by the second marriage as the legitimate heir of the second husband, is bad as being immoral, and is one to which a Court of Justice will not give effect. 49 P.R. 1890. E

**(4) Rajputs of Sartora clan of Kangra—Jhanjara form of marriage.**

Found that by the custom of Sartora Rajputs of the Kangra District a *jhanjara* or widow marriage is valid. 98 P.R. 1890. F

**(5) Jats of the Punjab.**

(a) "Among the Jat population of the Punjab, not only a widow, but a wife who has been deserted or put away by her husband, may marry again, and will have all the rights of a lawful wife." Punjab Customary Law, II, 131, 174, 190, 192, 193. G

N.B.—The same rule exists among the Lingaits of South Canara. See 8 M. 440.

(b) *Quere.*—Whether by custom in the Jullundur District a Hindu Jat can divorce his wife. 78 P.R. 1898. H

**(6) Union between a Kahnian Jat of the Gurdaspur District and his deceased brother's wife—Children of such union—Legitimacy of.**

Found, that among the Kahnian Jats of the Gurdaspur District when a man takes the wife of his deceased brother into his house without any marriage ceremony, the children of such connection are treated by custom as legitimate. 54 P.R. 1900. I

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).**

**XI.—PUNJAB—(Continued).**

**(7) Re-marriage of widow—Hindu Jats of Moga tahsil.**

In a suit the parties to which were Hindu Jats of Moga Tahsil of the Ferozepore District, found, that no custom existed under which a widow who had contracted a *karewa* marriage with a near relative did not forfeit her life interest in her first husband's estate. 90 P.R. 1889. J

**(8) Utal Jats, village Utalna, Ludhiana District—Custom—Widow—Unchastity.**

In a suit the parties to which were Utal Jats, village Utalna in the Ludhiana District, found, that according to custom a widow by unchastity forfeits her interest in her deceased husband's estate. 25 P.R. 1891. (107 P.R. 1888, R). K

**(9) Sus Jats of Hoshiarpur—Succession of mother—Re-marriage.**

Found, that by the custom of the Sus Jats of Hoshiarpur a mother is excluded from the succession to her son's estate when he has left uncles and cousins, at least when she has contracted a second marriage before her son's death. 117 P.R. 1888. (11 P.R. 1870; 97 P.R. 1870, R.). L

**(10) Renunciation of wife by husband—Validity of custom—Jats.**

Although divorce is not recognised *eo nomine* by Hindu Jats, it is in no way repugnant to the tribal law, by which they are governed in such matters, that a man who takes a wife should have the power of repudiating her, and that, when so repudiated, she should be free to marry another man. 33 P.R. 1896. M

**(11) Agricultural Brahmins of Tahall, Batala, Gurdaspur District—Marriage by *chadar andozi*.**

- Found, in a suit, the parties to which were agricultural Brahmins of mauza Tara, in the Batala tahsil of the Gurdaspur District, that a marriage by *chadar andozi* between a Brahmin and a widow called a *dharel* wife, is not valid by custom. 5 P.R. 1893. N

**(12) Husband not entitled to custody of wife once divorced.**

Where it appeared that plaintiff's wife, of whom custody was sought, had some time previously absconded with another man, against whom plaintiff instituted criminal proceedings under S. 498 of the Penal Code, which he subsequently compromised by divorcing his wife, and that the defendant, R.S., thereafter married the said woman by *karewa*, held, that inasmuch as plaintiff had done all he could to divest him self of connection with, and responsibility for, his wife, the Court was not justified in putting in force the discretionary powers vested in it and giving plaintiff a decree for the custody of his wife. 95 P.R. 1898. O

**(13) Sons by a *Khatrani* widow who lived with a *Khatri* as his *dharel*—*Khatris* of qasba Majitha, Amritsar District.**

- (a) Held, that the offspring of a union between a *Khatri* and a *Khatrani* widow, where there had been no marriage but the latter lived with the former as his *dharel*, were illegitimate. 51 P.R. 1899. P
- (b) Held, also, that no amount of recognition could alter the character of the union, or give a higher status to the off-spring than that of illegitimate children. 52 P.R. 1899. Q



**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).**

**XI.—PUNJAB—(Continued).**

(c) *Held*, further, that a custom entitling such children to succeed to their natural father's property after the death of his lawful widow and to the exclusion of his brother's sons would be invalid, as confounding concubinage with the true marriage relation, and conferring on illegitimate offspring the status and rights of legitimate children. 52 P.R. 1899. R

**(14) Pathans of Hoshiarpur—Unchastity of widow—Forfeiture of estate.**

Found, that by the custom of Pathans of Hoshiarpur unchastity in a widow involves the forfeiture of her rights in her husband's estate. 2 P.R. 1888. (158 P.R. 1883, *cited*). S

**(15) Hindu Rajputs of Gurdaspur District—Unchastity of widow—Forfeiture of estate.**

In a suit the parties to which were Rajputs residing in mauza Lohara, tahsil Shakargarh in the Gurdaspur District, *held*, that no custom was proved by which the unchastity of a widow involved the forfeiture by her of her husband's estate. 90 P.R. 1888. (78 P.R. 1866; 158 P.R. 1883; 2 P.R. 1888, *cited*) T

**(16) Bagri Jats of Sirsa District—Unchastity of widow—Forfeiture of estate—General custom—Hindu Law**

(a) Found, that there is no established custom among the Bagri Jats of the Sirsa District whereby the widow forfeits her estate by unchastity after the death of her husband. 107 P.R. 1888. (78 P.R. 1869; 158 P.R. 1883; 118 P.R. 1884, 105 P.R. 1885, *cited*). U

(b) There is no general custom in the Punjab by which a Hindu widow forfeits her husband's estate when vested in her, by an act of unchastity. In the absence of a proved special custom where the parties are Hindus, the Hindu law applies, and according to that law the widow's estate is not forfeited. 107 P.R. 1888. (78 P.R. 1869; 158 P.R. 1883; 118 P.R. 1894; 105 P.R. 1885, *cited*). Y

**(17) Sayads of Kharkhauda, tahsil Sampla, Rohtak District—Forfeiture by widow on re-marriage—Burden of proof.**

(a) Found, in a suit, the parties to which were sayads of Kharkhauda in the Sampla tahsil of the Rohtak District, that the defendant had failed to establish her right to retain her husband's land after her re-marriage. 143 P.R. 1893. (60 P.R. 1878, 82 P.R. 1887, 173 P.R. 1889, 71 P.R. 1892, R.). W

(b) *Held*, also, that the burden of proof had been rightly placed upon the defendant to prove the custom pleaded by her. 143 P.R. 1893. (60 P.R. 1878, 82 P.R. 1887; 173 P.R. 1889; 71 P.R. 1892, R.). X

**(18) Sayads of Kharkhauda, tahsil Sampla, Rohtak District—Forfeiture by widow on re-marriage—Continuing to live in first husband's house.**

(a) Found, in a suit, the parties to which were Sayads of Kharkhauda, tahsil Sampla, Rohtak District, that they followed the general custom of the agriculturists amongst whom they live, and that this custom provides that a widow on re-marriage forfeits her first husband's estate. 144 P.R. 1893. Y

**Customs as to widow Marriages in the Several Provinces of India—(Ctd.).**

**XI—PUNJAB—(Continued)**

(b) But this is subject to the very important proviso that she leaves her first husband's house and goes to reside with her second husband. If she continues to live in her first husband's house she retains his estate 144 P. R. 1893 (144 P. R. 1893 R) **Z**

- (19) **Pathans of Kharkhanda, tahsil Sampla, Rohtak District, who intermarry with Sayads—Forfeiture by widow on re-marriage—Residence in house of first husband after second marriage**

(a) Found, in a suit the parties to which were Pathans of Kharkhanda tahsil Sampla, Rohtak District, who intermarried with Sayads, that they followed the ordinary custom by which a marriage by a widow entails forfeiture of her first husband's land 145 P. R. 1893 **A**

(b) *Held* also that the parties were governed by the proviso to that custom, that where the widow after re-marriage does not go to reside in the house of her second husband but continues to reside in her first husband's house she retains for life her first husband's also 145 P. R. 1893 **B**

- (20) **Forfeiture of life estate by widow by reason of unchastity Sikh Jats of Amritsar District**

Found, that plaintiff has established the existence of a custom among Sikh Jats of the Amritsar District whereby a widow who abandons her deceased husband's household and contracts an irregular but more or less permanent union with other man forfeits her life estate in her late husband's land 40 F. R. 1893 **C**

- (21) **Re-marriage of widow with her deceased husband's brother—Forfeiture life estate in first husband's property—Gil Sikh Jats Bhanjal tahsil Fazilka of the Hissar (old Sirsa) District**

*Held*, that amongst Sikh Jats in the Sirsa District a widow marrying her husband's brother retains by custom her life estate in her first husband's property 89 P. R. 1900 **D**

- (22) **Re-marriage of Sikh Jat woman with her deceased husband's brother—Forfeiture of life estate in her former husband's property—Sikh Jats of the Ferozepur District**

*Held* that amongst Sikh Jats in the Ferozepur District a widow marrying her husband's brother does not forfeit by custom her life estate in her former husband's property 115 P. R. 1900 (39 P. R. 1896 79 P. R. 1897 11 A. 330 F) **E**

- (23) **Widow re-marrying—Forfeiture of rights—Custom**

(a) Two widows succeeding in equal shares to estate of deceased proprietor—Re marriage of one widow—Non forfeiture of her share by such widow—Death of second widow—Right of surviving widow to succeed to share of deceased widow See 26 P. R. 1888 **F**

(b) **Muhammadan Dogars of Hissar District—Grand mother and grand uncle—Re marriage—Forfeiture of estate** See 171 P. R. 1888 **G**

(c) **Hinjra Jats of Amritsar tahsil—Re marriage by *Kareva* of widow who continues to live in her husband's house—Absence of ceremony—Forfeiture of estate.** 74 P. R. 1893 **H**

**Customs as to widow Marriages in the Several Provinces of India—(Old.).**

**XI.—PUNJAB—(Concluded).**

(d) Re-marriage of Hindu widow—Rights in deceased husband's property—Act XV of 1856—Punjab Laws Act, 1872, S. 5—Effect of the Act of 1856 upon a custom recognizing the re-marriage of widows. See 46 P.R. 1891      I

**(24) Right of widow who has been guilty of unchastity to succeed to her deceased husband's estate.**

"      A wife among exogamous tribes, such as Jats, Hindu or Sikh, is entitled to be maintained from her husband's property as being a member, not of his family of origin (of which she is not a member by birth, being of another got) but of his household. If during his life she quits his house to reside with another man, or is turned out of it by the husband for adultery, she ceases to be a member of the household, and her title to maintenance, as a right comes to an end. The same principle may be traced in the custom as to widows.      34 P.R. 1893.      J

# THE PARSEE MARRIAGE AND DIVORCE ACT, 1865<sup>1</sup>.

(ACT XV OF 1865.)

[Passed on the 7th April, 1865.]

*An Act to define and amend the law relating to Marriage and Divorce among the Parsees.*

**WHEREAS** the Parsee Community has represented the necessity of defining and amending the law relating to Marriage and Divorce among Parsees; And whereas it is expedient that such law should be made conformable to the customs of the said community, It is enacted as follows:—

(Notes).

## 1.—“The Parsee Marriage and Divorce Act, 1865”

### (1) Statement of Objects and Reasons

For ———, see Gazette of India, 1865, p. 99.

**A**

### (2) Discussions on the Bill.

For ———, see Gazette of India, 1865, Supplement, pp. 44, 110, 113.

**B**

### (3) Act where declared in force.

This Act has been declared in force in—

(a) The whole of British India, except the Scheduled Districts, see Laws, Local Extent Act, XV of 1874, S. 3.

**C**

(b) It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act XIV of 1874, to be in force in the following Scheduled Districts, namely —

(i) Sindh	See Gazette of India, 1880, Pt. I, p. 672.		
(ii) West Jalpaiguri	Do.	1881,	Do. 74.
(iii) The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1890, Pt I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the district of Singhbhum	Do.	1881,	Do. 504.
(iv) The scheduled Districts in Ganjam and Vizagapatam	Do	1881,	Do 870.
(v) The Scheduled portion of the Mirzapur District	Do	1879,	Do. 383.
(vi) Jaunsar Bawar	Do.	1879,	Do. 382.

**General—(Concluded).**

Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion. 23 B. 509. **S**

(b) The Zoroastrian religion does admit and enjoin conversion. 23 B. 509. **T**

(c) The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including of course, the merit of conversion as a theological *dogma*, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. 23 B. 509. **U**

(d) In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation. 23 B. 509. **Y**

(e) Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. 23 B. 509. **W**

**(10) Adoption among Parsis—Will—Evidence.**

(a) An adoption made by a Parsee immediately before his death would render extremely improbable the execution of a will by him a very short time previous thereto, and, therefore, call for very clear proof to establish its existence. 5 W. R. 102. **X**

(b) Although in cases of adoption by *Dhurm-putr* (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the *Dhurm-putr*. 5 W. R. 102. **Y**

(c) In the absence of any such writing, and upon the whole evidence, the adoption in this case was pronounced to be as a *Paluk putr*, and not merely as a *Dhurm-putr*. 5 W. R. 102. **Z**

Interpretation-  
clause.

2. In this Act, unless there be something repugnant in the subject or context,—

Words in the singular number include the plural, and words in the plural number include the singular:

“priest” means a Parsee priest and includes Dastur and Mobed :

“marriage” means a marriage between Parsees whether contracted before or after the commencement of this

“husband” and “wife.” Act; and “husband” and “wife” respectively mean a Parsee husband and a Parsee wife;

“Section.” “section” means a section of this Act.

**General—(Continued).**

(e) Parsees are generally governed by English Law rightly or wrongly : *Naoroji v. Rogers*, 4 Bom. H.C. 1 ; *Bai Maneckbai v. Bai Merbai*, 6 B. 363. There is no express enactment excluding Parsees from the operation of English Common Law as there are in cases of Hindus and Mahomedans. 13 Bom. L.R. 920 (923). **K**

(f) The following observations of Davar, J. may also be noted —

"I am afraid it is too late in the day now to raise the question as to whether the Common Law of England does or does not apply to the Parsees who inhabit the town and Island of Bombay. In 4 B.H.C. 1, Westrop, J. held that it did and that case has been followed by a series of decisions of this Court holding that except where there is special legislation affecting the community, the common law of England applied to the Parsees residing in the Presidency Town of Bombay." 13 Bom. L.R. 920 (929—930). **L**

**(3) This Act is based on English Law.**

This Act relating to marriage and divorce, which was framed by the managing committee of the Parsee Law Association and upon which the present Act was based, was itself, with one addition, based upon the English Divorce Act of 1858. 9 B.H.C. 290 (303). **M**

**(4) Rule as to introduction of English Law in a conquered country.**

The introduction of the English law into a conquered or ceded country does not draw with it that branch which relates to aliens, if the acts of the Power introducing it show that it was introduced, not in all its branches, but only *sub modo*, and with the exception of this portion. 1 M.I.A. 175 **N**

**(5) Effect of Hindu customs on Parsi Law of marriage**

The Parsees seem to have had no special law of their own when they came to India in A.D. 717. They accordingly adopted Hindu Customs, *inter alia*, as to marriage. See 5 W.R. 102 (P.C.), cited in 13 B. 302 (307). **O**

**(6) Rule of justice, equity and good conscience**

In the absence of any special law for Parsees in the Mofussil, the rule of justice, equity, and good conscience should be observed, and the Court should follow with certain necessary modifications the practice of the Courts of Equity of England. 5 B.H.C.A.C.J. 109. **P**

**(7) Effect of custom on religious tenets**

A well-established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community. 23 B. 509 (13 B. 302; 22 B. 430, F). **Q**

**(8) Act not retrospective.**

The provisions of the Act do not in any way affect the validity or the consequences of a marriage celebrated before it came into force. 3 B.H.C.A.C.J. 113. **R**

**(9) Parsees, who are — Zoroastrians—Conversion.**

(a) The Parsi community consists of Parsees who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from

**General—(Concluded).**

Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion. 23 B. 509. **S**

(b) The Zoroastrian religion does admit and enjoin conversion. 23 B. 509. **T**

(c) The Indian Zoroastrians while theoretically adhering to their ancient religion and consistently avowing its principal tenets, including of course, the merit of conversion as a theological *dogma*, erected about themselves real caste barriers, and gradually fell under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as distinctly a caste meaning and as essentially a caste connotation as that used to denominate any other great Indian caste. 23 B. 509. **U**

(d) In the Zoroastrian community, while the religion and its ritual purity are still the mainspring of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste, or communal, or tribal organisation. 23 B. 509. **Y**

(e) Conversion—in the abstract at any rate, and as a theoretical religious tenet—was perfectly familiar to the Parsi community, not only in the remote past but in our own time. 23 B. 509. **W**

**(10) Adoption among Parsis—Will—Evidence.**

(a) An adoption made by a Parsee immediately before his death would render extremely improbable the execution of a will by him a very short time previous thereto, and, therefore, call for very clear proof to establish its existence. 5 W. R. 102. **X**

(b) Although in cases of adoption by *Dhurm-putr* (a partial adoption) it is not indispensably necessary that a declaration should be made on the third day after the decease, yet it is usual to make such a declaration and to take a writing from the *Dhurm-putr*. 5 W. R. 102. **Y**

(c) In the absence of any such writing, and upon the whole evidence, the adoption in this case was pronounced to be as a *Paluk putr*, and not merely as a *Dhurm-putr*. 5 W. R. 102. **Z**

Interpretation-  
clause.

2. In this Act, unless there be something repugnant in the subject or context,—

Words in the singular number include the plural, and words in the plural number include the singular :

“priest” means a Parsee priest and includes Dastur and Mobed :

“marriage” means a marriage between Parsees whether contracted before or after the commencement of this

“husband” and “wife.” Act; and “husband” and “wife” respectively mean a Parsee husband and a Parsee wife ;

“Section.” “section” means a section of this Act.

"Chief Justice."

"Chief Justice" includes Senior Judge.

"Court,"

"Court" means a Court constituted under this Act :

"British India" means the territories which are or shall be

"British India", vested in Her Majesty or her successors by the Statute 21 & 22 Vict. cap. 106, entitled "An

Act for the better government of India ; "

21 & 22 Vict.  
C. 106.

And, in any part of British India in which this Act operates -

"Local Govern-  
ment".

"Local government" means the person authorized to administer executive government in such part of India, or the chief executive officer of such part when it is under the immediate administration of the Governor-General of India in Council, and when such officer shall be authorized to exercise the powers vested by this Act in a Local Government ; and

"High Court".

"High Court" means the highest Civil Court of appeal in such part

(Notes).

#### 1—"Number."

N. B.—Cf S 13 (2) General Clauses Act (X of 1897).

#### 2—"British India."

N. B.—Compare this definition with S. 3 (27) of the General Clauses Act (X of 1897).

#### 3.—"Local Government."

N. B.—Compare this definition with S. 3 (29) of the General Clauses Act (X of 1897).

#### 4.—"High Court."

N. B.—Compare this definition with S. 3 (24) of the General Clauses Act (X of 1897).

### II.—Of Marriages between Parsees

3. No marriage contracted after the commencement of this

Requisites to validity of Parsee marriages.

Act shall be valid if the contracting parties are related to each other in any of the degrees of consanguinity or affinity prohibited among Parsees, and set forth in a table <sup>1</sup> which the Governor General of India in Council shall, after due enquiry, publish in the Gazette of India, and unless such marriage shall be solemnized according to the Parsee form of ceremony called "Asirvad <sup>2</sup>" by a Parsee priest in the presence of two Parsee witnesses independently of such officiating priest ; and unless, in the case of any Parsee who shall not have completed the age of twenty-one years, the consent of his or her father or guardian shall have been previously given to such marriage <sup>3</sup>.



(Notes).

1.—"Table"

**Table framed by the Governor General in Council.**

(a) A man shall not marry his —

1. Paternal grand-father's mother.
2. Paternal grand-mother's mother.
3. Maternal grand-father's mother.
4. Maternal grand-mother's mother
5. Paternal grand-mother.
6. Paternal grand-father's wife
7. Maternal grand mother.
8. Maternal grand-father's wife.
9. Mother or step-mother.
10. Father's sister or step-sister.
11. Mother's sister or step-sister
12. Sister or step-sister.
13. Brother's daughter or step-brother's daughter, or any direct lineal descendant of a brother or step-brother.
14. Sister's daughter or step-sister's daughter, or any direct lineal descendant of a sister or step-sister.
15. Daughter or step-daughter, or any direct lineal descendant of either.
16. Son's daughter or step-son's daughter, or any direct lineal descendant of a son or step-son.
17. Wife of son or step-son, or of any direct lineal descendant of a son or step-son.
18. Wife of daughter's son or of step-daughter's son, or of any direct lineal descendant of a daughter or step-daughter.
19. Mother of daughter's husband.
20. Mother of son's wife.
21. Mother of wife's paternal grand-father.
22. Mother of wife's paternal grand-mother.
23. Mother of wife's maternal grand-father
24. Mother of wife's maternal grand-mother.
25. Wife's paternal grand-mother
26. Wife's maternal grand-mother.
27. Wife's mother, or step-mother.
28. Wife's father's sister.
29. Wife's mother's sister.
30. Father's brother's wife
31. Mother's brother's wife.
32. Brother's son's wife.
33. Sister's son's wife

*See* Gazette of India of the 9th Sept , 1865, pp. 981, 982. A

(b) A woman shall not marry her —

1. Paternal grand-father's father.
2. Paternal grand-mother's father.
3. Maternal grand-father's father.
4. Maternal grand-mother's father.
5. Paternal grand-father.

**1.—“ Table ”—(Concluded).**

6. Paternal grand-mother's husband.
7. Maternal grand-father.
8. Maternal grand-mother's husband.
9. Father or step-father.
10. Father's brother or step-brother.
11. Mother's brother or step-brother.
12. Brother or step-brother.
13. Brother's son or step-brother's son or any direct lineal descendant of a brother or step-brother.
14. Sister's son or step-sister's son, or any direct lineal descendant of a sister or step-sister.
15. Son or step-son, or any direct lineal descendant of either.
16. Daughter's son or step-daughter's son, or any direct lineal descendant of a daughter or step-daughter.
17. Husband of daughter or of step-daughter, or of any direct lineal descendant of a daughter or step-daughter.
18. Husband of son's daughter or step-son's daughter, or of any direct lineal descendant of a son or step son.
19. Father of daughter's husband.
20. Father of son's wife.
21. Father of husband's paternal grand-father.
22. Father of husband's paternal grand-mother.
23. Father of husband's maternal grand-father.
24. Father of husband's maternal grand-mother.
25. Husband's paternal grand-father.
26. Husband's maternal grand-father.
27. Husband's father or step-father.
28. Brother of husband's father.
29. Brother of husband's mother.
30. Husband's brother's son, or his direct lineal descendant.
31. Husband's sister's son, or his direct lineal descendant.
32. Brother's daughter's husband.
33. Sister's daughter's husband.

*See Gazette of India, 9th Sept., 1865, pp 981, 982 B*

**Note.**—In the above table the words “brother” and “sister” denote brother and sister of the whole as well as half blood. Relationship by step means relationship by marriages.

**2.—“ Asirvad.”**

**Asirvad, ceremony of, what is.**

The marriage ceremony of *Asirvad* includes a prayer (the nikah), or exhortation to the parties. See 13 B. 302 (311). **C**

**3.—“ The consent of his or her father or guardian shall have been previously given to such marriage ”**

**(1) Infant marriages among Parsis.**

Although the practice of infant marriages is one which finds no warrant in their own religious system—the Parsis in Western India have in the course of centuries so generally adopted such practice from their

**3 —“ The consent of his or her father or guardian shall have been previously given to such marriage ”—(Continued).**

Hindu neighbours as to give such marriages amongst themselves all the validity they possess amongst Hindus, making them independent of any question of subsequent consent or non-consent by the parties thereto. 13 B. 302 **D**

**(2) Infant marriage amongst Parsis—Consent of father or guardian—Consent may be implied.**

(a) In 1868 the plaintiff and defendant, then of the ages of seven and six years respectively, went through the ceremony of marriage in the presence of their respective parents and according to the rights of their religion. The formal consent on behalf of the plaintiff was not given by his father, but by his uncle, with whom he was living and by whom he had been adopted. Nineteen years afterwards the plaintiff filed this suit praying for a declaration that the pretended marriage was null and void, and did not create the *status* of husband and wife between the plaintiff and defendant. The defendant resisted the suit, and claimed to be the lawful wife of the plaintiff. The plaintiff and defendant never lived together as man and wife, nor was the marriage ever consummated.

*Held*, that under the circumstances the formal consent of the uncle and the tacit consent of the father were enough to satisfy the requirements of section 3 of Act XV of 1865, which requires the previous consent of the father or guardian to the marriage. 13 B. 302. **E**

(b) The following observations of Scott, J. may be noted —

“ I will deal with the minor issue of the father's consent first. No doubt, it is required by S. 3 of the Parsee Marriage Act and it was not formally given at the time of the marriage. But the uncle acting as father consented, and the natural father not only by his presence gave a tacit consent, but ever afterwards he has approved the marriage, and treated it as valid. I think this objection cannot be sustained.”  
*Per* Scott, J. in 13 B. 302 (309). **F**

(c) The following remarks of Scott, J. are also worthy of being noted :—“ The requisites to the validity of a Parsi marriage as given in S. 3 of the Parsi Marriage Act are —(1) a religious ceremony called *asuvad*, (2) in the presence of two witnesses, and (3) if either party is under twenty-one, the consent of the father or guardian is required. The only reference to infant marriages is in S. 37, which says that no suit can be brought to enforce a marriage if at the date of the suit the husband is not over sixteen, or the wife not over fourteen. The validity of such a marriage, which has ensued after those ages are reached, is not decided. The Court must then look to English law, which generally is applicable to Parsis in Bombay. The Zoroastrian system would seem not to have contemplated marriage in infancy. The marriage ceremony of *asuvad* includes a prayer (the *nikah*), or exhortation to the parties, which would be senseless if it were not addressed to persons capable of matrimonial union in every sense. The *Zendavesta* contains many passages which exclude the idea of infant marriage. For instance ‘ Let them betroth a sister or a daughter to a pure man after her fifteenth year ’ Again, the maiden who encounters the bridegroom is to be ‘ Marriageable ’ And certain

**3.—“The consent of his or her father or guardian shall have been previously given to such marriage ”—(Continued).**

maidens are required to be young women fit for marriage, different from maidens not yet sought by men. All this agrees with the opinion sent by the wise men of Persia, who two hundred years ago told their brethren in India that the age of marriage was fourteen for boys and ten for girls. But custom seems to have wandered from the pure doctrine of the *Zendavesta*, and the law, whether English or Persian, can only be applied subject to any well-established usage. When the Parsis settled in Western India eleven hundred and sixty years ago they probably brought with them a system, both of law and custom, from Persia. But it was all unwritten, and gradually fell into desuetude, and the mere handful of Persian strangers gradually and naturally adapted much of the law and usage that obtained in the Hindu community in whose midst they were forced to dwell. There is no doubt they adopted, amongst other things, the injurious practice of infant marriage. From the high level of education and civilization which the Parsi community of the present day has reached these marriages are now discontinued, but I have little doubt they were until lately common, nor can it be doubted cases still occur. The statistics given to me prove the existence of such marriages, though they also prove a strong current of opinion and practice which will gradually restore the older and healthier system of adult marriage. But infant marriage still is practised and recognized. I do not rely only on the instances of which evidence was given in this case. Such instances were hardly enough to prove a well-established usage. But much more convincing testimony is to be found in the statistics given me, and again in the proceedings put in, which went on before the Parsi Law Commission, a Government Commission of 1862 which produced the Parsi Marriage Act. For instance, the Parsi Law Association in 1862 sent to the Commission eighty-five delegates, all of them leading-Parsis, to ask that the *Panchayat* should have power to dissolve marriages contracted before puberty, and this was asked, said the delegates, in their petition, “in consequence of the custom of marriages taking place during infancy amongst the Parsi community.” This was refused the Commission declined to insert either this provision or any explicit legislative sanction or prohibition of infant marriages. In short, the Commission acted as Government generally acts on matters of custom which appear to be injurious, but yet are admitted by the particular community.

It is difficult to conceive stronger proof of the prevalence of the usage than this petition which emanated from the great majority of the Parsi community. They have, no doubt, been very common until recently, and, as a rule—almost a universal rule, the present case being the only known exception—these infant marriages have been carried out by the parties. The question has never been before raised, whether either of the parties could legally repudiate the contract on reaching the age of discretion. If the English law is applicable, they could be then repudiated. But English law is only applicable subject to well-established usage, and I very much doubt whether these marriages,

**3.—“The consent of his or her father or guardian shall have been previously given to such marriage”**—(Continued).

which are an established fact in the Parsi community, are of such an inchoate probational character as to allow of repudiation. The Parsis have, no doubt, insensibly adopted them from the Hindus around them, and such marriages amongst Hindus are certainly not probational.” 13 B. 302 (310–312). **G**

**(3) Principles applicable to the above case.**

(a) The law to be applied to the above case is the English law, subject, however, to any well-established usage. 13 B. 302. **H**

(b) By the English law such a marriage would be an inchoate and imperfect marriage capable of repudiation by either party after arriving at years of discretion, but capable also of being made a valid and binding marriage by the consent of the parties thereto after they had arrived at such age. 13 B. 302. **I**

(c) The circumstances of the case showed that there had been such acquiescence in, and acceptance of, the marriage by the plaintiff after arriving at years of discretion as to render the marriage valid and binding on him, and incapable of subsequent repudiation. 13 B. 302. **J**

**(4) Jurisdiction in the above case**

*Held*, also that such a suit as the one stated above not being in the category of suits delegated to a special Court by Act XV of 1865, the jurisdiction to try it remained in the High Court, to which it had been given by section 12 of the Letter's Patent. 13 B. 302. **K**

**(5) Proof of consent of parties to the marriage.**

Consummation is the best proof of consent to a marriage, but is not the only proof. 13 B. 302. **L**

**(6) Marriage among Parsees—Suit for declaration of invalidity of marriage during infancy—Effect of custom validating such marriage—Age of majority among Parsees for purposes of marriage**

(a) A Parsi suing to have a marriage declared void should be deemed to be “acting in the matter of marriage” for the purpose of the saving provision in S. 2 of the Indian Majority Act (IX of 1875) so that his capacity is not to be affected by the 18 years' limit in S. 3 of the Act, but will be regulated by the provisions of the Parsi Marriage and Divorce Act (XV of 1865) fixing 21 as the age of majority for Parsees. 22 B. 430. **M**

(b) Plaintiff, a Parsi woman, was found by the lower Courts to have attained the age of 18 on the 20th September, 1884, and on the 20th September 1887, she was of the age of 21 years. On the 11 of September, 1890 which was within three years of the latter date, she filed the present suit praying for a decree declaring that the marriage ceremony performed in her infancy did not create the status of wife and husband between her and the defendant.

*Held* that the effect of S. 7 of the Limitation Act was to allow the plaintiff three years' time within which to sue after attaining her majority and that she be deemed to have become a major for the purpose of bringing the suit only, when she was 21 years old; and under Art. 120 of the Limitation Act governing the suit, it was within time. 22 B. 430. **N**

**3.—“The consent of his or her father or guardian shall have been previously given to such marriage”—(Concluded).**

(c) On the merits, it was observed that Act XV of 1865 contained no provisions as to the age at which a Parsee can contract marriage, the matter being left to the general law governing Parsees, and, in the absence of legislation, the law to be observed was the usage of the locality, and the lower Courts had distinctly found in favour of the existence of a custom validating and rendering binding marriages between Parsees even though contracted when the parties were children of tender age, and it was not open to the High Court on second appeal, to arrive at an independent finding as to the existence of such a custom, especially as there was a large body of evidence on the record in support of it 22 B. 490. **O**

**4** No Parsee shall, after the commencement of this Act, contract any marriage in the lifetime of his or her wife or husband, except after his or her lawful divorce from such wife or husband, by sentence of a Court as hereinafter provided

**Re-marriage save after divorce unlawful during lifetime of first wife or husband.**

and every marriage contracted contrary to the provisions of this section shall be void

**5.** Every Parsee who shall, after the commencement of this Act and during the lifetime of his or her wife or husband, contract any marriage without having been lawfully divorced from such wife or husband, shall be subject to the penalties provided in sections 494 and 495 of the Indian Penal Code, for the offence of marrying again during the lifetime of a husband or wife **XLV of 1860.**

**(Notes).**

**I — “Bigamy”**

**(1) Bigamy—Penal Code, Ss. 494, 495 — Punishment for bigamy.**

“Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

**Exception.**—This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction,

nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting a subsequent marriage shall, before such marriage takes place, inform

**1.—“Bigamy”—(Concluded).**

the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge ” See S. 494, Penal Code. **P**

“Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ” See S. 495, Penal Code. **Q**

**(2) Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of this Act, not punishable**

See 3 B.H.C. (A.C.J.) 113 noted under S. 30, *infra*. **R**

**6.** Every marriage contracted after the commencement of this Act shall, immediately on the solemnization thereof, be certified by the officiating priest in the form contained in the schedule to this Act.  
Certificate and registry of marriages.

The certificate shall be signed by the said priest, the contracting parties, or their fathers or guardians when they shall not have completed the age of twenty-one years, and two witnesses present at the marriage, and the said priest shall thereupon send such certificate, together with a fee of two rupees to be paid by the husband, to the Registrar of the place at which such marriage is solemnized

The Registrar on receipt of the certificate and fee shall enter the certificate in a register to be kept by him for that purpose, and shall be entitled to retain the fee

**(Note).**

**General.**

**N.B.**—Compare this section with the provisions of S. 54 of Act XV of 1872 (Christian Marriage), *infra*

**7.** For the purposes of this Act a Registrar shall be appointed. \* \* \*

Within the local limits of the ordinary original civil jurisdiction of a High Court the Registrar<sup>1</sup> shall be appointed by the Chief Justice of such Court, and, without such limits, by the Local Government. Every Registrar so appointed may be removed by the Chief Justice or Local Government appointing him.

**(Notes).**

**General.**

**N B.**—The words “who may be the Registrar appointed under Act XVI of 1861 (to provide for the Registration of Assurances),” in this section, were repealed by the Repealing Act 1870 (XIV of 1870).

**1.—“Registrar.”**

**N.B.**—Registrars of Assurance in certain towns have been appointed Registrars of Parsi Marriages.—

- (1) Bombay, *see* Bom. R. & O. Vol. I
- (2) Burma, *see* Bur. R. M.
- (3) Central Provinces, *see* Cent. Pro. R. & O.

For Such Registrars in the N.-W. Frontier Province *see* Gazette of India, 1901, Pt. II, p. 1304. **S**

**8.** The register of marriages mentioned in section 6 shall, at all reasonable times, be open for inspection, and certified extracts therefrom shall, on application, be given by the Registrar on payment to him by the applicant of two rupees for each such extract.

*Marriage-register to be open for public inspection.*

Every such register shall be evidence of the truth of the statements herein contained

**(Note).**

**General.**

**N.B.**—Compare this section with the provisions of S. 63 of Act XV of 1872 (Christian Marriage), *infra*.

**8-A.** Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the Governor General in Council from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by the Local Government by which he was appointed, a true copy certified by him, in such form as the Governor General, from time to time, prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals.

*Transmission of certified copies of certificates in marriage register to Registrar-General of Births, Deaths and Marriages.*

**(Notes).**

**General**

**N.B. 1.**—This section was added by Act VI of 1886, S. 31.

**N.B. 2**—Compare this section with S. 54, last para of Act XV of 1872 (Christian Marriage)

**1.—“Such intervals as the Governor General in Council from time to time directs”**

**Certificates of copies of entries in certificate book of Parsi marriages.**

In exercise of the powers conferred by section 13-A of Act III of 1872 (to provide a form of marriage in certain cases), and section 8 A of the Parsi Marriage and Divorce Act, 1865, the Governor-General in Council is pleased to issue the following orders.



**1.—“ Such intervals as the Governor General in Council from time to time directs ”—(Concluded).**

Copies of entries in the Marriage Certificate Book prescribed in section 13 of Act III of 1872 and in the Register of Marriages referred to in section 6 of the Parsi Marriage and Divorce Act, 1865, which Registrars (Except the Registrar appointed by the Chief justice of the High Court of Judicature at Bombay under Act XV of 1865,) under these Acts are required to send to the Registrars-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886, shall be certified in the form set forth in the following schedule, and shall be sent at intervals of three months, on or as nearly as possible after the 1st January, April, July and October in each year.

Should no entries be made in a Marriage Certificate Book, or a Register of Marriages, as the case may be, during the preceding three months, a certificate to this effect shall be sent to the Registrar-General concerned.

**SCHEDULE**

Form of Certificate of truth of copies of entries in Marriage Certificate Book under Act III of 1872 (or Register of Marriages under the Parsi Marriage and Divorce Act 1865, as the case may be) to be sent to Registrar-General.

Certified that the above, which contains entries from No \_\_\_\_\_ regarding \_\_\_\_\_ to No \_\_\_\_\_ regarding—is a true copy of all the entries in the Marriage Certificate Book under Act III of 1872 (or Register of Marriages under Act XV of 1865, as the case may be) kept by me for the three months ending the day of \_\_\_\_\_ 18 \_\_\_\_\_.

Dated the \_\_\_\_\_ of \_\_\_\_\_  
(Signature)

Registrar of Marriages under Act III of 1872 (or  
Registrar under the Parsi Marriage and Divorce Act,  
1865, as the case may be) for (local area).

See Gazette of India, Supplement, 1889, p. 921. T

**9.** Any priest knowingly and wilfully solemnizing any marriage contrary to and in violation of section 4 shall, on conviction thereof, be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two hundred rupees, or with both

Penalty for solemnizing marriage contrary to section 4.

**(Note)**

**General.**

**N B.**—Compare this section with the provisions contained in Part VII of Act XV of 1872, Ss. 68, 69, 70 (Christian Marriage).

**10.** Any priest neglecting to comply with any of the requisitions affecting him contained in section 6 shall, on conviction thereof, be punished for every such offence with simple imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

Penalty for priest's neglect of requirements of section 6.

**(Note).**

**General.**

**N B.**—Compare this section with the provisions contained in Part VII, of Act XV of 1872 (Christian Marriage).

- 11.** Every other person required by section 6 to subscribe or attest the said certificate, who shall wilfully omit or neglect so to do, shall, on conviction thereof, be punished for every such offence with a fine not exceeding one hundred rupees.

Penalty for omitting to subscribe and attest certificate.

**(Note)**

**General**

**N B.**—Compare this section with the provisions contained in part VII of XV of 1872 (Christian Marriage)

- 12.** Every person making or signing or attesting any such certificate containing a statement which is false, and which he either knows or believes to be false, or does not know to be true, shall be deemed to be guilty of the offence of forgery as defined in the Indian Penal XLV of 1860. Code, and shall be liable, on conviction thereof, to the penalties provided in section 466 of the said Code

Penalty for making &c, false certificate

**(Note)**

**General**

**N B** —Compare this section with the provisions contained in Part VII of Act XV of 1872 (Christian Marriage)

- 13** Any Registrar failing to enter the said certificate pursuant to section 6 shall be punished with simple imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both

Penalty for not registering certificate.

**(Note).**

**General**

**N.B** —Compare this section with the provisions contained in Part VII of Act XV of 1872.

- 14.** Any person secreting, destroying, or dishonestly or fraudulently altering the said register in any part thereof shall be punished with imprisonment of either description as defined in the Indian Penal Code XLV of 1860. for a term which may extend to two years, or, if he be a Registrar, for a term which may extend to five years, and shall also be liable to fine which may extend to five hundred rupees

Penalty for secreting, destroying or altering register

(Note).

**General.****N B.**—Compare this section with S. 75 of Act XV of 1872 (Christian Marriage).*III—Of Parsee Matrimonial Courts.*

**15.** For the purposes of hearing suits under this Act, a special Court<sup>1</sup> shall be constituted in each of the presidency-towns of Calcutta, Madras and Bombay, and in such other places in the territories of the several Local Governments as such Governments respectively shall think fit.

(Notes).

**General.****(1) Jurisdiction of High Court to deal with matrimonial causes are among Parsis**

The following remarks of Scott, J. throw light on the above point —“The next question, that of the jurisdiction of this Court over such a case, is one of considerable difficulty. No doubt the Parsis in India are, as a general rule, subject to English law. They brought no code of laws from Persia, and all ordinary disputes between Parsis are now regulated in conformity with the laws of England. But in Parsi matrimonial matters a special Court has been created. The present case admittedly does not come within the jurisdiction of this special Court, and it is, therefore, argued that no Court whatever is competent to try such a suit. The special Court undoubtedly has no jurisdiction. It has only power to grant a decree of nullity of marriage, it has no power to deal with a case where there never was a marriage at all. As regards the total absence of any force, Sir Erskine Perry in 1843, as Judge of the late Supreme Court, laid down the broad principle that Parsis were subject to the ecclesiastical jurisdiction of the Court in disputes arising out of the marriage contract—*Enzeboye v. Ardaseer Cursetjee Perry's Or Ca.*, p. 57. But the Privy Council reversed this decision (6 Moo, I A. 348) and held that the ecclesiastical jurisdiction extended only to Christians in questions of the restitution of conjugal rights. Their Lordships, however, at the same time intimated that the Supreme Court on its civil side might possibly administer some kind of remedy for the violation of duties and obligations arising out of the matrimonial union between Parsis. The High Court inherited all the powers of the Supreme Court, and was also specially empowered in the exercise of its ordinary original civil jurisdiction to “try suits of every description.” Would not this wide jurisdiction cover such cases as are not within the jurisdiction of the special Parsi Court? It must be remembered that if this power is not wide enough to cover the present cases, the parties would be practically without any remedy. They would be relegated to their *Panchayet forum*, which has long been without authority, even as a domestic tribunal, and now hardly exists at all. This was not the intention of Government when the High Courts were established. Sir C. Wood in his letter of May 14th, 1862, accompanying the Letters

**General—(Concluded).**

Patent constituting the High Court of Bombay, refers to the Privy Council's decision I have cited, and says the object of the charter was to do away with all such limitations and to invest the High Court with power to determine cases of every description and to apply a remedy to every wrong I think, therefore, the words "to try suits of every description" comprise matrimonial suits, subject of course to the provisions of the Parsi Marriage Act, which assigns to a special tribunal most of the questions incident to the matrimonial contract, but not the questions involved in the present suit." 13<sup>o</sup> B. 302 (309, 310). U

**1.—"Special Court"**

**N.B.**—For Notification constituting the Parsi Chief Matrimonial Court in—

- (1) Bombay, *see* Bom. R. & O., Vol. I.
- (2) Central Provinces, *see* C. P., R. & O.
- (3) Lower Burma, except the Hill Districts of Arakan, *see* Burma Gazette, 1903, Pt. I, p. 180.
- (4) Madras, *see* Mad. R. & O., Pt. II. Y

**16.** The Court so constituted in each of the presidency-towns

Parsi Chief Matrimonial Courts

shall be entitled the Parsee Chief Matrimonial Court of Calcutta, Madras or Bombay, as the case may be .

The local limits of the jurisdiction of a Parsee Chief Matrimonial Court shall be continuous with the local limits of the ordinary original civil jurisdiction of the High Court

The Chief Justice of the High Court, or such other Judge of the same Court as the Chief Justice shall from time to time appoint, shall be the Judge of such Matrimonial Court, and, in the trial of cases under this Act, he shall be aided by eleven delegates.

**17.** Every Court so constituted at a place other than a presi-

Parsi District Matrimonial Court

dency town shall be entitled the Parsee District Matrimonial Court of such place<sup>1</sup>

Subject to the provisions contained in the next following section, the local limits of the jurisdiction of such Court shall be continuous with the limits of the district in which it is held.

The Judge of the principal Court of original civil jurisdiction at such place shall be the Judge of such Matrimonial Court, and, in the trial of cases under this Act, he shall be aided by seven delegates.

**(Note)**

**1 — "Parsi District Matrimonial Court of such place."**

**N.B.**—For Notification constituting District Courts in Surat, Poona, and in Sindh, *see* Bom. R. and O Vol. I.

**18.** The Local Government may from time to time alter the local limits of the jurisdiction of any Parsee District Matrimonial Court, and may include within such limits any number of districts under its Government

Power to alter territorial jurisdiction of District Courts.

(Note).

*1.—“Power to alter territorial jurisdiction of District Courts.”*

**N.B.**—For Notification fixing the local limits of the Jurisdiction of the courts constituted at Poona and at Surat under S. 17, see Bom. R. & O., Vol. I.

**19** Any district which the Local Government, on account of the fewness of the Parsee inhabitants, shall deem it inexpedient to include within the jurisdiction of any District Matrimonial Court, shall be included within the jurisdiction of the Parsee Chief Matrimonial Court for the territories under such Local Government where there is such Court

Certain districts within jurisdiction of Chief Matrimonial Court

(Note).

**General**

**N B. 1.**—Under this power the Settlement of Aden and its dependencies have been included within the Jurisdiction of the Parsi Chief Matrimonial Court of Bombay, see Bom. R. & O., pp. 27 and 28.

**N.B. 2.**—For notification declaring all districts in the Madras Presidency where the Act is in force to be included within the jurisdiction of the Parsi Chief Matrimonial Court at Madras, see Mad. R. & O. Vol. I, Pt. II.

**N.B.3.**—For Notification including all Districts in Upper Burma as well as those in Lower Burma within the jurisdiction of the Parsi Chief Matrimonial Court at Rangoon, see Burma Gazette, 1907, Pt. I, p. 918.

**20.** A seal shall be made for every Court constituted under this Act, and all decrees and orders and copies of decrees and orders of such Court shall be sealed with such seal, which shall be kept in the custody of the presiding Judge.

Court seal.

**21.** The Local Governments shall, in the presidency-towns and districts subject to their respective Governments, respectively appoint persons to be delegates to aid in the adjudication of cases arising under this Act.

Appointment of delegates.

The persons so appointed shall be Parsees their names shall be published in the official Gazette; and their number shall, within the local limits of the ordinary original civil jurisdiction of a High Court, be not more than thirty, and in districts beyond such limits not more than twenty

Power to appoint  
new delegates.

**22.** The appointment of a delegate shall be for life.

But whenever a delegate shall die, or be desirous of relinquishing his office, or refuse or become incapable or unfit to act, or be convicted of an offence under the Indian Penal Code or other law XLV of 1860, for the time being in force, then and so often the Local Government may appoint any other person being a Parsee to be a delegate in his stead; and the name of the person so appointed shall be published in the Official Gazette.

Delegates deemed  
public servants

**23.** All delegates appointed under this Act shall be considered to be public servants within the meaning of the Indian Penal Code.

XLV of 1860.

Selection of dele-  
gates under sections  
16 and 17 from  
those appointed  
under section 21

**24** The delegates selected under sections 16 and 17 to aid in the adjudication of suits under this Act shall be taken under the orders of the presiding Judge of the Court in due rotation from the delegates appointed by the Local Government under section 21

Practitioners in  
Matrimonial Courts

**25** All advocates, vakils, and attorneys-at-law entitled to practise in a High Court shall be entitled to practise in any of the Courts constituted under this Act, and all vakils entitled to practise in a District Court shall be entitled to practise in any District Matrimonial Court constituted under this Act

Court in which  
suits to be brought

**26** All suits instituted under this Act shall be brought in the Court within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit

When defendant  
has left British  
India

When the defendant shall at such time have left British India, such suit shall be brought in the Court at the place where the plaintiff and defendant last resides together.

#### *IV.—Of Matrimonial Suits*

(a) *For a Decree of Nullity.*

In case of lunacy  
or mental unsound-  
ness.

**27.** If a Parsee at the time of his or her marriage was a lunatic or of habitually unsound mind, such marriage may, at the instance of his or her wife or husband, be declared null and void upon proof that the lunacy or habitual unsoundness of mind existed at the time of the marriage and still continues.

Provided that no suit shall be brought under this section if the plaintiff shall at the time of the marriage have known that the respondent was a lunatic or of habitually unsound mind.

**(Notes).**

**General.**

**N.B. 1.**—Compare this section with Ss. 18 and 19 of the Divorce Act (IV of 1869).

**N.B. 2.**—For Notes, see the notes under Ss. 18 and 19 of the Divorce Act (IV of 1869), *supra*.

**28.** In any case in which consummation of the marriage is from natural causes impossible, such marriage may, at the instance of either party thereto, be declared to be null and void.

In case of im-  
potency<sup>1</sup>.

**(Notes).**

**General.**

**N.B. 1.**—Compare this section with Ss. 18 and 19 of the Divorce Act (IV of 1869).

**N.B. 2.**—For full notes on this section see notes under Ss. 18 and 19 of the Divorce Act (IV of 1869), *supra*.

**I —“ Impotency.”**

**Suit by wife for nullity—General and relative impotency—Impotency *quoad hanc*—English Law.**

(a) In March, 1882, the plaintiff and defendant, Parsis, were married according to the rites and ceremonies of their religion. In October, 1882, the plaintiff attained puberty, and for seventeen months from that time she lived with the defendant in his parents' house; but there was no consummation of the marriage. There was no physical defect in either plaintiff or defendant, nor any unwillingness in the plaintiff to consummate the marriage, but the defendant had always entertained such hatred and disgust for the plaintiff as to result, in the opinion of the medical experts, in an incurable impotency in the defendant *as regards the plaintiff*.

The delegates unanimously found, on the evidence, that the consummation of this marriage had from its commencement been impossible, because the defendant was from a physical cause, namely, impotency as regards the plaintiff, unable to effect consummation. They also found that there was no collusion or connivance between the parties.

*Held*, on this finding, that such impotency *quoad* the plaintiff must be regarded as one of the causes going to make consummation of a marriage impossible under section 28 of Act XV of 1865, there being nothing in the Act to suggest a contrary opinion. 16 B. 639. **W**

(b) The observations of Mr. Lushington and of Lord Watson in *G. v. M.* 10 Ap. Ca., 171, as to impotency *quoad hanc*, and practical impossibility of consummation, approved and followed. 16 B. 639. **X**

(c) The law to be applied to Parsis in this respect is based on the corresponding law of England. 16 B. 639 (642). **Y**

(d) “An observation which must be apparent to all—that impotency *quoad hanc* is just as prejudicial to the individual female as universal impotence.” *Per* Lushington, J. in *G. v. M.* cited in 16 B. 639 (643). **Z**

*(b) For a decree of Dissolution in Case of Absence.*

**29.** If a husband or wife shall have been continually absent from his or her wife or husband for the space of seven years, and shall not have been heard of a being alive within that time by those persons who would naturally have heard of him or her had he or she been alive, the marriage of such husband or wife may, at the instance of either party thereto, be dissolved .

In case of absence for seven years.

**(Notes).**

**General.**

**N B**—Compare this section with S. 10 of Act IV of 1869 (Divorce), see, also, notes thereunder

**Presumption as to death of a missing person.**

(i) *Burden of proving death of person known to have been alive within 30 years.*

When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it. See Evidence Act, 1872, S. 107. **A**

(ii) *Burden of proving that person is alive who has not been heard of for seven years.*

[Provided that when] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is [shifted to] the person who affirms it. See Evidence Act, 1872, S. 108. **B**

*(c) For Divorce or Judicial Separation*

**30.** Any husband may sue that his marriage may be dissolved, and a divorce granted, on the ground that his wife has since the celebration thereto been guilty of adultery ;

On ground of wife's adultery

and any wife may sue that her marriage may be dissolved and a divorce granted on the ground that since the celebration thereof her husband has been guilty of adultery with a married or fornication with an unmarried woman not being a prostitute, or of bigamy<sup>3</sup> coupled with adultery<sup>1</sup>, or of adultery coupled with cruelty<sup>4</sup>, or of adultery coupled with wilful desertion<sup>2</sup> for two years or upwards, or of rape, or of an unnatural offence

On ground of husband's adultery, &c

In every such suit for divorce on the ground of adultery the plaintiff shall, unless the Court shall otherwise order, make the person with whom the adultery is alleged to have been committed a co-defendant, and in any such suit by the husband the Court may order the adulterer to pay the whole or any part of the costs of the proceedings.



**(Notes).****General.**

**N.B.**—Compare this section with Ss. 10 & 22 of the Divorce Act (IV of 1869), and see, also, notes thereunder.

**(1) Suit for divorce—Husbands's liability for wife's costs—Rule of English Law applicable to Parsis.**

- (a) The Common Law of England applies to Parsis who inhabit the town and island of Bombay. 13 Bom L R 920 **C**
- (b) Under that Common Law, the wife is entitled to pledge her husband's credit and defend herself at his costs in any action that he may file against her for dissolution of his marriage with her. 13 Bom. L.R 920. **D**
- (c) It is not necessary that the wife should be successful in the proceedings. 13 Bom. L R 920 **E**
- (d) The costs of the wife payable by the husband are not limited to the amount paid into the Court secured by the husband for that purpose. 13 Bom L R 920 **F**
- (e) The solicitors of the wife must make all efforts to secure their costs from their real debtor, the husband, before they can be allowed to apply for a charging order against the wife's property recovered or preserved in the suit through their exertion. 13 Bom. L.R. 920. **G**
- (f) The foundation for the Common Law rule is that where the wife finds it necessary to protect herself and her interest, more especially if she is attacked by her husband, she ought to have the means to do so and is, therefore, entitled to pledge her husband's credit for all proper and reasonable costs. 13 Bom. L R. 920 (932). **H**

**(2) Suit for divorce—Jurisdiction.**

- (a) The plaintiff and defendant were Parsis. The husband filed this suit in April, 1891, stating that in March, 1885, he and the defendant went through the ceremony of *Asirvad* at Akola in the Berar Assigned Districts. He alleged that he was at the time only nineteen years of age and that his mother and guardian had not given her previous consent to the ceremony nor was she present at it. He and the defendant, subsequently, cohabited at Bhusawal until the 8th April, 1885, but since then he had not lived with the defendant. He further alleged that the defendant had been guilty of adultery, and he prayed that, if necessary, it might be declared that the *Asirvad* ceremony did not constitute a valid marriage, but that if the marriage should be declared valid, it might be dissolved. At the hearing, it was found that the requirements of section 3 of the Parsi Marriage and Divorce Act, were complied with at the marriage so that the marriage would have been valid, if it had been celebrated within British India. It was also found that the defendant had been guilty of adultery. *Held* that the jurisdiction of the Court was not barred merely by the circumstance that the parties were married at Akola. 16 B 136 **I**
- (b) S. 30 of the Act applies to marriages however celebrated. In the present case, both the parties were domiciled within the territorial jurisdiction of the Court at the time of the marriage, and were still so domiciled, and the adultery was also committed within the jurisdiction. The Court therefore had jurisdiction. 16 B. 136. **J**

**General—(Concluded).**

(c) The delegates having found that at the marriage the requirements of section 3 of the Parsi Marriage Act, XV of 1865, were complied with, *held*, assuming that there was no special law or usage in the Berars on the subject as to the requisites of a valid marriage between Parsis in that district, or that, if there was such law or usage, it was in accordance with section 3 of the Act, the marriage between the plaintiff and the defendant was valid and capable of being dissolved. 16 B. 136. **K**

(d) The following observations of Birdwood J. are worthy, of being noted.—

"It appears from the evidence that the parties were married at Akola in the Berars. As the Berars are not vested in Her Majesty by the Statute 21 and 22 Vic., cap. 106, they are not included in "British India," as defined in the Parsi Marriage and Divorce Act, and the question arises, with reference to section 53 of that Act, which declares that it "shall extend to the whole of British India," whether this Court has jurisdiction to dissolve the marriage of the parties. I am of opinion that the jurisdiction of the Court is not barred merely by the circumstance that the parties were married at Akola. The Act is certainly not in force at Akola, but section 26 of the Act permits a Parsi husband or wife to bring a suit in the Court established under the Act within the limits of whose jurisdiction the defendant resides at the time of the institution of the suit. Section 30 provides for suits for the dissolution of a marriage, and the word "marriage" is defined in section 2 as meaning "a marriage between Parsis whether contracted before or after the commencement" of the Act. The provisions of section 30 do not, therefore, apply only to marriages celebrated in accordance with the requirements of section 3. That section applies to marriages whenever celebrated. It applies also, in my opinion, to valid marriages wheresoever celebrated. If it had been the intention of the Legislature to give relief to Parsi husbands and wives, in proper cases, only if they had been married in British India, that intention would have been clearly expressed. In the Indian Divorce Act IV of 1869 the Courts established thereunder have their jurisdiction in respect of marriages expressly limited. Those Courts can make no decree of dissolution of marriage unless the marriage has been solemnised in India, or unless the matrimonial offence complained of has been committed in India, or unless the husband has, since the solemnization of the marriage, exchanged his profession of Christianity for the profession of some other form of religion. No such limitation of the jurisdiction of this Court is to be found in Act XV of 1865. As, in the present case, both the parties were domiciled within the territorial jurisdiction of this Court at the time of the marriage, and are still so domiciled, and as the adultery of which the defendant has been found guilty was also committed within the jurisdiction. I have no doubt that the Court has jurisdiction. (*Cf. Niboyet v. Niboyet*, 3 P. D. 52, and L. 4, ib. 1.)" 16 B. 136 (138, 139) **L**

**1—"Bigamy coupled with adultery"**

**2.—"Adultery coupled with wilful desertion"**

**"Bigamy coupled with adultery"—"Adultery coupled with desertion"—What are.**

A Parsi residing in Bombay, after the passing of Act XV of 1865, but before it came into operation, contracted a second marriage, during the

**1 —“ Bigamy coupled with adultery ”—(Concluded).****2.—“ Adultery coupled with wilful desertion ”—(Concluded)**

life-time of his first wife, from whom he had not been divorced, and whom he, moreover, wilfully deserted for two years. On appeal from an order by the Judge of the Parsi Chief Matrimonial Court, rejecting a plaint for divorce by the first wife, on the ground that the subject-matter of the plaint did not constitute a cause of action, under S. 30 of Act XV of 1865, and Act VIII of 1859, S. 32 *Held* that the facts alleged in the plaint did not amount to “bigamy coupled with adultery,” nor to “adultery coupled with wilful desertion,” within the meaning of section 30 of Act XV of 1865. 3 B.H.C. A.C.J. 113. **M**

**3. —“ Bigamy ”****Second Marriage contracted by a Parsi husband while first wife was living, prior to the passing of this Act.**

- (a) A second marriage contracted by a parsi husband, during the lifetime of his first wife, was not unlawful before the Act came into operation. 3 B H C. A.C.J. 113. **N**
- (b) The provisions of the Act did not in any way affect the validity or the consequences of a marriage celebrated before it came into force 3 B.H.C. A.C.J 113. **O**
- (c) “In the case of *Merwanji Nushervanji v. Avabai*, and the other cases referred to in the report of that case (2 Borr. 231), it was found that second marriages among Parsis (the first wife being alive) were not strictly allowed without sufficient cause; but that such second marriages had been very numerous among members of the Parsi community, without any former precedent of the rigid enforcement of the penalties of the law, if any such existed. No question has been raised as to the correctness of that decision, and although second marriages among Parsis during the lifetime of the first wife, have been frequent down to the date on which Act XV of 1865 came into operation, no proceedings have been taken in the interval against the parties contracting them as chargeable on that account with bigamy or adultery.” 3 B H C. A C J. 113 (114). **P**
- (d) The preamble of the Act is—“Whereas the Parsi community has represented the necessity of defining and amending the law relating to marriage and divorce among Parsis, and whereas it is expedient that such law should be made conformable to the customs of the said community.” And Sec. 14 enacts that “no Parsi shall after the commencement of this Act contract any marriage in the lifetime of his or her wife or husband, except after his or her lawful divorce from such wife or husband, by sentence of a Court as hereinafter provided; and every marriage contracted contrary to the provisions of this section shall be void.”

This shows what the state of the law with regard to marriages was among the Parsis, that the customs of the sect were such that such second marriages could not be set aside 3 B H.C. A.C.J. 113 (115). **Q**

- (e) Before Act XV of 1865 came into operation, a Parsi contracting a second marriage in the lifetime of his or her wife or husband could not be punished under the Indian Penal Code. 3 B.H.C.A C.J. 113 (115). **R**

3.—“*Bigamy*”—(Concluded).

- (f) There is no reason why marriages contracted before the passing of the Act should be made, subject to the consequences of the Act. 3 B.H.C.A. C.J. 113 (116) S
- (g) When it was passed nothing could have been further from the intention of the Legislature than to give a retrospective effect to it. 3 B.H.C.A. C.J. 113 (116). T
- (h) Hence questions with reference to past marriages cannot be raised under this Act. They must be governed by the law which prevailed before it came into operation. 3 B.H.C.A. C.J. 113 (116). U

4.—“*Cruelty*.”

**What is legal cruelty among Parsis—English Law how far helpful.**

(a) The following remarks from the learned summing up by Mr. Justice Melvill in Suit No. 9 of 1865 are worthy of being noted:—“I have read these *dicta* decisions and extracts as showing the opinions of learned and wise Judges and of eminent text-writers on the Law of Marriage and Divorce with respect to the acts which may properly be held to constitute legal cruelty. But I would remind you that you are not bound to follow with strictness the doctrine of the law as administered in England or in any other European or American State. The Legislature has left the matter to the discretion of delegates subject to the direction of the Judge of the principles by which you are to be guided. Those principles I have attempted to declare to you and I trust I have made myself clear. Discretion to use the words of the great Lord Mansfield in the case of the *King* against *Willies* when applied to a Court of Justice means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague, and fanciful but legal and regular. It will be for you now to exercise a wise and sound discretion in dealing with the circumstances of the case. You must find what acts of misconduct which the defendant has alleged in his written statement have been proved to your satisfaction to have been committed by the plaintiff, and you must then declare if the whole or any of the acts so found by you amount in your judgment to treatment which render it improper for her to be compelled to live with her husband.” See the same cited in 2 Bom. L.R. 815 (849). Y

(b) The following remarks from Mr. Justice Fulton’s charge to the delegates may be referred to in determining what is legal cruelty among Parsis. You should not require the defendant to receive the wife back into his house if she has been guilty of acts, cruel in their nature, so grave as to destroy the foundations of conjugal life. The causes must be grave and weighty and such as to show a moral impossibility that the duties of married life can be discharged.

You will be careful to remember that you must not by your verdict sanction any relaxation of the Marriage bond beyond what you know that the conscience of the community will approve. The acts on which you can find that the defendant is entitled to a decree must be of a cruel nature grave and weighty and such as, in your opinion, founded on your knowledge of the customs and habits of Parsi life, render it a moral impossibility for the parties to live together.

Now I think you have to recollect in the first place that a wife has a right to live in her husband’s house and to be maintained by him and that

## 4.—“Cruelty”—(Concluded).

you should not refuse her this right unless you are satisfied that her conduct has been such towards him as to destroy the foundations of conjugal life. You must consider her actions during these 16 years so far as they are disclosed to you in the evidence and as fair men you must decide whether you think her conduct has been so outrageous as to disentitle her to relief.

It is not enough to say that she is quarrelsome, that the parties are not likely to live happily together. In justice you must consider whether it is proved that she has been guilty of cruel conduct disentitling her to relief. See the same acted in 2 Bom. L. R. 845 (853, 854). **W**

(c) Except in so far as the customs of the Parsis introduce special considerations Courts ought to accept the principles which have been accepted by the English law as to what constitutes cruelty in law. 2 Bom. L. R. 845 (849). **X**

(d) The following principle is laid down by Lord Hobhouse as to what constitutes legal cruelty —“The conclusion I draw from the authorities is that there is no rigid rule to exclude from the consideration of Judge or Jury a case where acts, cruel in their nature, are so grave as to destroy the foundations of conjugal life. I do not think that any rule can be laid down less wide than that of Lord Stowell, ‘that the causes must be grave and weighty, and such as to shew an absolute impossibility’ (meaning of course, a moral impossibility) ‘that the duties of married life can be discharged.’ The fact that violence and personal danger are far the most common ground alleged for separation has led to repeated statements of the doctrine of danger in terms applicable and appropriate to those cases. But they are only one class of broader category indicated by Lord Stowell.

It is said that we cannot define “impossibility” of discharging duties. Certainly not, any definition would be either so wide as to be nugatory, or too narrow to fit the ever-varying events of human life. Neither can we define other terms applicable to human conduct, such as “honesty” for instance, or “good faith,” or “malice”, or, to come nearer to the present case, “danger” “reasonable apprehension,” “cruelty” itself. Such rudimentary terms elude a *priori* definition, they can be illustrated, but not defined, they must be applied to the circumstances of each case by the Judge of fact, which in this case is a jury directed by a Judge, and controlled, if ever in principle, by the Court above. I do not know any better or other way of deciding controversies on each point.” See the same cited with approval in 2 Bom. L.R. 845 (851, 852). **Y**

31. If a husband treat his wife with such cruelty or personal violence as to render it in the judgment of the

Grounds of Judicial separation.

Court improper to compel her to live with him, or if his conduct afford her reasonable grounds for apprehending danger to life or serious personal injury, or if a prostitute be openly brought into or allowed to remain in the place of abode of a wife by her own husband, she shall be entitled to demand a judicial separation.

**(Notes).**

**General.**

**N.B. 1.**—For notes see under S. 30, *supra*.

**N.B. 2.**—Compare this section with Ss. 10 and 22 of the Divorce Act (IV of 1869), and see also notes thereunder.

**32.** In a suit for divorce or judicial separation under this Act, if the Court be satisfied of the truth of the allegations contained in the plaint, and, that the offence therein set forth has not been condoned, and that the husband and wife are not colluding together, and that the plaintiff has not connived at or been accessory to the said offence, and that there has been no unnecessary or improper delay in instituting the suit, and that there is no other legal ground why relief should not be granted<sup>1</sup>, then and in such case, but not otherwise, the Court shall decree, a divorce or judicial separation accordingly

**(Notes).**

**General**

**N.B.**—Compare this section with Ss. 13 and 14 of the Divorce Act (IV of 1869), and for notes, see also the notes under those sections.

**1.**—“*Other legal ground why relief should not be granted.*”

**Adultery of petitioner—Effect**

- (a) Under S. 32 of the Parsi Marriage and Divorce Act 1865, adultery of the petitioner is a legal ground on which the Court can refuse the petition for divorce. 10 Bom.L.R. 1019. **Z**
- (b) The following observations of Chaudavarkar, J. throw light on the above point —It is urged that the finding in question is not a valid ground for rejecting plaintiff's suit for divorce, because the adultery of a petitioner suing for dissolution of marriage or judicial separation is not mentioned in S. 32 of the Parsi Marriage and Divorce Act (XV of 1865) among the legal grounds which are specified as disentitling the petitioner to a decree. It is argued that as S. 31 of the English Matrimonial Causes Act (20 & 21 Vic. c. 85), from which the language of S. 32 of the Parsi Marriage and Divorce Act appears to have been substantially borrowed, expressly includes the adultery of a petitioner suing for dissolution of marriage among the legal grounds on which the Court may, in its discretion, decline to dissolve the marriage, whereas the Parsi Act studiously omits to include such adultery among those grounds, the plain inference is that the Indian Legislature intended that a petitioner suing for divorce under the latter Act should not be non-suited merely on the ground of his or her adultery during the marriage. But S. 32 of the Parsi Act is not, whereas the

## 1.—“Other legal ground why relief should not be granted”—(Concluded).

corresponding sections of the English Act are, exhaustive. The latter specified all the legal grounds on which a petitioner suing for divorce *shall* or *may* be non-suited. The former enumerates only some of them and then says that if “there is no other legal ground why relief should not be granted, the Court shall decree a divorce or judicial separation accordingly.” The words “other legal ground,” construed as they must be on the principle of *ejusdem generis*, mean any other legal ground which is of the same kind as any of the legal grounds previously mentioned. As the section borrows its language substantially from the English Act so far as it enumerates the legal grounds and as the latter Act treats the adultery of a petitioner suing for divorce as a ground similar in character to certain other grounds which are the same as those enumerated in the Parsi Act, I think it a reasonable construction of the latter Act to hold that the Legislature intended that where such adultery is proved, relief by way of divorce should be refused.

This construction is supported by what we have ascertained to be the invariable practice on the Parsi Matrimonial Side of this Court.” *Per* Chaudavartar, J. in 10 Bom. L.R. 1019 (1022, 1023). **A**

(c) “I feel great difficulty in construing the words other legal ground.” “Perhaps they were inserted in the section to give scope to Parsi custom where it could be so fully established as to come under the head of customary law. Whatever be the explanation however, it is clear that adultery on the wife’s part is regarded amongst Parsis as a reason for refusing her application for divorce.” *Per* Heaton, J. in 10 Bom. L.R. 1019 (1023). **B**

**33.** In any suit under this Act for divorce or judicial separation, if the wife shall not, have an independent income sufficient for her support and the necessary expenses of the suit, the Court, on the application of the wife shall not have an independent income sufficient for her support suit such sum, not exceeding one-fifth of the husband’s net income, as the Court, considering the circumstances of the parties, shall think reasonable.

(Notes).

General.

**N.B. 1.**—Compare this section with S. 36 of the Divorce Act (IV of 1869).

**N.B. 2.**—For notes, see notes under S. 36 of the Divorce Act (IV of 1869), *supra*.

## 1.—“Alimony pendente lite.”

## (1) Parsi Matrimonial Court—Suit by wife for judicial separation—Alimony—Practice.

(a) A wife sued her husband for judicial separation in the Parsi Matrimonial Court. Alimony was granted to her by an order dated 11th July, 1891, which directed the defendant to pay alimony to her from the 15th April, 1891, “until the final decree herein be passed.”

**1.—“Alimony pendente lite” —(Concluded).**

On the 18th July, 1891, the suit was dismissed, and after that date the defendant ceased to pay alimony. The plaintiff obtained a rule for review of judgment which was discharged on the 27th January, 1892, and on the 18th March, 1892, she filed an appeal against the decree dismissing the suit and against the order refusing a review. She now applied for an order directing the defendant to pay her all the arrears of alimony “*pendente lite*” from the date of filing the suit, or so much as had not been paid, and that he should pay her further alimony until the final disposal of the appeal. *Held* dismissing the application, that the words “final decree herein,” contained in the order of the 11th July, 1891, by which alimony was granted, meant the decree in the suit and not in the appeal. 17 B. 146. **C**

The Parsi Matrimonial Court constituted under Act XV of 1865 had no power to award alimony “*pendente lite*” after decree and pending appeal. 17 B. 146. **D**

(c) An unsuccessful wife is not entitled to claim alimony after final decree and pending appeal. 17 B. 146 **E**

(d) Nor for the period during which she is seeking review of judgment. 17 B. 146. **F**

(e) The words, “during the suit,” in section 33 of Act XV of 1865 include the period up to the making of a final or absolute decree. 17 B. 146. **G**

(f) *Ellis v Ellis*, 8 P.D., 188 and *Dunn v Dunn*, 13 P.D., 91, should guide the practice of the Parsi Matrimonial Court in allotment of alimony the time following a decree nisi. 17 B. 146. **H**

**(2) Liability of Parsi husband for wife's costs—English rule applicable.**

(a) The payments contemplated in this section are merely payments “*during the suit*” and does not in any way limit or qualify the liability of the husband to the wife's solicitors. 13 Bom. L.R. 920 (333). **H-1**

(b) S. 33 does incorporate the English law that the husband is bound to provide for his wife. The intention seems to be to put it in a modified form, *viz*, with reference to the husband's income. 13 Bom. L.R. 925. **H-2**

**34.** The Court may, if it shall think fit, on any decree for Permanent alimony divorce or judicial separation, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum, or such monthly or periodical payments of money for a term not exceeding her life, as, having regard to her own property (if any), her husband's ability and the conduct of the parties, shall be deemed just, and for that purpose may require a proper instrument to be executed by all necessary parties and suspend the pronouncing of its decree until such instrument shall have been duly executed.

In case any such order shall not be obeyed by her husband, he shall be liable to damages at her suit, and further to be sued by any person supplying her with necessaries, during the time of such disobedience, for the price or value of such necessaries.



(Notes).

General.

N.B. 1.—Compare this section with S. 37 of the Divorce Act (IV of 1869).

N.B. 2.—For notes, see notes under S. 37 of the Divorce Act (IV of 1869).

**Parsi Marriage and Divorce Act XV of 1865—Alimony—Charge on husband's immoveable property—Widow—Distributive share.**

(a) By an order of the Parsi Matrimonial Court the deceased was directed to execute a proper instrument charging his immoveable property with the payment of Rs. 70 per mensem by way of permanent alimony to his wife during her life. The instrument was executed accordingly. On his death his widow was held entitled, in addition to the Rs. 70 per mensem charged on her deceased husband's immoveable property, to a distributive share in his estate. 24 B 465 = 2 Bom. L.R. 602. I

(b) The following observations of Russell, J. may be noted:—"It is to be observed that the Parsi Marriage and Divorce Act, XV of 1865, S. 34, which deals with permanent alimony does not contain the proviso for varying, &c., orders for permanent alimony which is contained in S. 37 of the Indian Divorce Act IV of 1869, and section 34 of the Parsi Act corresponds with section 32 of 20 and 21 Victoria, Chapter 85, under which it has been held that the order for permanent alimony is permanent and incapable of being varied see *Rawlins v. Rawlins* 4 Sw. and Tr 158. I mention this because, if it were not so, it appears to me that the Parsi Matrimonial Court might under the circumstances, be moved to vary the decrees absolute. 24 B. 465 (439) = 2 Bom L.R. 602. J

**35.** In all cases in which the Court shall make any decree or order for alimony, it may direct the same to be paid either to the wife herself or to any trustee on her behalf to be approved by that Court, and may impose any terms or restrictions which to the Court may seem expedient, and may from time to time appoint a new trustee, if for any reason it shall appear to the Court expedient so to do.

Payment of alimony to wife or her trustee

(Notes).

General

N.B. 1.—Compare this section with S. 38 of Act IV of 1869 (Divorce).

N.B. 2.—For notes see notes under S. 38 of Act IV of 1869 (Divorce).

(d) *For Restitution of Conjugal Rights.*

**36.** Where a husband shall have deserted or without lawful cause<sup>1</sup> ceased to cohabit with his wife, or where a wife shall have deserted or without lawful cause ceased to cohabit with her husband, the party so deserted or with whom cohabitation shall have so ceased may sue for the restitution of his or her conjugal rights, and the Court, if satisfied of the truth of the allegations contained in the plaint, and that there is no just ground<sup>2</sup> why relief should not be granted, may proceed to decree such restitution of conjugal rights accordingly.

Suit for restitution of conjugal rights.

**3** If such decree shall not be obeyed by the party against whom it is passed, he or she shall be liable to be punished with simple imprisonment for a term which may extend to one month or with fine which may extend to two hundred rupees, or with both

**(Notes).**

**General.**

**N.B. 1.**—Compare this section with Ss 32 and 33 of the Divorce Act (IV of 1869).

**N.B. 2.**—For notes see notes under Ss 32 and 33 of the Divorce Act (IV of 1869).

**1—"Lawful cause"**

**2—"Just ground."**

**(1) "Just"—"Lawful"—meaning of the expressions.**

(a) The question—What constitutes a lawful ground among the community of the Parsis for the refusal of the husband to live with his wife or *vice versa*—is one the determination of which lies within the cognizance of the delegates. 2 Bom. L.R. 845. **K**

(b) The word "just" in S 36 of the Parsi Marriage and Divorce Act, 1865, is not intended to have any different signification from the word "lawful" in the same section. 2 Bom. L.R. 845. **L**

(c) To justify a refusal for the restriction of conjugal rights, the causes must be grave and weighty and such as to show a moral impossibility that the duties of married life can be discharged. 2 Bom. L.R. 845. **M**

(d) Discretion when applied to a Court of Justice means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague, and fanciful but legal and regular. 2 Bom. L.R. 845. **M-1**

**(2) Deeds of separation—Agreement to live separate, if good defence in suit for restitution.**

(a) Under section 36 of the Parsi Marriage and Divorce Act (XV of 1865) a contract by which a husband has agreed to allow his wife to live separate is a good defence to a subsequent suit by him for restitution of conjugal rights. 23 B. 279. **N**

(b) Under the word "lawful" was used by the Legislature in some peculiar and technical sense, it seems clear that, if a husband has contracted to allow his wife to live apart, and she chooses to do so, she has a lawful cause for so doing. *Per* Fulton, J. in 23 B. 279 (280). **O**

(c) Her will doubtless is the cause, and the existence of a contract makes it "lawful." 23 B. 279 (281). **P**

(d) It can hardly now be suggested that such a contract is void as immoral or contrary to public policy. Such contracts have long been enforced by injunction by the Courts of equity in England, and are now accepted as a defence to claims for restitution of conjugal rights by the Probate Division of the High Court. 23 B. 279 (281). **Q**

**(3) Principles of English Law on the above subject applicable to Parsis.**

(a) The English law on the subject is very clearly explained by Lopes, L.J., in *Russell v. Russell*, (1895) P. at pp. 332, 333, as follows.—

**1.—“Lawful Cause”—(Concluded).****2.—“Just ground”—(Concluded).**

“The effect of the Judicature Acts has been indirect; but, at the same time, very important. It is, however, confined to separation deeds. These, as is well known, were treated as illegal and void by the Ecclesiastical Courts, see *Westmeath v. Westmeath*, 2 Hagg. Ecc. Supp., 1, 115. But when it was settled, as it ultimately was (see *Besant v. Wood*), 12 Ch. D. 605, that the Court of Chancery would restrain a suit for restitution of conjugal rights if brought contrary to a covenant not to institute such a suit, and when the Judicature Acts made the Divorce Court a Division of the High Court and abolished injunctions to stay actions, and substituted in all branches of the High Court defences instead of such injunctions, it followed that a separation deed containing a covenant not to sue for restitution of conjugal rights became a defence to a suit for such restitution, see *Marshall v. Marshall*, 5 P.D., 19, *Clark v. Clark*, 10 P.D., 188.” 23 B. 279 (281). **R**

(b) In this country between Parsis the contract of separation appears as binding as a similar contract between Christians in England. 23 B. 279 (281). **R-1**

(c) It was not suggested that it was specially inconsistent with the Parsi customs of marriage, and even if it were, it would be a question or argument whether the existence of such custom could remove such a contract from the scope of the Contract Act, or could invalidate it as an immoral contract. Considering how fully the Parsis have adopted the Western ideas of marriage, and how readily they have accepted the Act of 1865, it is not likely, I think that it will ever, be contended that such a contract is void. 23 B. 279 (281). **S**

**3.—“If such decree shall not be obeyed by the party....he or she shall be liable to be punished, etc.”**

**(1) Decree for restitution among Parsis, how enforceable.**

(a) A decree for restitution of conjugal right under the Parsee Marriage and Divorce Act is enforceable only in the manner provided in S. 36 of the Act. 9 B.H.C. 290. **T**

(b) Such provision is in substitution <sup>of</sup>, and not in addition to, the ordinary remedies provided by S. 200 of the Code of Civil Procedure, 1859. 9 B.H.C. 290. **U**

(c) By S. 40, of the Parsee Marriage and Divorce Act, it is enacted that “the provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act” 9 B.H.C. 290 (292). **Y**

(d) The following observations of the Judge in the above case are worthy of being noted —“As it is, there is nothing in the Act to show whether the Legislature intended that the punishment provided in S. 36 should be in addition to, or in substitution for, the ordinary remedies provided by S. 200 of the Code of Civil Procedure. If the imprisonment and fine, which may be awarded under S. 36, were intended simply as a punishment for an offence, simply as a mode of vindicating the dignity of the Court, then I see no reason why the aggrieved by the disobedience to the decree should not have his Civil remedy.

**3.—“ If such decree shall not be obeyed by the party . . . he or she shall be liable to be punished, etc ”—(Continued).**

But if, on the other hand, such imprisonment and fine were intended to operate solely in satisfaction of the decree, or in satisfaction of the decree, as well as *in poenam* for the contempt, then the party aggrieved has no remedy beyond that specifically provided. The question which I have to decide, is whether the general application of S. 200 of the Code to decrees for the restitution of conjugal right is, in the case of Parsees, superseded by the special provisions of S. 36 of the Parsee Marriage and Divorce Act, which provides that “ if such decree shall not be obeyed by the party against whom it is passed he, or she, shall be liable to be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.” The framers of the Code, in inserting the provision as to restitution in the Parsee Marriage Act must have known that the duty of cohabitation, which they were determining to enforce, is regarded in most systems of law as a duty of imperfect obligation, and not to be enforced by Courts of law. They must have known that in England it has been enforced hesitatingly and not without strong protest by those who have thought and written on the subject. It could not have failed to occur to them that to force a woman to live with a husband whom she detests can be of no real benefit to him and to punish her with extreme severity for refusing to do so is only to make our Courts the instrument of the husband's revenge. It could hardly have occurred to them that the dignity of a Court required that this particular act of disobedience should be punished more severely than any other act of disobedience. And therefore, it seems to me that in the minds of the framers of this Act, there must have been present many considerations which would induce them to mitigate, and none which would induce them to increase, the penalties by which co-habitation might be enforced under the general provisions of the Code of Civil Procedure. 9 B.H.C. 290 (292—295). **W**

- (e) The penalty provided in S. 36 of the Parsee Marriage and Divorce Act appears to be of the same nature, but it differs from the English process, inasmuch as a definite term is fixed for its duration. Under the English process the duration of imprisonment to which an obstinately recalcitrant wife might be subjected is unlimited, and in the case of *Barlee v Barlee* to which I have already alluded, the wife was actually confined, until, as it is stated, she became a lunatic. The framers of the Parsee Marriage and Divorce Act may have recoiled before such a precedent, and may reasonably have considered that it was not desirable to subject a wife even to imprisonment for so long a period as two years to which she would be liable under the Code of Civil Procedure. The contempt of court would certainly be sufficiently punished by the same punishment (simple imprisonment for one month and a fine of two hundred rupees) which may be awarded under S. 100 of the Indian Penal Code for disobedience of an order promulgated by a public servant and which under S. 163 of the Code of Criminal Procedure all courts can inflict for a contempt committed in the presence of the court. And, on the other hand, regarding the commitment as a process in execution, it might well be considered

**3.—“If such decree shall not be obeyed by the party....he or she shall be liable to be punished, etc.”—(Continued).**

that if imprisonment for a month would not induce a woman to overcome her dislike to her husband, it would be cruelty to attempt to force her to “the lowest degradation of a human being.” 9 B.H.C. 290 (296, 297). **X**

(f) Hence the intention of S. 36 of the Parsee Marriage and Divorce Act is that the penalty therein provided should operate not only as a purging of the contempt, but in full satisfaction of the decree. 9 B.H.C. 290 (297) **Y**

(g) The above-mentioned view seems to be in accordance with that adopted by the High Court (Arnold and Westropp, JJ.) in the unpublished case of *Regina v. Dossabhai Framji*, to which I have already alluded. In that case Sir J. Arnold is stated, in the newspaper report of the case, to have said—“S. 10 of the Parsee Marriage and Divorce Act vested in the Parsee Matrimonial Court the powers given by the Code of Civil Procedure, and as one of the sections of the Code of Civil Procedure,—viz, the 200th—gave the power of enforcing, by imprisonment or attachment, decrees for the performance of particular acts, it appeared to him that the words which formed the conclusion of S. 36 of the Act merely altered the mode in which the Court should enforce its own decrees, and punish a contempt or any disobedience of its decrees, the alteration being in effect that the punishment should consist, not of simple imprisonment and attachment but of simple imprisonment and fine.” Mr. Justice Westropp is stated to have added that he concurred in the observation of Mr. Justice Arnold in reference to the bearing which S. 200 of the Civil Procedure Code had upon the 36th section of the Act. The Court seems to have held that the penalty provided in S. 36 was not a penalty for an offence, but a process in execution, as well as for contempt, that as such it was a process to be enforced, not by a Magistrate, but by the court which made the order, and that it was in alteration of, and, therefore, in substitution for, the penalties provided by S. 200 of the Civil Procedure Code.” 9 B.H.C. 290 (297). **Z**

**(2) Suits for restitution in several systems of law and the modes of enforcing decrees therein.****(i) General**

The suit for the restitution of conjugal rights is not one which commends itself to all minds, and has not found a place in the judicial system of all nations. 9 B.H.C. 290 (293). **A**

**(ii) English Law.**

The English Law allows such suits and enforces them by process of Court. (*Ibid.*) **B**

**(iii) American Law.**

(a) Closely as the Americans have in general followed the English law, they have deliberately excluded from their system the suit for the restitution of conjugal rights. 9 B.H.C. 290 (293). **C**

(b) “Over England”, says an American writer (Bishop on Marriage and Divorce, 4th ed., vol. 1, p. 30) with national grandiloquence—“Over England, but not over this country, walks still that spawn of a dark

**3. — "If such decree shall not be obeyed by the party .. he or she shall be liable to be punished, etc.'"—(Concluded)**

age whose mission it was to keep unconjugal sinners in the straight performance of the holy matrimonial duties, termed the suit for the restitution of conjugal rights."

**(iv) Scotch Law.**

The Scotch Laws enjoin "adherence," but it does not appear that they enforce a reunion against the wife or against the husband, when hateful to either. 9 B H C. 290 (233). **D**

**(v) Code Napoleon—French Law.**

(a) The Code Napoleon, which governs the greater part of Europe, has no process for compelling the cohabitation of discordant couples or for constraining them, as Blackstone sarcastically remarks, "to come together again if either party be weak enough to desire it contrary to inclination of the other." 9 B.H.C. 290 (294). **E**

(b) I take these remarks from Mr Macqueen's work on the law of marriage and divorce (pp. 311-315)—"No French lawyer," he says, "ever proposed the rule expedient of a prison," (although the French law reprobates matrimonial severance more strenuously than the English law does) "nor would it be just to say that any English lawyer deliberately recommended a thing so palpably tyrannical and futile." 9 B.H.C. 290 (294) **F**

**(vi) Canon Law**

(a) By the Canon Law, from which the suit for the restitution of conjugal rights was derived, the court could compel cohabitation in every sense of the term. 9 B H C 290 (294) **G**

(b) Before the Reformation however, the courts were generally content to enforce their decrees by spiritual reprehension and excommunication. When the Ecclesiastical Courts lost much of their authority, they had to invoke the aid of the Court of Chancery, and upon a *significavit* from the Ecclesiastical Court that a party was in contempt, the Court of Chancery would proceed to enforce obedience by attachment and sequestration. But the paucity of reported cases shows how seldom this power was exercised, and I can only find one case—*Barke v. Barlee* (1 Add 301)—in which severity against a recalcitrant wife was carried to an extreme. 9 B H C 290 (294, 295) **H**

**37. Notwithstanding anything herein before contained, no suit**

No suit to enforce marriage or contract arising out of marriage when husband under 16, or wife under 14 years.

shall be brought in any Court to enforce any marriage between Parsees, or any contract connected with or arising out of any such marriage, if, at the date of the institution of the suit, the husband shall not have completed the age of sixteen years, or the wife shall not have completed the age of fourteen years.

**38. In every suit preferred under this Act, the case shall be**

Suits with closed doors.

tried with closed doors, should such be the wish of either of the parties.

(Note).

**General.**

**N.B.**—Compare this section with S. 53 of the Divorce Act IV of 1869), and see also notes thereunder

**39.** [Stamps on plaints and petitions] *Rep. by Act VII of 1870.*

**40.** The provisions of the Code of Civil Procedure shall, so far as the same may be applicable, apply to suits instituted under this Act.

Civil Procedure Code applied.

(Note)

**General**

**N.B** —Compare this section with S. 45 of the Divorce Act (IV of 1869), and see also notes thereunder

**41** In suits under this Act all questions of law and procedure shall be determined by the presiding Judge; but the decision on the facts shall be the decision of the majority of the delegates before whom the case is tried,

Determination of questions of law, procedure and fact.

**42** An appeal shall lie to the High Court from the decision of any Court established under this Act, whether a Chief Matrimonial Court or a District Matrimonial Court, on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground.

Appeal to High Court

Provided that such appeal be instituted within three calendar months after the decision appealed from shall have been pronounced.

(Note).

**General**

**N B.**—Compare this section with S. 55 of the Divorce Act (IV of 1869).

**43.** When the time hereby limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or

when any such appeal shall have been dismissed, or

Liberty to parties to marry again

when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner,

it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death.

**(Note).**

**General.**

**N.B.**—Compare this section with S. 57 of the Divorce Act (IV of 1869).

*V.—Of the Children of the Parties.*

**44.** In any suit under this Act for obtaining a judicial separation or a decree of nullity of marriage, or for dissolving a marriage, the Court may from time to time pass such *interim* orders, and make such provision in the final decree as it may deem just and proper, with respect to the custody, maintenance and education of the children under the age of sixteen years, the marriage of whose parents is the subject of such suit,

and may, after the final decree upon application by petition for this purpose, make from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such final decree, or by *interim* orders in case the suit for obtaining such decree were still pending.

**(Notes).**

**General**

**N.B.**—Compare this section with Ss. 41 to 44 of the Divorce Act (IV of 1869) and see also notes thereunder.

**Minority—Guardians—Practice and procedure.**

- (a) In a suit by a husband for divorce under section 30 of the Parsi Marriage Act, XV of 1865, the defendant, if under the age of 21 years, although more than 18, must be deemed to be a minor, and a guardian for the suit of the defendant must be appointed. 18 B. 366. **I**
- (b) The Parsi Marriage and Divorce Act treats every Parsi under the age of 21 as a minor. 19 B. 366 (367). **J**
- (c) Thus in section 3, in treating of the requisites to the validity of Parsi marriages, it is provided that, in the case of any Parsi who shall not have completed the age of 21 years, the consent of his or her father or guardian shall have been previously given to such marriage. 18 B. 366 (367). **K**
- (d) By section 6 the father or guardian must sign the certificate according to the form as shown by the schedule to the Act, the heading to the last column of the said form running thus.—“Signature of father or guardian when husband or wife is an *infant*.” I am satisfied, therefore that the defendant is an infant, and I must appoint a proper person to be her guardian for the suit. 18 B. 366 (367). **L**



**45.** In any case in which the Court shall pronounce a decree of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, the Court may order such settlement as it shall think reasonable to be made of such property, or any part thereof, for the benefit of the children of the marriage or any of them.

Settlement of wife's property for benefit of children.

(Note).

**General.**

**N.B.** 1.—Compare this section with S. 39 of the Divorce Act (IV of 1869).

**N.B.** 2.—For notes, see notes under S. 39 of the Divorce Act (IV of 1869).

*VI.—Of the Mode of enforcing Penalties under this Act.*

**46.** All offences under this Act may be tried by any officer exercising the powers of a Magistrate, unless the period of imprisonment to which the offender is liable shall exceed that which such officer is competent to award under the law for the time being in force in the place in which he is employed

Cognizance of offences under this Act

When the period of imprisonment provided by this Act exceeds the period that may be awarded by such officer, the offender shall be committed for trial before the Court of Session.

**47.** If any offence which by this Act is declared to be punishable with fine, or with fine and imprisonment not exceeding six months, shall be committed by any person within the local limits of the ordinary original Civil jurisdiction of the High Court, such offence shall be punishable upon summary conviction by any Magistrate of Police of the place at which such Court is held.

Punishment of offences under Act committed within local limits of High Court.

**48.** All fines imposed under the authority of this Act may, in case of non-payment thereof, be levied by distress and sale of the offender's moveable property by warrant under the hand of the officer imposing the fine.

Levy of fines by distress.

**49.** In case any such fine shall not be forthwith paid, such officer may order the offender to be arrested and kept in safe custody until the return can be conveniently made to such warrant of distress, unless the offender shall give security to the satisfaction of such officer for his appearance at such place and time as shall be appointed for the return of the warrant of distress

Procedure until return made to distress warrant.

**50.** If upon the return of the warrant it shall appear that no sufficient distress can be had whereon to levy such fine, and the same shall not be forthwith paid, or

in case it shall appear to the satisfaction of such officer, by the confession of the offender or otherwise, that he has not sufficient moveable property whereupon such fine could be levied if a warrant of distress were issued,

any such officer may, by warrant under his hand, commit the offender to prison, for any term not exceeding two calendar months when the amount of fine shall not exceed fifty rupees, and for any term not exceeding four calendar months when the amount shall not exceed one hundred rupees, and for any term not exceeding six calendar months in any other case, the commitment to be determinable in each of the cases aforesaid on payment of the amount of fine.

### VII — Miscellaneous.

**51.** Subject to the provisions contained or referred to in this Act, the High Court shall make such rules and regulations concerning the practice and procedure of the Parsee Chief and District Matrimonial Courts in the Presidency or Government in which such High Court shall be established, as it may from time to time consider expedient, and shall have full power from time to time to revoke or alter the same

All such rules, revocations and alterations shall be published in the official Gazette.

#### (Notes).

#### General

**N.B.**—Compare this section with S. 62 of the Divorce Act (IV of 1869).

#### I.—“Rules.”

**N.B.**—For rules made under this section for the Parsi Chief and District Matrimonial Courts of—

(1) The Bombay Presidency, *see* Bom. R. & O. Vol. I.

(2) Lower Burma, *see* Burma Gazette, 1904, Pt. IV, p. 383

**52.** The Governor General of India in Council may invest the chief executive officer of any part of British India under the immediate administration of the Government of India with the powers vested by this Act in a Local Government

Power to invest chief executive officer with powers of Local Government

**53.** [Commencement and extent of Act] *Rep. by the Repealing Act, 1876 (XII of 1876).*



**RULES AND ORDERS UNDER ACT XV OF 1865 (PARSI MARRIAGE AND DIVORCE) IN FORCE IN BOMBAY.**

**(1) Order constituting Parsi Chief Matrimonial Court in Bombay and District Courts in Surat and Poona and their limits.**

" *Notn., dated 30th August 1865, B.G.G., 1865, Vol. II, p. 486.*—The Honourable the Governor in Council of Bombay is pleased to notify, under the provisions of Act XV of 1865, Sections 15 and 18, that the Parsi Chief Matrimonial Court of Bombay has been constituted in the Presidency town of Bombay and that Parsi District Matrimonial Courts have been constituted in the towns of Surat and Poona, respectively.

The local limits of the Jurisdiction of the Parsi District Matrimonial Court of Surat include the Districts of Surat and Ahmedabad.

The local limits of the Jurisdiction of the Parsi District Matrimonial Court of Poona include the Districts of Poona, Ahmednagar, Satara and Kaladgi (*now Sholapur-Bijapur*)

The District Registrars at Surat and Poona, appointed under Act XVI of 1864, have been appointed also Registrars for the purposes of Act XV of 1865 under Provisions of Section 7.

The names of persons to be Delegates to aid in the adjudication of cases in the Parsi District Matrimonial Courts of Surat and Poona will be published hereafter." See Bombay Local Rules and Orders, Vol I, p 27 (Ed. 1896). N

**(2) Order constituting Parsi District Matrimonial Court for Sind.**

" *Notn., dated 19th July 1865, B.G.G., 1865, Vol II, p 151.*—Under the provisions of Section 17 of Act XV of 1865, the Honourable the Governor in Council is pleased to constitute the District Court of Karachi as the Parsi District Matrimonial Court for the Province of Sind, and to notify that the local limits of the jurisdiction of that Court will be coextensive with those of the Province of Sind

The Deputy Registrar appointed under Act XVI of 1864 is appointed Registrar of Parsi Marriages in Sind, under Section 7 of the Parsi Marriage and Divorce Act, 1865. See Bombay Local Rules and Orders, Vol I, (Ed. 1896), p. 27. O

**(3) Settlement of Aden and its dependencies to be included within the jurisdiction of the Parsi Chief Matrimonial Court of Bombay**

(a) " *Notn., No 2046 A, dated 11th April 1891, B G G, 1891, Pt I, p. 337* — The Governor in Council is pleased to direct, under Section 19 of Act XV of 1865 (an Act to define and amend the law relating to Marriage and Divorce among the Parsis) that the Settlement of Aden and its dependencies shall be included within the jurisdiction of the Parsi Chief Matrimonial Court of Bombay " Bombay Local Rules and Orders, Vol. I, pp. 27 and 28 (Ed. 1896) P

(b) " *Notn., No 3378, dated 24th June 1891, B G G, 1891, Pt I, p 515.*—*Erratum.*—In the Government Notification No 2046-A, dated the 11th April 1891, published at page 337 of Part I of the *Bombay Government Gazette* of the 23rd idem, for the words "the Settlement of Aden shall be included within the jurisdiction of the Parsi Chief Matrimonial Court of Bombay, " *read* " the Settlement of Aden

**RULES AND ORDERS UNDER ACT XV OF 1865  
(PARSI MARRIAGE AND DIVORCE) IN FORCE  
IN BOMBAY—(Continued).**

and its dependencies shall be included within the jurisdiction of the Parsi Chief Matrimonial Court of Bombay " See Bombay Local Rules and Orders, Vol I, (Ed 1896), p. 28. ' **Q**

**(4) Rules for the Parsi Chief and District Matrimonial Courts.**

" *Notn., dated 1st September 1865, D G.G. 1866, Vol. II, p. 1025* —Rules and Regulations for the Parsi Chief and District Matrimonial Courts in the Presidency of Bombay —

- (i) All proceedings shall be regulated by the provisions of the Code of Civil Procedure, save so far as such provisions may be varied or modified by the following rules.
- (ii) In cases when the plaintiff is seeking for a decree of nullity of marriage the plaint shall state that no collusion or connivance exists between the plaintiff and the other party to the marriage or alleged marriage, and in cases of dissolution of marriage on the grounds of adultery, that no collusion or connivance exists between the plaintiff and the person alleged to have committed adultery.

*(A form of Plaint is given, No. I, infra)*

- (iii) The defendant shall in cases put in a written statement of his (or her) case, and of his or her answer to the material allegations in the plaint, and shall file the same ten days at the least before the day appointed for the hearing of the suit

*(A form of written statement is given, No. II, infra).*

No statement shall be received after such period without special order of the Court, in default, the Court shall be empowered to proceed *ex parte* on the day appointed for hearing the suit'

- (iv) All plaints, written statements, petitions, and all responsive allegations must be duly verified, and must be duly stamped pursuant to the provisions of Section 39 of Act XV of 1865, or they will not be received or filed
- (v) In cases involving a decree of nullity of marriage, or a decree of judicial separation, or of dissolution of marriage, the defendant shall, in the written statement and answer, state that there is not any collusion or connivance between the defendant and the other party to the marriage
- (vi) When an answer admitting the fact of a marriage between the parties has been filed, and the husband has appeared in the suit, the wife may proceed to file an *application for alimony*, in substance according to the Form III, and a day shall be fixed for hearing such application.
- (vii) After an application for alimony has been filed, a copy thereof shall be served forthwith upon the husband, and within fifteen days after such service he shall file his answer thereto, which shall be subscribed and verified in the manner provided for subscribing and verifying plaints, or in default the Court will proceed *ex parte*.

RULES AND ORDERS UNDER ACT XV OF 1865  
(PARSI MARRIAGE AND DIVORCE) IN FORCE  
IN BOMBAY—(*Concluded*)

- (viii) After the answer of the husband has been filed, the wife may apply to the Court to decree her alimony *pendente lite*, provided that the wife shall, four days before she so moves the Court, give notice to her husband or to his agent or pleader of her intention so to do.
- (ix) The wife, subject to any order as to costs, may, if not satisfied with the husband's answer, apply to have a day fixed for hearing such application, when witnesses may be examined in support of and against such application for alimony.
- (x) A wife who has obtained a decree of judicial separation in her favour, and has previously filed her application for alimony, may, unless in cases when an appeal to the full Court is interposed, move the Court to decree her permanent alimony, provided that she shall, eight days at least before making any such application, give notice to the husband, his agent, or to his pleader, of her intention so to do.  
Bombay Local Rules and Orders Vol I, Ed 1896, pp. 28, 29 R
- (5) Rule for regulating the practice and procedure of the Parsi Chief Matrimonial Court.

"*Notn*, dated 2nd September 1873, B.G.G., Pt I, p 761— The following rule for regulating the practice and procedure of the Parsi Chief Matrimonial Court, has been made by the High Court under the provisions of Section 51 of Act XV of 1865 —

The Parsi Chief Matrimonial Court may receive in evidence, and act upon affidavit produced in support of, or in opposition to, any interlocutory application or motion,

Such affidavits may be made before any Commissioner for taking affidavits at the Original Jurisdiction Side of the High Court, or before the Registrar or Deputy Registrar at its Appellate Side " Bombay Local Rules and Orders, Vol. I (Ed. 1896), p. 31. S

FORMS

No. I.

FORM OF PLAINT FOR DIVORCE

To

THE JUDGE OF THE PARSI CHIEF MATRIMONIAL COURT.

A.B.

vs.

C.B.

(and R.S. as the case may be).

The day of 186

1. That the plaintiff was on the day of 186 lawfully married to C B. at

2. That after his said marriage the plaintiff lived and cohabited with his said wife at and at , and that the plaintiff and his said wife have had issue of their said marriage, three children, one son and two daughters (*as the case may be*).

3. That on the of 186 and other days between that day and the said C B. defendant, in the committed adultery with R.S.

## 536 Act XV of 1865 (THE PARSEE MARRIAGE AND DIVORCE).

4. That in and during the months of January, February, and March 186 the said C.B. defendant, frequently met the said R.S. at and on divers such occasions committed adultery with the said R.S.

5 That there is not any collusion or connivance whatever between the plaintiff and the said defendant C.B. and R.S., or either of them in respect of this suit.

The plaintiff, therefore, prays that your Lordship will proceed to decree (*here state the relief sought*) and that plaintiff have further and other relief in the premises as to your Lordship may seem meet. Bombay Local Rules and Orders, Vol. I, (Ed. 1896), p. 29. T

### No. II.

#### FORM OF ANSWER.

#### IN THE PARSI CHIEF MATRIMONIAL COURT

The day of 196 .

A. B.  
vs.  
C. B.

1. The defendant C.B. by P.A. his Pleader, Agent, (or *in person*) saith that she denies that she committed adultery with R. S. as is set forth in the said plaint.

2. The defendant further saith that on the day of 186 and on other days between that day and the said A.B. the plaintiff, at , committed adultery with X Y., being a married woman, &c.

(*In like manner the defendant is to state connivance, condonation or other matters which may be relied on as a ground for dismissing the petition*)

3. The defendant further saith that she is not colluding or conniving with the plaintiff that he may obtain a decree in this suit, wherefore this defendant humbly prays—

That your Lordships will be pleased to reject the prayer of the said plaint and decree, &c., &c. Bombay Local Rules and Orders, Vol. I (Ed. 1896) p 30. U

### No. III.

#### APPLICATION FOR ALIMONY.

To

THE JUDGE OF THE PARSI CHIEF MATRIMONIAL COURT.

C. B.  
vs.  
A. B.

The day of 186 .

The Application of C.B., defendant, the lawful wife of A.B., sheweth.

1 That the said plaintiff A.B. has for many years carried on the business of at and from such business derives the net annual income of Rs.

2. That the said plaintiff A.B. holds shares of the Railway Company amounting in value to Rs. and yielding a clear annual dividend to him of Rs ,

3. That the said plaintiff A.B. is possessed of made in his said business of to the value of Rs.

(*and so on for any other property, moveable or immoveable, the husband may possess.*)

The defendant, therefore, humbly prays that your Lordship will be pleased to allow her such sum or sums of money by way of alimony *pendente lite* (or *permanent alimony*) as to your Lordship shall seem meet Bombay Local Rules and Orders, Vol. I (Ed. 1896) pp 30, 31 Y

# THE SPECIAL MARRIAGE ACT, 1872.

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## CONTENTS.

### *Preamble.*

#### SECTIONS.

1. Local extent.
2. Conditions upon which marriages under Act may be celebrated.
3. Appointment of Marriage Registrars.
4. One of the parties to intended marriage to give notice to Registrar.
5. Notice to be filed and copy entered in the Marriage Notice Book.
6. Objection to marriage.
7. Procedure on receipt of objection  
Objector may file suit.
8. Certificate of filing of suit to be lodged with Registrar.
9. Court may fine when objection not reasonable.
10. Declaration by parties and witnesses.
11. Marriage how to be solemnized.
12. Place where marriage may be solemnized.
13. Certificate of Marriage.
- 13 A. Transmission of certified copies of entries in Marriage Certificate Book to the Registrar-General of Births, Deaths and Marriages
14. Fees
15. Penalty on married person marrying again under Act.
16. Punishment of bigamy
17. Indian Divorce Act to apply.
18. Law to apply to issue of marriages under Act.
19. Saving of marriages solemnized otherwise than under Act.
20. [*Repealed* ]
21. Penalty for signing declarations or certificates containing false statements

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First Schedule.—Notice of marriage

Second Schedule —Declarations to be made by the Bridegroom and bride.

Third Schedule.—Registrar's certificate.

Fourth Schedule.—[*Repealed.*]





# THE SPECIAL MARRIAGE ACT, 1872<sup>1</sup>.

(ACT III OF 1872.)

[*Passed on the 22nd March, 1872*]

*An Act to provide a form of Marriage in certain cases.*

WHEREAS it is expedient to provide a form of marriage for persons who do not profess the Christian, Jewish  
Preamble. Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion, and to legalize certain marriages the validity of which is doubtful; It is hereby enacted as follows:—

(Notes)

## *1.—“The Special Marriage Act, 1872”*

### (1) Publication of Bill.

The Bill as introduced was published in the Gazette of India, 1868 p. 1403.

### (1-A) Statement of objects and reasons

There was no —, the bill as introduced was published in the Gazette of India, 1868, p. 1403 . A

### (2) The Report of the Select Committee.

For ———, see Gazette of India, dated 21st December, 1871, *Ibid*, 1871, Pt. V, p. 519. B

### (3) Discussions in Council.

For ———, see Gazette of India, 1868, Supplement, pp. 890, 1197, *Ibid*, 1871, Extra Supplement, pp. 16, 42, *Ibid*, 1872, Supplement, pp. 2, 57, 193 and 261. C

### (4) Act where declared in force.

This Act has been declared in force in —

(a) The Sonthal Parganas, see Sonthal Parganas Settlement Regulation II of 1872, S. 3, as amended by the Sonthal Parganas Justice and Laws Regulation, III of 1899. D

(b) British Baluchistan, see the British Baluchistan Laws Regulation I of 1890, S. 3. E

(c) Angul and the Khondmals, see the Angul District Regulation, I of 1894, E. 3. F

(d) It has been declared by notification under S. 3 (a) of the Scheduled Districts Act, XIV of 1874, to be in force in the following Scheduled Districts, namely —

(i) The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see Gazette of India, 1881, Pt. I, p. 504. The District of Lohardaga included at this time the present District of Palamau, which was separated in 1894. The District of Lohardaga is now called the Ranchi District.

(ii) The North-Western Provinces Tarai, see Gazette of India, 1876, Pt. I, p. 505. G

1.—“ *The Special Marriage Act, 1872* ”—(Continued).

## (5) History of the Act—Reasons for the passing of the Act.

The following have been taken from the speech of Sir J. Stephen in the Legislative Council —

“ A religious body called the Brahmo Samaj, which has been for many years in existence has for sometime past acquired a considerable degree of prominence and importance in most of the great cities of India. It is interesting on many accounts, but, above all, because Brahmoism is at once the most European of Native religions and the most living of all Native versions of European religion. One of the points on which the Brahmoes have most closely followed English views and one of the most important points in their whole system is the matter of marriage. Brahmoes in common with Englishmen, believe that marriage should be the union for life in all common cases of one man with one woman, and the most numerous body of the Brahmoes go a step further, and are of opinion that marriages should be regarded in the light of a contract between a mature man and mature woman, of a suitable age, and not as a contract by which parents unite together children in their infancy. Besides this the Brahmoes agree in objecting to some of the ceremonies by which Hindus celebrate marriages on the ground that they are idolatrous.

There are however two classes of Brahmoes, the Adi-Brahma-Samaja, or the conservative Brahmoes, and the Progressive Brahmoes. The Progressive Brahmoes have broken far more decisively with Hinduism than the Conservatives.

As regards marriage, the difference between the two parties appears to be this, the marriage ceremonies adopted by the Progressive Brahmoes depart more widely from the Hindu Law than those which are in use amongst the Adi-Brahmoes. The Adi-Brahmoes indeed contend that by Hindu Law, their ceremonies though irregular would be valid. The Progressive Brahmoes admit that by Hindu law their marriage would be void. Moreover the Progressive Brahmoes are opposed both to infant marriage and polygamy far more decisively than the Conservative party. The former, in particular, adopt the European view, that marriage is a contract between the persons married; the latter retain the native view, that the father can give away his daughter as he thinks right when she is too young to understand the matter.

In this state of things the Progressive Brahmoes took the opinion of Mr. Cowie, then Advocate-General, as to the legal validity of their marriages. That opinion was unfavourable to the validity of the marriages in question.

Upon this the Brahmo community represented to Lord Lawrence's Government that they suffered under a great disability by reason of the existence of a state of the law which practically debarred them from marriage unless they adopted a ceremonial to which they had conscientious objections. The marriage law of British India, as he understood and as it then was may be shortly described as follows.—

By the Bengal Civil Courts Act, which consolidates and re-enacts the old Regulations, and by corresponding Regulations in Madras and Bombay, the Courts are to decide, in questions regarding marriage in which the parties are Hindus, according to Hindu law; if the parties are Muhammadans, according to Muhammadan law, and, in cases, not specially

1.—“*The Special Marriage Act, 1872*”—(Continued).

provided for, according to justice, equity, and good conscience. Custom also has, in most parts of India, the force of law in this matter, although the exact legal ground on which its force stands, differs to some extent in different parts of the country. There are also a variety of Acts of Parliament and Acts of the Indian legislatures which regulate marriages between Christians, Europeans and Natives, and between Parsis. As the Brahmoees were neither Muhamminadans, nor Parsis, nor Christians no other mode of marriage was expressly provided for them by law, and the inference was drawn that they were unable to marry at all.

This being so, it was necessary that a remedy had to be provided for the Brahmoees. The only question was, what remedy would be appropriate? The most obvious remedy would have been no doubt, to give the members of the Brahmo Samaj a Bill legalizing marriages between members of that body only. But the then legislature felt that there was a great difficulty in the way of doing so. The sect in question was deficient in stability. It was new, and like all new religious bodies endowed with considerable degree of vitality, its doctrines and discipline were in a very indefinite state. To give a legal quasi-corporate existence, for such a purpose as the regulation of marriage, to such a body, would have been very difficult, especially in view of the fact that, it had already within a few years of its establishment, broken into two sections, differing from each other upon this very subject of marriage, amongst other things. There was another objection to such a measure. The Government were obliged to treat marriage, to a certain extent, denominationally, by the fact that, in this country, law and religion are so closely connected together, but such a system is most inconvenient, and ought not to be carried further than is absolutely necessary. The Government could hardly assume a more invidious position than that of undertaking to give a new form of marriage to every new sect which did not happen to like the old ones, and of deciding, at the same time, whether a particular body of men did or did not constitute a new sect of sufficient importance for such a purpose.

There is, again, this further difficulty about a denominational system of marriage. How are we to deal with the case of marriages between people of different denominations? What is to happen if a Brahmo wants to marry a Positivist? Are we to have a Bill for Brahmoees, a Bill for Positivists, a Bill for half and half couples. If so, when a few more sects have been established, and when a Bill has to be framed on the principle of providing for the combinations of a number of things taken two together, our statute book, will become a regular jungle of Marriage Acts. Under these circumstances, Sir Henry Maine proposed to make the Brahmo question the opportunity for passing a measure of the most comprehensive nature. He proposed to pass an Act to legalize marriage between certain Natives of India not professing the Christian Religion, and objecting to be married in accordance with the rites of the Hindu, Muhammadan, Buddhist, Parsi, or Jewish religion.

I.—“*The Special Marriage Act, 1872*”—(Continued).

He introduced the Bill on the 18th November, 1868, in a speech of characteristic interest and ability, and it was circulated to the Local Governments for opinions.

The answers of the Local Governments were received in due course, and were laid before me on my arrival in India at the end of 1869. They were unfavourable to the Bill proposed, and stated the grounds upon which it was objected to so fully as to supply the Government with all the information necessary to enable them to deal with the subject finally. All the grounds of objection may, I think, be reduced to one, namely, that the Bill, as drawn and circulated, would introduce a great change into Native law, and involve interference with Native social relations. On a full and repeated consideration of the whole subject, the Government were unanimously of opinion that this objection ought to prevail.

We thought that the Bill, as drawn by Sir Henry Maine, would involve an interference with Native law which we did not consider justifiable under all the circumstances of the case.

The Hindu law and religion on the subject of marriage (I need not at present refer to Muhammadanism) are one and the same thing, that if they must be adopted as a whole, or renounced as a whole, that if a man objects to the Hindu law of marriage, he objects to an essential part of the Hindu religion, ceases to be a Hindu, and must be dealt with according to the laws which relate to persons in such a position.

As a matter of strict law, there can be no doubt of the power of the Legislative Council to sweep away or to alter to any extent the whole fabric of Hindu or Muhammadan law just as it has the legal power to do many other things which no one of ordinary sense or humanity would for a moment think of. Our objections towards these systems of law is a moral obligation and must be construed accordingly. This obligation has been justly appreciated and acted upon by successive generations of Indian statesmen, and its true nature can be shortly expressed as follows.—“Native laws should not be changed by direct legislation, except in extreme cases, though they may and ought to be moulded by the Courts of Justice, so as to suit the changing circumstances of society.”

“Laws relating to such subjects as marriage have their root in the every deepest feelings, and in the whole history, of a nation. nor is it easy to imagine a more tyrannical or a more presumptuous abuse of superior force, than that which would be involved in any attempt to bring the views and practices of one nation, upon such subjects, into harmony with those of other nations, whose institutions and characters have been cast in a totally different mould. I should feel as little sympathy for an attempt to turn Hindus into Englishmen by Acts of the Legislative Council, as for attempts to turn Englishmen into Hindus by Act of Parliament.”

Sir James Stephen then proceeded to consider the question whether the Bill as originally framed by Sir H. Maine constituted an interference with Hindu Law, and to state the reasons which led him to think that it did. He then laid before the Council the bill which was subsequently passed as Act III of 1872.

1.—“*The Special Marriage Act, 1872*”—(Continued).

Even this bill as framed by Sir James Stephen evoked much adverse criticism from the Native community, but it was made into Law in spite of such adverse reception from those whom the law was intended to affect.

The chief points of criticism as well as the reasons that induced the Government to pass the enactment were lucidly summarized in the concluding speech of the President. The President said —“I give my unhesitating adherence to the Bill embodied in the present draft, and I am unable to recognize the validity of the objections which have been offered to its provisions. These objections fall under the three following heads —

“1. It is urged that the widely permissive character of the Bill opens a door to precipitate and immoral marriages.

“2. That the Bill goes beyond the actual necessities of the case

“3. That the measure is calculated to produce uneasiness and discontent in the Hindu and Musalman communities throughout the country.

“I am not disposed to attribute much importance to the argument that the Bill, even in its original form, would have acted as a provocation or facility to imprudent or demoralizing connections. If we regard the powerful influence exerted by family relations and the prescriptions of caste in this country, it does not seem probable to me that many persons would have availed themselves of the liberty embodied in the measure to contract engagements of an unworthy nature. But all hazard of such an evil has been obliterated by the limitations of age now imposed, with reference both to the man and the woman, in the case of persons marrying without the consent of parents or guardians. The stipulations in this respect are now so prudent and guarded that there does not seem to be the least room left for the operation of deception or passion.

“The fact that the Bill as now drawn is not limited to existing necessities, but that it contemplates and embraces the contingencies of a remote future, is, in my mind, an argument in favour of the measure, not against it. It seems far more consistent with the principles of our legislation and Government to admit religious equality as a general right, than to grant it as a favour in particular cases. The contention of the opponents of the measure is, that as one sect after another separates itself from the ancient religious communities of the country, each band of fugitives should be specially admitted to the prerogative of lawful marriage. I deem it more conformable to the maxims and principles of our administration that the rule of religious equality should be broadly and boldly laid down, and that all should be freely and spontaneously admitted to claim and enjoy its benefits. Nor can I think it desirable that questions of a delicate and irritating character should be frequently raised by reiterated legislation. By adopting the provisions of the present Bill, we put a stop to agitation. By sanctioning the proposed amendments, we should revive and exasperate agitation for an indefinite period.

“The capital argument urged against the present measure is the apprehension that it will be susceptible of misinterpretation, that it will create a

**Act III of 1872 (THE SPECIAL MARRIAGE ACT).****1.—“*The Special Marriage Act, 1872*”—(Continued).**

feeling of alarm in the minds of the old Musalman and Hindu communities, and be regarded as a covert attack upon their religious and national customs and institutions. I confess that I do not see anything in the nature of the alleged provocation which is likely to maintain durable suspicions and resentments. Nor do I see that any dissatisfaction or suspicion that might temporarily exist would be of a general and dangerous character. In what class, I ask, would this alleged discontent exist? Not in the educated and respectable, though restricted, class who have enjoyed the full benefits of European culture and who have broken with the customs and institutions of their forefathers—for it is for the protection of these that the present measure is contrived: not among the numerous and valuable order of Natives, who have appropriated to themselves the advantages of highest English education in the highest degree, but who, from real conviction, or from a sentiment of national piety and pride, have remained attached to the beliefs and habits of the past—for this class, from which our most valuable public servants are drawn, are thoroughly convinced of the earnest desire which the English Government cherish to occupy an impartial position, indulgent and benevolent to all not among the dark and dense masses of the lower castes, industrial or agricultural—for to these, this Bill and all similar measures will remain for ages, or at least for years, absolutely unknown. The impressions which have been so much spoken of, might, I admit, have more sway with a certain middle-class of Natives, who are partly educated, who are disposed to criticize and appreciate the policy of Government without being fully cognizant of its real views, who are strongly attached to the old standards of faith and social life, and are suspicious of innovation from authority—in fact, who are half enlightened. I admit that there is a class among whom a Bill of this character may be regarded as an aggression on the part of Government, or, if not as a direct aggression, as a measure under cover of which the institutions of religion and caste may be gradually sapped and weakened. But, even here, I think that, if the question is allowed to subside into silence, little durable effect will be produced. The operation of the Bill will be rarely felt or seen. It will cease to attract attention. It will die out in the popular memory, and be forgotten. Nor must we forget that, as education becomes more diffused, the suspicions and resentments to which I have alluded will have less and less force. What gives offence now will give no offence a few years hence.

“ In the rare cases in which the operation of the Act becomes felt and known, I am not without a hope that the effect will sometimes be rather good than evil. The seceding communities from the old religions are not at all likely to be of a profligate character. They will probably be composed of men of intelligence and morality. When the middle class of public in the provinces come to understand the movement better; when they see that these speculative religionists are persons of worth, and that marriage with them, far from being a careless, precarious, secular contract, is a religious tie, solemnized by a decent and holy rite, the Native public will, I suspect, regard the motives and provisions of the Bill rather with favour than repugnance. In a word,

**1.—“The Special Marriage Act, 1872”—(Continued).**

I am disposed to believe that the provisions of the measure, as drafted by my honourable friend, Mr. Stephen, will give substantial and permanent satisfaction and protection to the classes for whose welfare it is destined, and will not produce those prejudicial results in other classes which the opponents of the Bill would persuade us to expect.”

**(6) Scope of the Act.**

(a) This Act is, as its title indicates, “an Act to provide a form of marriage in certain cases ” 19 C. 289 (291) H

(b) Any provision with regard to capacity to marry, or with regard to rights of property, would be entirely beyond the scope of this Act 19 C. 289 (291). I

**(7) Reason for framing the will in its present general form.**

“When relief in any matter connected with religion was sought by any sect or body of the Natives of India and when a case for such relief was established, it would be good policy to confine to relief to the particular sect or body making the application. Considering the unknown depths of Native feeling on these subjects, it would generally be better not to generalize beyond the immediate necessity and hence Mr. Maine thought the policy which confined the relief of the Native Converts Marriage Dissolution Act to Christians was sound, although there were doubtless other classes in the same position. But after much conversation with the Native gentleman Mr. Maine had convinced himself that the creed of the Brahmoes lacked stability. The process by which the sect was formed might be increasing in activity, but there seemed also to be growing disinclination to accept any sect of common tenets. It would be difficult for legal purposes to define a Brahmo and if no definition were given, there might shortly be petitions for relief by persons who were in the same legal position as the present applicant, but who declared that they could not conscientiously call themselves Brahmoes. Hence the Bill had been drawn with some degree of generality.” See Gazette of India, 1868 Part V, p. 890. J

**(8) Necessity for religious ceremonial.**

“With religious ceremonial this Bill would not be concerned. The Brahmoes could add to the requirements of the law whatever ritual they preferred, and the result would be that, as in several European countries, there would be first a civil and afterwards a religious marriage.” (Ibid.) K

**(9) Principle on which this Act is based to one of religious toleration.**

(a) This Act only involves a very small extension of the principle of the *lex loci* Act (XXI of 1850). That Act relieved from all civil disabilities persons excommunicated from any Native religion, or, in other words, the first generation of Converts or dissidents, but it did not expressly provide relief to the second and ulterior generations. The opinion was partly repaired by the decision of the Privy Council and would be in part supplied by the present measure.” (Ibid.) L



1.—“*The Special Marriage Act, 1872*”—(Concluded).

- (b) S. 9 of Reg. VII of 1832 and Act XXI of 1850 provided for the protection of the rights of inheritance. But they omitted to provide for the right of contracting marriage, without which inheritance cannot arise. One reason, however, why we should remove the difficulty is that, it is entirely the creation of the British administration of Justice in this country. It might strike every man that by our introduction of legal ideas and our administration of justice through regular Courts, we give a solidity and rigidity to Native usage, which it does not naturally possess. In order to prevent the monstrous injustice which occasionally results from this process, we must control it by the proper instrument—timely legislation. See Gazette of India, 1868, Part V, p. 1197 ■

Local extent.      1 This Act extends to the whole of British India.

[Commencement.] Rep Act XVI of 1874.

2. Marriages may be celebrated under this Act between persons neither of whom professes the Christian or the Jewish, or the Hindu or the Muhammadan, or the Parsi or the Buddhist, or the Sikh or the Jaina religion, upon the following conditions:—

Conditions upon which marriages under Act may be celebrated

(1) neither party must, at the time of the marriage, have a husband or wife living;

(2) the man must have completed his age of eighteen years, and the woman her age of fourteen years, according to the Gregorian calendar;

(3) each party must, if he or she has not completed the age of twenty-one years, have obtained the consent of his or her father or guardian to the marriage;

(4) the parties must not be related to each other in any degree of consanguinity or affinity which would according to any law to which either of them is subject, render a marriage between them illegal.

*1st Proviso.*—No such law or custom, other than one relating to consanguinity or affinity, shall prevent them from marrying.

*2nd Proviso.*—No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor, who stands to each of them in a nearer relationship than that of great-great-grand-father or great-great-grand-mother, or unless one of the parties is the lineal ancestor, or the brother or sister of some lineal ancestor, of the other.

3. The Local Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any portion of the territory subject to its administration. The officer so appointed shall be called "Registrar of Marriages under Act III of 1872," and is hereinafter referred to as "the Registrar." The portion of territory for which any such officer is appointed shall be deemed his district.

(Notes)

General.

N.B. 1.—For notifications appointing Registrars under this section for district in —

- (a) Assam, *see* Assam Rules, Manual, Ed., 1898, p. 26
- (b) Burma, *see* Burma Gazette, 1902, Pt. I, p. 607
- (c) Bombay Presidency, *see* Bombay Rules and Order.
- (d) Central Provinces, *see* Civil Procedure Rules and Order.
- (e) United Provinces of Agra and Oudh, *see* notification quoted at p. 42 of the North-West Provinces and Oudh List of Local Rules and Orders, Ed., 1894

N.B. 2.—Compare this section with S. 7 of Act XV of 1872 (Christian Marriage)

One of the parties to intended marriage to give notice to Registrar.

4. When a marriage is intended to be solemnized under this Act, one of the parties must give notice in writing to the Registrar before whom it is to be solemnized.

The Registrar to whom such notice is given must be the Registrar of a district within which one at least of the parties to the marriage has resided for fourteen days before such notice is given.

Such notice may be in the form given in the first schedule to this Act.

(Note).

General.

N.B.—Compare this section with S. 38 of Act XV of 1872 (Christian Marriage).

5. The Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of every such notice in a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book under Act III of 1872," and such book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

Notice to be filed and copy entered in the Marriage Notice Book.

## (Note)

## General.

**N.B.** —Compare this section with S. 40 of Act XV of 1872 (Christian Marriage).

**6.** Fourteen days after notice of an intended marriage has been given under section 4, such marriage may be solemnized, unless it has been previously objected to in the manner hereinafter mentioned.

Objection to marriage.

Any person may object to any such marriage on the ground that it would contravene some one or more of the conditions prescribed in cls. (1), (2), (3) or (4) of section 2

The nature of the objection made shall be recorded in writing by the Registrar in the register, and shall, if necessary, be read over and explained to the person making the objection, and shall be signed by him or on his behalf

## (Note).

## General

**N.B.**—Compare this section with Ss. 20 and 44 of Act XV of 1872 (Christian Marriage)

**7.** On receipt of such notice of objection the Registrar shall not proceed to solemnize the marriage until the lapse of fourteen days from the receipt of such objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court open at the time, until the lapse of fourteen days from the opening of such Court

Procedure on receipt of objection

The person objecting to the intended marriage may file, a suit in any Civil Court having local jurisdiction (other than a Court of Small Causes) for a declaratory decree, declaring that such marriage would contravene some one or more of the conditions prescribed in cls. (1), (2), (3) or (4) of section 2.

Objector may file suit.

## (Note).

## General.

**N.B.** —Compare this section with Ss. 45 to 48 of Act XV of 1872 (Christian Marriage)

**8.** The officer before whom such suit is filed shall thereupon give the person presenting it a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within fourteen days from the receipt of notice of objection, if there be a Court of competent jurisdiction open at the time, or, if there be no such Court

Certificate of filing of suit to be lodged with Registrar

open at the time, within fourteen days of the opening of such Court, the marriage shall not be solemnized till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed; or, if there be an appeal from such decision, till the decision of the Appellate Court has been given.

If such certificate be not lodged in the manner and within the period prescribed in the last preceding paragraph, or if the decision of the Court be that such marriage would not contravene any one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2, such marriage may be solemnized

If the decision of such Court be that the marriage in question would contravene any one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2, the marriage shall not be solemnized.

**(Note).**

**General.**

**N B** —Compare this section with Ss. 41 to 48 of Act XV of 1872 (Christian Marriage).

**9** Any Court in which any such suit as is referred to in sec. 7 is filed may, if it shall appear to it that the Court may fine when objection not reasonable. objection was not reasonable and *bona fide*, inflict a fine, not exceeding one thousand rupees, on the person objecting, and award it, or any part of it, to the parties to the intended marriage

**(Note)**

**General**

**N B** —Compare this section with Ss. 49 and 67 of Act XV of 1872 (Christian Marriage)

**10** Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Registrar, Declaration by parties and witnesses. sign a declaration in the form contained in the second schedule to this Act. If either party has not completed the age of twenty-one years, the declaration shall also be signed by his or her father or guardian, except in the case of a widow, and, in every case, it shall be countersigned by the Registrar.

**(Notes).**

**General.**

**N B** —Compare this section with S. 51 of Act XV of 1872 (Christian Marriage).

## General—(Concluded).

**Hindu widow remarrying under the provisions of this Act—Effect on her proprietary rights—Act XV of 1856.**

(a) A Hindu widow inherited the property of her husband, taking therein the estate of a Hindu widow. She afterwards married a second husband, not a Hindu, in the form provided by Act III of 1872, having first made a declaration, as required by section 10 of that Act, that she was not a Hindu. Held, by the majority of the Full Bench (Prinsep, J., *dissenting*) that by her second marriage she forfeited her interest in her first husband's estate in favour of the next heir, all rights which any widow may have in her deceased husband's property by inheritance to her husband being expressly determined by section 2 of the Hindu Widow's Marriage Act (XV of 1856) upon her remarriage. (19 C. 289.)

(b) S. 2 of Act XV of 1856 does not apply to all Hindu widows re-marrying, but only to Hindu widows remarrying as Hindus under Hindu Law as provided by the Act (*Per Prinsep, J.*) 19 C. 289

11. The marriage shall be solemnized in the presence of the Registrar and of the three witnesses who signed the declaration. It may be solemnized in any form, provided that each party says to the other, in the presence and hearing of the Registrar and witnesses, "I, [A], take thee, [B], to be my lawful wife (or husband)."

Marriage how to be solemnized.

## (Note)

## General

**N.B.**—Compare this section with S. 51 of Act XV of 1872 (Christian Marriage)

12. The marriage may be celebrated either at the office of the Registrar or at such other place, within reasonable distance of the office of the Registrar, as the parties desire. Provided that the Local Government may prescribe the conditions<sup>1</sup> under which such marriages may be solemnized at places other than the Registrar's office, and the additional fees to be paid thereupon

Place where marriage may be solemnized.

## (Notes).

1.—"Provided that the Local Government may prescribe conditions, etc."

**N.B.**—For rules made under this section for.—

(a) Assam, see Assam Rules Manual, Ed., 1893, p. 27.

(b) United Provinces of Agra and Oudh. See Notification quoted at p. 42 of the North West Provinces and Oudh list of Local Rules and Orders, Ed., 1894.

**13.** When the marriage has been solemnized, the Registrar shall enter a certificate thereof in a book to be kept by him for that purpose and to be called the "Marriage Certificate Book under Act III of 1872," in the form given in the third schedule to this Act, and such certificate shall be signed by the parties to the marriage and the three witnesses.

**(Note)**  
**General.**

**N.B.**—Compare this section with S. 54 of Act XV of 1872 (Christian Marriage).

**13-A** The Registrar shall send to the Registrar General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as the Governor General in Council from time to time directs<sup>1</sup>, a true copy certified by him, in such form as the Governor General in Council from time to time prescribes, of all entries made by him in the said marriage certificate book since the last of such intervals<sup>2</sup>.

**(Notes).**

**N B. 1.**—Compare this section with S. 55 of Act XV of 1872 (Christian Marriage).

**N B 2.**—This section was inserted by S. 29 of the Births, Deaths and Marriage Registration Act, VI of 1886.

**1 — "At such intervals . . . directs."**

**Orders issued under this section.**

For—, see Gazette of India, 1889 Sup. p. 921, cited *infra* (at the end of this Act).

**2 — "The last of such intervals "**

**Duty of Registrar General—Indexes of certified copies**

As to—to make and keep indexes of the certified copies sent to his office under this section. See Act VI of 1886, S. 7

**14.** The Local Government shall prescribe the fees to be paid to the Registrar for the duties to be discharged by him under this Act

Fees<sup>1</sup>.

The Registrar may, if he think fit, demand payment of any such fee before solemnization of the marriage or performance of any other duty in respect of which it is payable

The said Marriage Certificate Book shall at all reasonable times be open for inspection, and shall be admissible as evidence of the truth of the statements therein contained. Certified extracts therefrom shall on application be given by the Registrar on the payment

to him by the applicant of a fee to be fixed by the Local Government for each such extract

(Notes)

I — "Fees"

**For scales of fees to be paid to Registrars of marriage prescribed by—**

- (a) The Government of Bombay, see Bom. R. and O.
- (b) Burma, see Burma Gazette, 1903, Pt. I, p. 737
- (c) Chief Commissioner, Central Provinces, see C.P. R. and O.
- (d) Government, United Provinces, see Notification quoted at page 42 of the North-Western Provinces and Oudh list of Local Rules and Orders, Ed., 1894.

**15.** Every person who, being at the time married, procures a marriage of himself to be solemnized under this Act, shall be deemed to have committed an offence under S. 494 or S. 495 of the Indian Penal Code, as the case may be, and the marriage so solemnized is void.

Penalty on married person marrying again under Act

**XLV of 1860.**

**16.** Every person married under this Act who, during the lifetime of his or her wife or husband, contracts any other marriage, shall be subject to the penalties provided in sections 494 and 495 of the Indian

Punishment of bigamy.

**XLV of 1860.** Penal Code for the offence of marrying again during the lifetime of a husband or wife, whatever may be the religion which he or she professed at the time of such second marriage

**IV of 1869.**

**17.** The Indian Divorce Act shall apply to all marriages contracted under this Act, and any such marriage may be declared null or dissolved in the manner therein provided, and for the causes therein mentioned, or on the ground that it contravenes some one or more of the conditions prescribed in clause (1), (2), (3), or (4) of section 2 of this Act

Indian Divorce Act to apply

**18.** The issue of marriages solemnized under this Act shall, if they marry under this Act, be deemed to be subject to the law to which their fathers were subject as to the prohibition of marriages by reason of consanguinity and affinity, and the provisos to section 2 of this Act shall apply to them.

Law to apply to issue of marriages under Act

**19.** Nothing in this Act contained shall affect the validity of any marriage not solemnized under its provisions; nor shall this Act be deemed directly or indirectly to affect the validity of any mode of contracting marriage; but, if the validity of any such mode shall hereafter come into question before any Court, such question shall be decided as if this Act had not been passed

Saving of marriages solemnized otherwise than under Act.

20. [*Registry of marriages contracted before passing of Act.*]  
*Rep. by the repealing Act, 1876 (XII of 1876).*

**21.** Every person making, signing or attesting any declaration or certificate prescribed by this Act, containing a statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be deemed guilty of the offence described in section 199 of the Indian Penal Code.

**XLV of 1860.**

**(Note).**

### General.

**N B**—Compare this section with S. 66 of Act XV of 1872 (Christian Marriage)

## FIRST SCHEDULE

(See section 4)

## NOTICE OF MARRIAGE

To \_\_\_\_\_, a Registrar of Marriages under Act III of 1872  
for the \_\_\_\_\_ District.

• I hereby give you notice that a marriage under Act III of 1872 is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say) --

Names.	Condition	Rank or profession	Age	Dwelling-place	Length of residence.
<i>A B</i>	<i>Unmarried Widow.</i>	<i>Landowner.</i>	<i>Of full age</i>	<i>.</i>	<i>23 days</i>
<i>C D</i>	<i>Spinner.</i>	<i>.</i>	<i>Minor.</i>	<i>...</i>	<i>...</i>

Witness my hand, this

day of

187

(Signed)

*A.B.*



## SECOND SCHEDULE.

(See section 10.)

*Declaration to be made by the Bridegroom.*I, *A B*, hereby declare as follows :—

1. I am at the present time unmarried .
2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion :
3. I have completed my age of eighteen years :

4. I am not related to *C D* [*the bride*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *C D* is subject, and subject to the provisos of cl. (4) of section 2 of Act III of 1872, render a marriage between us illegal :

[*And when the bridegroom has not completed his age of twenty-one years*

5. The consent of my father [*or guardian, as the case may be*] has been given to a marriage between myself and *C D*, and has not been revoked .]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine

(Signed) *A B* [*the bridegroom*].*Declaration to be made by the Bride.*I, *C D*, hereby declare as follows :—

1. I am at the present time unmarried :
2. I do not profess the Christian, Jewish, Hindu, Muhammadan, Parsi, Buddhist, Sikh or Jaina religion
3. I have completed my age of fourteen years :

4. I am not related to, *A B* [*the bridegroom*] in any degree of consanguinity or affinity which would, according to the law to which I am subject, or to which the said *A B* is subject, and subject to the provisos of clause (4) of section 2 of Act III of 1872, render a marriage between us illegal :

[*And when the bride has not completed her age of twenty-one years, unless she is a widow :*

5. The consent of *M N*, my father [or guardian, as the case may be], has been given to a marriage between myself and *A B* and has not been revoked :]

6. I am aware that, if any statement in this declaration is false, and if in making such statement I either know or believe it to be false, or do not believe it to be true, I am liable to imprisonment, and also to fine.

(Signed) *C D* [the bride].

Signed in our presence by the above-named *A B* and *C D* :

*G H,*  
*I J,* [three witnesses].  
*K L,*

[And when the bridegroom or bride has not completed the age of twenty-one years, except in the case of a widow :

Signed in my presence and with my consent by the above-named *A B* and *C D* :

*M N*, the father [or guardian]  
of the above-named *A B* (or *C D*,  
as the case may be) ]

(Countersigned) *E F*,

Registrar of Marriages under Act III of  
1872 for the District of

\* Dated the      day of      18

### THIRD SCHEDULE

(See section 13)

Registrar's Certificate

I, *E F*, certify that, on the      of      18  
appeared before me *A B* and *C D*, each of whom in my presence  
and in the presence of three credible witnesses, whose names are  
signed herunder, made the declarations required by Act III of  
1872, and that a marriage under the said Act was solemnized be-  
tween them in my presence

(Signed)      *E F*,

Registrar of Marriages under Act III of  
1872 for the District of

((Signed)      *A B*,

*C D*,

*G H,*  
*I J,* (three witnesses)  
*K L,*

Dated the      day of      18 .

## FOURTH SCHEDULE

[Repealed by the Repealing Act, 1876 (XII of 1876.)]

RULES AND ORDERS MADE UNDER ACT III OF 1872  
(SPECIAL MARRIAGE).

## I.—GENERAL.

Transmission of returns under the Special Marriage and Parsi Marriage and Divorce Acts, 1865 and 1872, to Registrars-General under Act VI of 1886.

*Resolution No —  $\frac{5}{1074-85}$  (Judicial), dated the 9th August, 1889.*—In exercise of the powers conferred by section 13-A of Act III of 1872 (to provide a form of marriage in certain cases), and section 8-A of the Parsi Marriage and Divorce Act, 1865, the Governor-General in Council is pleased to issue the following orders —

Copies of entries in the marriage Certificate Book prescribed in section 13 of Act III of 1872 and in the Register of Marriages referred to in section 6 of the Parsi Marriage and Divorce Act, 1865, which Registrars, except by the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay under Act XV of 1865, under these Acts are required to send to the Registrars-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886, shall be certified in the form set forth in the following schedule, and shall be sent at intervals of three months, on or as nearly as possible after the 1st January, April, July and October in each year

Should no entries be made in a Marriage Certificate Book, or a Register of Marriages, as the case may be during the preceding three months, a certificate to this effect shall be sent to the Registrar-General concerned.

## SCHEDULE.

*Form of Certificate of truth of copies of entries in Marriage Certificate Book under Act III of 1872 (or Register of Marriages under the Parsi Marriage and Divorce Act, 1865, as the case may be) to be sent to Registrar General.*

Certified that the above, which contains entries from No. \_\_\_\_\_ regarding \_\_\_\_\_ to No. \_\_\_\_\_ regarding \_\_\_\_\_, is a true copy of all the entries in the Marriage Certificate Book under Act III of 1872 (or Register of Marriages under Act XV of 1865, as the case may be) kept by me for the three months ending the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_  
Dated the \_\_\_\_\_ of \_\_\_\_\_

(Signature.)

Registrar of Marriages under Act III of 1872  
(or Registrar under the Parsi Marriage and  
Divorce Act, 1865, as the case may be) for  
(local area)

See Gazette of India, 1889, Pt VI, Supplement, p. 921, printed also in the general Statutory Rules and Orders, Vol I, 1907, p. 315.

## II — BENGAL

Notification dated the 4th June, 1872 (published in the Calcutta Gazette of 1872, p. 2358).

## II.—BENGAL—(Concluded).

The Lieutenant-Governor is pleased to publish the following rules under Act III of 1872 in supersession of those published in the Calcutta Gazette of the 22nd May 1874, page 2322 —

[Rule I requiring marriages to be registered by ex-officio Registrars, &c, has been cancelled by Notification dated the 23rd March, 1875, post, p. 290]

2. Under the provisions of section 14 of the Act, the Lieutenant-Governor has been pleased to prescribe the following scale of fees to be charged by a Marriage Registrar for the duties to be discharged by him —

	Rs. A P.
(1) For receiving notice of marriage under section 4 of the Act . . . . .	0 8 0
(2) For receiving objection to such notice under section 6 . . . . .	0 8 0
(3) For receipt of declaration under section 10 and subsequent attendance at marriage in the Registrar's office, section 11 . . . . .	1 0 0
(4) For giving a certified extract from marriage Certificate Book, section 14 . . . . .	0 8 0
(5) For registration of marriage already contracted, section 20 . . . . .	1 0 0
(6) For registering a marriage at any other time than the office hours prescribed by rule 2, an extra fee of rupees . . . . .	2 0 0

3. Every Registrar must give public notice of the place where he holds his office, and is bound to register marriages there. All registrations at the office are to be made between the hours of 10 A.M. and 5 P.M., unless the special fee mentioned in rule 2, clause (6), is paid.

4. The place, other than a Registrar's office, where a marriage is to be registered shall be determined by the parties themselves, who shall specify such place in writing at the time when the notice of intended marriage is given to the Registrar.

5. If such place is not more than five miles distant from the Registrar's office, the fee for registering the marriage shall be Rs. 4, and if more than five miles distant, an additional fee of 4 annas per mile shall be charged.

6. When a marriage is solemnized at any place other than the Registrar's office it may be registered at any reasonable hour.

7. All Registrars are required to post a notice of every intended marriage publicly and conspicuously in their offices for fourteen days before registering such marriage.

*Notification dated the 23rd March, 1875 (published in Calcutta Gazette of 1875, Part I, p. 491.)*

In modification of the notification of the 4th June, 1874, the Lieutenant-Governor is pleased to cancel the rule which requires that marriages under Act III of 1872 shall be registered by *ex-officio* Registrar only at the office of the Marriage Registrar and at no other place.

In rule 4 of the rules appended to the notification of the above date, the words "by a Registrar other than an *ex-officio* Registrar" are to be omitted.

See Bengal Local Rules and Orders, (1903) Vol. II, pp. 289, 290.

## III — BOMBAY

*Order appointing ex-officio Registrars of Marriages and fixing the scale of fees to be paid to them.*

*Notn., dated 18th September 1872, B G G., 1872, Pt. I, p. 1046.*—Under the provisions of Section 3 of Act III of 1872, the Honourable the Governor in Council is pleased to appoint the following persons to be *ex-officio* Registrars of Marriage, under that Act in the Bombay Presidency —

For the City of Bombay. The Registrar and Sub-Registrar appointed under Act VIII of 1871 for the District and Sub-District of Fort and Colaba under that Act.

## III.—BOMBAY—(Concluded).

For the Mofussil      The Sub-Registrars appointed under Act VIII of 1871 for the Central Sub-Divisions in the Registrars' Districts under that Act as hereafter specified; each Sub-Registrar of such Central Sub-Division to be Registrar of Marriages under Act III of 1872, for a District co-extensive with the Registrar's District in which he is employed under Act VIII of 1871

For Aden      ...      The Registrar appointed under Act VIII of 1871.

Under the provisions of Section 14 of the said Act, No. III of 1872, His Excellency the Governor in Council is also pleased to lay down the following scale of fees to be paid to the Registrars of Marriages under the said Act —

For the solemnization of a Marriage at the Office of a Registrar of Marriages	Rs. 5
For such solemnization at a private house within a radius of six miles from the Office of a Registrar of Marriages	„ 15
For such solemnization at a private house beyond six miles	„ 30
For the registration of a notice under Section 4 of the Act	Annas. 8
For the registration of an objection under Section 6 of the Act	„ Rupee 1
For a copy of a Marriage certificate	„ 1
For every other application which may be necessary under the Act	„ Annas. 8

The fees shall be credited to the Fund known as the Registration Fund when the marriage is solemnized at the Office of a Registrar of Marriages, but when the Registrar attends at any other place, Rupees 5 only of the fee paid shall be credited to the Registration Fund, and the remainder be held to be the perquisite of the Registrar

The following Sub-Registrars are declared to be Sub-Registrars of the Central Sub-Divisions of the several Registration Districts under Act III of 1871.

District	Sub-Registrar.	Station.
<i>Gujarat.</i>		
Ahmedabad	Special Sub-Registrar of Ahmedabad and Daskroi	Ahmedabad.
Broach	Special Sub-Registrar of Broach	Broach.
Kaira	Special Sub-Registrars of Kaira and Mehmabad	Kaira.
Panch Mahal	Sub-Registrar of Godhra	Godhra.
Surat	Special Sub-Registrar of Surat and Chorasi	Surat
<i>Konkan.</i>		
Alibag	Special Sub-Registrar of Alibag	Alibag.
Ratnagiri	Special Sub-Registrar of Ratnagiri and Sytowdeh.	Ratnagiri.
Thana	Special Sub-Registrar of Salsette	Thana.
<i>Deccan.</i>		
Ahmednagar	Special Sub-Registrar of Ahmednagar	Ahmednagar.
Khandesh	Special Sub-Registrar of Dhulia	Dhulia.
Nasik	Special Sub-Registrar of Nasik	Nasik.
Poona	Special Sub-Registrar of Haveli and Cantonment of Poona	Poona.
Satara	Special Sub-Registrar of Satara	Satara.
Sholapur	Special Sub-Registrar of Sholapur	Sholapur.

District.	Sub-Registrar.	Station.
<i>Southern Maratha Country.</i>		
Belgaum	Special Sub-Registrar of Belgaum	Belgaum.
Dharwar	Special Sub-Registrar of Dharwar	Dharwar.
Kaladgi	Special Sub-Registrar of Bagalkot	Bagalkot (there is no Sub-Registrar at Kaladgi from which Bagalkot is distant only 6 miles.
<i>North Kanara</i>		
Kanara	Special Sub-Registrar of Karwar	Karwar
<i>Sind.</i>		
Frontier District.	Sub-Registrar of Jacobabad	Jacobabad
Hyderabad	Special Sub-Registrar of Hyderabad	Hyderabad.
Karachi	Sub-Registrar of Karachi	Karachi
Shikarpur	Special Sub-Registrar of Shikarpur	Shikarpur.
Thar and Parkar	Sub-Registrar of Umarmkot	Umarmkot

See Bombay Local Rules and Orders, 1896, Vol. I, pp 98, 99.

#### IV.—UNITED PROVINCES OF AGRA AND OUDH.

*The following rules have been made by the Government of the United Provinces of Agra and Oudh under sections 3 12 and 14 of Act III of 1872 as amended by Act VI of 1882 —*

1. Magistrates of districts shall be *ex-officio* Registrars of Marriages under Act III of 1872, and their district shall be continuous with the full limits of their jurisdiction, as prescribed under Act X of 1882.

2. Marriages shall be registered by *ex-officio* Registrars only at their offices and at no other place.

3. All Registrars other than Magistrates of districts must give public notice of the place where they hold their office.

4. Marriages at the Registrar's office shall be solemnized between the hours of 10 a.m., and 4 p.m., unless the additional fee mentioned in the rule 5 clause (d), is paid.

5. The following fees shall be paid for the duties to be discharged by Registrars under the Act —

	RS.	A.	P.
(a) For receipt of notice of marriage under section 4	0	8	0
(b) For receipt of objection to such notice under section 6	0	8	0
(c) For receipt of declaration under section 10 and subsequent attendance at a marriage in the Registrar's office under section 11	1	0	0
(d) For attending at a marriage at any other time than the office hours prescribed by rule 4, an additional fee of	2	0	0
(e) For giving a certified extract from the marriage certificate book under section 11	0	8	0

6. Marriages to be registered by a Registrar other than an *ex-officio* Registrar, may be solemnized at any place other than the Registrar's office, which may be determined by the parties themselves, who shall specify such place in writing at the time when notice of the intended marriage is given to the Registrar.

## IV.—UNITED PROVINCES OF AGRA AND OUDH—(Concluded).

7. If such place is not more than five miles distant from the Registrar's office, the fee for registering the marriage shall be Rs 4; and, if more than five miles distant, an additional fee of four annas per mile shall be charged.

8. When a marriage is to be solemnized at any place other than the Registrar's office, it shall take place at any reasonable hour.

9. All fees paid under these rules to *ex officio* Registrars shall be credited to Government.

10. All Registrars are required to post a notice of every intended marriage publicly, and in a conspicuous place in their office, for fourteen days before registering such Marriages. (G. O. No 733 VII—291, B., dated 5th August 1891. See Manual of Orders of Government, U.P. of Agra and Oudh, Ed., 1902, Vol. I, Dept. III, pp. 79, 80.

## V—PUNJAB.

*List of Rules and Orders made under Enactment applying to the Punjab.*

Acts of the Governor-General in Council.				Rules and Orders.		
1	2	3	4	5	6	7
Year	Number.	Subject.	Section.	Subject.	Number and date of Notification.	Where Published.
1872	I	Marriage.	3	Appointing as Registrar of Marriages the Deputy Commissioner of—		
				1 Delhi, in the Delhi District,	No. 4182, 18th November, 1875	U. P. Gazette, 1875, Part I, p. 427
				2 Lahore, in the Lahore District,	No. 2868, 1st September, 1880.	1880, Part I, p. 282.
				3. Amritsar, within the Local limits of his jurisdiction.	No. 1236, A, 13th December, 1883.	1883, Part I, p. 784.
		Ditto.	12	Rules.	No 2869, 1st September, 1880.	1880, Part I, p. 282.
			A	Transmission of marriage returns by Registrars to Registrar-General of Births, Deaths and Marriages appointed under Act VI of 1886.	Resolution No 6-1074-85, 9th August, 1889	..
				Extending provisions of Act to Quetta, reference in the Act to the Local Government to read as referring to the Agent to the Governor-General in Baluchistan	No. 876 E., 1st May 1889.	1889. Part I, p. 252 (Gazette of India).

*See List of*

Rules and Orders, Punjab, 1902, pp 48, 49.

# THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

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## CONTENTS.

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### *Preamble*

### PRELIMINARY

### SECTIONS.

1. Short title.  
Extent
2. Enactments repealed
3. Interpretation-clause

---

### PART I.

#### THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Marriages to be solemnized according to Act.
5. Persons by whom marriages may be solemnized.
6. Grant and revocation of licenses to solemnize marriages
7. Marriage-Registrars  
Senior Marriage-Registrar  
Magistrate when to be Marriage-Registrar.
8. Marriage Registrars in Native States
9. Licensing of persons to grant certificates of marriage between Native Christians.

---

### PART II

#### TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED

10. Time for solemnizing marriage  
Exceptions.
11. Place for solemnizing marriage  
Fee for special license

---

### PART III

#### MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT

12. Notice of intended marriage
13. Publication of such notice.  
Return or transfer of notice



**SECTIONS.**

14. Notice of intended marriage in private dwelling.
15. Sending copy of notice to Marriage-Registrar when one party is a minor.
16. Procedure on receipt of notice.
17. Issue of certificate of notice given and declaration made. Proviso.
18. Declaration before issue of certificate.
19. Consent of father, or guardian, or mother
20. Power to prohibit by notice the issue of certificate.
21. Procedure on receipt of notice
22. Issue of certificate in case of minority
23. Issue of certificate to Native Christians
24. Form of certificate
25. Solemnization of marriage.
26. Certificate void if marriage not solemnized within two months.

---

**PART IV**

**REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION**

27. Marriages when to be registered
28. Registration of marriages solemnized by Clergymen of Church of England
29. Quarterly Returns to Archdeaconry  
Contents of returns
30. Registration and returns of marriages solemnized by Clergymen of Church of Rome
31. Registration and returns of marriages solemnized by Clergymen of Church of Scotland
32. Certain marriages to be registered in duplicate
33. Entries of such marriages to be signed and attested
34. Certificate to be forwarded to Marriage-Registrar, copied and sent to Registrar-General
35. Copies of certificates to be entered and numbered
36. Registrar to add number of entry to certificate, and send to Registrar-General.
37. Registration of marriages between Native Christians under Part I or III.  
Custody and disposal of register-book.

**PART V.**

**MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE-REGISTRAR.**

**SECTIONS.**

38. Notice of intended marriage before Marriage-Registrar.
39. Publication of notice
40. Notice to be filed and copy entered in Marriage Notice Book
41. Certificate of notice given and oath made.  
Proviso.
42. Oath before issue of certificate
43. Petition to High Court to order certificate in less than fourteen days.  
Order on petition
44. Consent of father or guardian.  
Protest against issue of certificate.  
Effect of protest
45. Petition where person whose consent is necessary is insane, or unjustly withholds consent  
Procedure on petition.
46. Petition when Marriage-Registrar refuses certificate.  
Procedure on petition
47. Petition when Marriage-Registrar in Native State refuses certificate
48. Petition when Registrar doubts authority of person forbidding  
Procedure on petition  
Reference when Marriage-Registrar in Native State doubts authority of person forbidding.  
Procedure on reference
49. Liability for frivolous protest against issue of certificate.
50. Form of certificate
51. Solemnization of marriage after issue of certificate.
52. When marriage not had within two months after notice new notice required.
53. Marriage-Registrar may ask for particulars to be registered.
54. Registration of marriage solemnized under Part V.
55. Certificates to be sent monthly to Registrar General.  
Custody of register-book.

**SECTIONS.**

56. Officers to whom Registrars in Native States shall send certificates.
57. Registrars to ascertain that notice and certificate are understood by Native Christians.
58. Native Christians to be made to understand declarations.
59. Registration of marriages between Native Christians.

---

**PART VI.**

**MARRIAGE OF NATIVE CHRISTIANS.**

60. On what conditions marriages of Native Christians may be certified.
61. Grant of certificate
62. Keeping of register-book and deposit of extracts therefrom with Registrar-General.
63. Searches in register-book and copies of entries.
64. Books in which marriages of Native Christians under Part I or Part III are registered
65. Part VI not to apply to Roman Catholics.  
Saving of certain marriages

---

**PART VII.**

**PENALTIES.**

66. False oath, declaration, notice or certificate for procuring marriage.
67. Forbidding, by false personation, issue of certificate by Marriage Registrar
68. Solemnizing marriage without due authority.
69. Solemnizing marriage out of proper time, or without witnesses.  
Saving of marriages solemnized under special license.
70. Solemnizing, without notice or within fourteen days after notice, marriage with minor.
71. Issuing certificate, or marrying without publication of notice, marrying after expiry of notice ;  
solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice ;  
issuing certificate against authorized prohibition.

**SECTIONS.**

- 72. Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice, or against authorized prohibition
- 73. Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome); issuing certificate, or marrying, without publishing notice or after expiry of certificate, issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice, issuing certificate authorizedly forbidden, solemnizing marriage authorizedly forbidden.
- 74. Unlicensed person granting certificate pretending to be licensed.
- 75. Destroying or falsifying register-books.
- 76. Limitation of prosecutions under Act

**PART VIII**

**MISCELLANEOUS**

- 77. What matters need not be proved in respect of marriage in accordance with act
- 78. Correction of errors
- 79. Searches and copies of entries
- 80. Certified copy of entry in marriage-register, etc, to be evidence.
- 81. Sending certificates of certain marriages to Secretary of State for India
- 82. Local Government to prescribe fees
- 83. Power to make rules.
- 84. Power to prescribe fees and rules for Native States.
- 85. Power to declare who shall be District Judge
- 86. Power to delegate functions under this Act of Governor-General in Council
- 87. Saving of consular marriages
- 88. Non-validation of marriages within prohibited degrees

• *Schedule I.*—Notice of marriage

*Schedule II* --Certificate of receipt of notice

*Schedule III.*—Form of register of Marriages

*Schedule IV.*--Marriage Register-book  
Certificate of Marriage.

*Schedule V.*—Enactments repealed.



# THE INDIAN CHRISTIAN MARRIAGE ACT, 1872<sup>1</sup>.

(ACT XV OF 1872.)

[Passed on the 18th July, 1872.]

*An Act to consolidate and amend the law relating to the solemnization in India of the marriages of Christians.*

**WHEREAS** it is expedient to consolidate<sup>2</sup> and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; It is hereby enacted as follows —

Preamble.

## 1.—“*The Indian Christian Marriage Act, 1872.*”

**N.B.**—This Act is based on 14 and 15 Vic. chs. 40 and 59, Geo. III, ch. 84 (both statutes relate to marriages in India and are now no longer in force) and Acts V of 1852 and V of 1865, the last two Acts were repealed by this Act

### (1) Statement of Objects and Reasons.

For———, see Gazette of India, 1871, Pt. V, p. 473.

**A**

### (2) Proceedings in Council.

For———, see Gazette of India, 1870, Supplement p. 1077, *Ibid.*, 1871, Supplement, pp. 1426, 1643, *Ibid.*, 1872, Supplement pp. 257, 728, 742, 805, 813 and 858

**B**

### (3) Act where declared in force.

This Act has been declared in force in—

(a) Upper Burma generally, except the Shan States, see Burma Laws Act XIII of 1898, S. 4 and Sch. I.

**C**

(b) The Hill District of Arakan, see the Arakan Hill District Laws Regulation, IX of 1874, S. 3.

**D**

(c) British Baluchistan, see the Baluchistan Laws Reg. I of 1890, S. 3.

**E**

(d) The Sonthal Parganas, see the Sonthal Parganas Settlement Regulation, III of 1872, as amended by the Sonthal Parganas Justice and Laws Regulation III of 1899.

**F**

(e) Also by notification under S. 3 of the Scheduled Districts Act XIV of 1874, in the following scheduled Districts namely —

(i) The Districts of Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum, see Gazette of India, 1881, Pt. I, p. 504,

**G**

(ii) The North-Western Provinces Tirai, see Gazette of India, 1876, Pt. I, p. 505.

**H**

**Note.**—The District of Lohardaga, now called the Ranchi District (see Calcutta Gazette, 1899, Pt. I, p. 44), included at this time the Palamau District, which was separated in 1894.

**I**

**1 —“ The Indian Christian Marriage Act, 1872 ”—(Concluded).**
**(3-a) Framing of the Act.**

The Act XV of 1872 is, very badly and clumsily drawn. 14 M 342 (352).  
(*Per Collins, C.J.*) J

**(3-b) Scope of the Act**

“There was little doubt that the intention of the Bill, as introduced, was simply to deal with the forms and ceremonies of marriage; it was to be what it called itself—A Bill to regulate the law for the solemnisation of marriage, not a Bill to regulate the Marriage Law. This has nothing to do with the essence of the contract ” *See Gazette of India, 1872, Suppt., p. 805.* K

**(4) Statutes relating to—How interpreted.**

(a) “In interpreting statutes relative to marriage and its formalities, mere prohibitory words have never been held to create a nullity, unless that nullity is declared in the Act.” *Browne and Powles on Divorce, 7th Ed., 1905, p. 94.* L

(b) The Acts of colonial legislatures, where the English law prevails, must be governed by the same rules of construction as prevail in England. *Catterall v. Swetman, 1 Robert 317 (1845).* M

**2.—“ To consolidate ”**
**Reasons for the passing of the present Act—Previous state of the law, defects in, how sought to be remedied.**

(a) The Bill provided for the collation into one enactment of the provisions of the Sts. 14 and 15 Vic. c. 40 and the Indian Acts V of 1852 and V of 1865 with such alterations of wording and arrangement as were incidental to the process of consolidation. It further comprised three substantial amendments of the then existing law.

At the time, only Act V of 1852 extended to the territories of Native Princes in alliance with Her Majesty, and there was great doubt as to the validity of a marriage solemnized between the Christian subjects of Her Majesty in Native States otherwise than in the presence of a Marriage-Registrar appointed under that Act, even if the marriage be solemnized by an ordained clergyman of any of the established churches, and in conformity with the ceremonies and customs of such churches.

The Bill was framed to remove this doubt by extending the entire law relating to Christian marriages to Native states in alliance with Her Majesty.

There was also some ambiguity in the provisions of the existing law as to the submission of returns of marriages solemnized between Native Christians. For statistical purposes the Indian Government was required to transmit to England the returns of marriages solemnized between British subjects who, though resident in this country, retained their English domicile, and to meet this requirement, the law obliged persons registering Christian marriages to submit with regularity the returns of such marriages.

The wording and arrangement of the provisions of the then existing law relative to this obligation, did not clearly indicate its intended extent. There had been, from time to time, since the passing of Act V of 1865, various references to the Local Governments on the subject, and the orders passed thereon did not evince a uniform interpretation of the requirements of the law on the part of the Executive.

**2.—“To consolidate”—(Concluded)**

This Act was so framed as to lay down clearly the rule that the returns of marriages between Native-Christians, howsoever they might have been solemnized, were not required

The most important amendment made by this Act was in regard to marriages between Native-Christians, either of whom was a minor. The framers of the then existing law, actuated by the desire of making the forms of marriage between Native-Christians of the poorer and uneducated classes as simple and unexpensive as possible, dispensed with all notices, and required only that the persons intending marriage should be of a specified age,—which in the case of both male and female was considerably below that which constituted majority even amongst the natives of this country—and that they should not stand in relation to each other within the prohibited degrees of consanguinity and affinity—apparently as prescribed by the English canon, though this was not expressly specified to be such.

The practical effect of this was to deprive Native Christian parents of that control over the action of their children in the very important matter of contracting marriages which the law or custom gave to parents of all countries and creeds. The result of the enactment of Part V of Act V of 1865 was in all probability overlooked by the legislature of that year. Further, several leading men of the Native-Christian community submitted a memorial to the Government on the subject, pointing out the extreme hardship inflicted on them by the legislation referred to, with which memorial the Government was in entire sympathy. To this grievance, a remedy was provided for by S. 54 of the Bill. That section was intended to restore the power of control of which Native-Christian parents had been deprived by the then existing law, without introducing the notices and forms unsuited to the poorer and uneducated classes, and which was the special object of past legislation to avoid. See Speech by the Hon. Mr. Cockerell in introducing the Christian Marriage Bill on the 19th October, 1871. N

(b) Many of the difficulties which the Christian Marriage Act XV of 1872 was intended to avoid were produced by the manner in which the several Acts that were sought to be consolidated by that measure (*viz.*, Act V of 1852, Act V of 1865, Sts. 14 and 15 Vic. C. XL, 58 (Geo. Cap. 54) were pieced together and by the uncertainty which arose from the cross references to one another contained in them. Hence the present consolidating Act. See the speech of Mr. Stephen in the Legislative Council on the 19th Oct. 1871. O

**PRELIMINARY**

**Short title.** 1. This Act may be called the Indian Christian Marriage Act, 1872.

**Extent.** It extends to the whole of British India, and, so far only as regards Christian subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty<sup>1</sup>.

[Commencement.] Rep. by the Repealing Act, 1874 (XVI of 1874).



(Note).

**1.—“Territories of Native Princes and States in alliance with Her Majesty.”**

**Reason for extending the Act to the—**

Prior to the passing of this Act only Act V of 1852 extended to the territories of Native Princes in alliance with Her Majesty, and there was great doubt as to the validity of a marriage solemnized between the Christian subjects of Her Majesty in Native States otherwise than in the presence of a Marriage-Registrar appointed under that Act, even if the marriage was solemnized by an ordained clergyman in any of the established Churches, and in conformity with the ceremonies and customs of such churches.

This Act wanted to remove this doubt by extending the entire law relating to Christian marriages to Native States in alliance with Her Majesty.” See Gazette of India, 1871, Part V, Suppl., p. 1426, P

**2** The enactments specified in the fifth schedule hereto annexed are repealed, but not so as to invalidate any marriage confirmed by, or solemnized under, any such enactment

And all appointments made, licenses granted, consents given, certificates issued, and other things duly done under any such enactment shall be deemed to be respectively made, granted, given, issued and done under this Act.

VII of 1870. For clause XXIV of section 19 of the Court-fees Act, 1870, the following shall be substituted —

“XXIV, Petitions under the Indian Christian Marriage Act, 1872, sections 45 and 48 ”

**3.** In this Act, unless there is something repugnant in the subject or context,—

“Church of England” and “Anglican” mean and apply to the Church of England as by-law established,

“Church of Scotland” means the Church of Scotland as by law established;

“Church of Rome” and “Roman Catholic” mean and apply to the Church which regards the Pope of Rome as its spiritual head;

“Church” includes any chapel or other building generally used for public Christian worship,

“Minor” means a person who has not completed the age of twenty-one years and who is not a widower or a widow;

“Native State” means the territories of any Native Prince or State in alliance with Her Majesty;

the expression "Christians" means persons professing the Christian religion ;

and the expression "Native-Christians" includes the Christian descendants of Natives of India converted to Christianity, as well as such converts.

"Registrar General of Births, Deaths and Marriages" means a Registrar General of Births, Deaths and Marriages appointed, under the Births, Deaths and Marriages Registration Act, 1886. VI of 1886.

(Note).

**N.B.**—The last para of this section was added by the Births, Deaths and Marriage Registration Act VI of 1886, S. 30, cl. (a).

## PART I

### THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

**4.** Every marriage between persons, one or both of whom is or are<sup>1</sup> a Christian, or Christians, shall be solemnized in accordance with the provisions of the next following section, and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Marriages to be solemnized according to Act.

(Notes)

**General**

**N.B.**— See notes under S 5 *infra*.

### Scope and effect of the section.

The Section permits the marriage of a christian with a person who is not a christian. See U.B.R. (1897-1901), Vol. II, 488 (491) **Q**

**I — "Or are."**

**N.B.**—The words "or are" were inserted by the Repealing and Amending Act XII of 1891, Sch. 11

Persons by whom marriages may be solemnized.

**5.** Marriages may be solemnized in India—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a minister,

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland.

(3) by any Minister of religion licensed under this Act to solemnize marriages :

(4) by, or in the presence of, a Marriage-Registrar appointed under this Act ;

(5) by any person licensed under this Act to grant certificates of marriage between Native-Christians.

**(Notes).**

**General.**

**ENGLISH LAW.**

**(1) Presumption in favour of marriage.**

(a) All legal presumptions are in favour of the validity of a marriage *Catterall v Sweetman*, 1 Robert. 304 (1815) **R**

(b) In suits for nullity the burden of proof is on the party seeking to impugn the marriage. *Cuno v. Cuno*, L R., 2 H.L. Sc. Ap. 300 , 29 L.T. 316. **S**

**(2) Marriage what is**

The word "marriage", as understood in the English Court, means the voluntary union for life of one man and one woman to the exclusion of all others, as understood in Christian countries. Brown and Powles on Divorce, 7th Ed., 1905, p. 89. *Hyde v. Hyde*, L.R. 1 P. & D. 130. **T**

**(3) Parties to marriage**

(a) All persons may marry according to the Laws of England unless they labour under the following *disabilities* —(i) Prior marriage, (ii) Insanity, (iii) Fraud or coercion, (iv) Consanguinity or affinity 1 Blackstone, 434 **U**

(b) A legal marriage can only be contracted by single persons—under which term are included widowers, widows, and divorced persons—not being within the prohibited degrees of *consanguinity* or *affinity*, both of whom are *consenting* and of sound mind, and able to perform the duties of matrimony. Brown and Powles on Divorce, 7th Ed., 1905, p. 92 **Y**

**(4) Prior marriage, a bar to marriage**

Marriage by a person whose husband or wife is still living is bigamy. *R. v. Harborne*, 2 Ad & El 540 **W**

**(5) Insanity, if bar to marriage**

(a) Insanity prevents consent, which is indispensable to marriage, as to all other contracts. Stephen's Com 8th Ed Vol. 2, pp. 62, 240 **X**

(b) Marriage, like all other civil contracts, will be invalidated by want of consent of capable persons. *Turner v Meyers*, 1 Hagg C.C. 414, *Hancock v Peaty*, L R., 1 P & D. 335. **Y**

**Incapacity of mind—Effect.**

One of the grounds for a suit for nullity is incapacity of mind, or as it is commonly called, insanity, and in *Hancock v Peaty*, Lord Penzance on this point says "The law upon this subject is clear and without difficulty. It is thus stated by Lord Stowell in *Turner v. Meyers*: "It rests on the simple proposition, that marriage is a contract as well as a religious vow, and, like all other contracts, will be invalidated by the want of consent of capable persons." And it may surely be

**General—(Continued).**

**ENGLISH LAW—(Continued)**

added that, if any contract more than another is capable of being invalidated on the ground of the insanity of either of the contracting parties, it should be the contract of marriage, an act by which the parties bind their property and their persons for the rest of their lives." Browne and Powles on Divorce, 7th Ed., 1903, p. 116. **Z**

**(7) Marriage of a lunatic during a lucid interval.**

The following is extracted from Mr. Hammick's Marriage Laws of England,

"The marriage of a lunatic not under a commission of lunacy during a lucid interval is valid. In cases of the most inveterate malady it has been held that there are lucid intervals when the mind is apparently rational upon all subjects, and no symptom of delusion can be called forth on any subject, so that, the disorder being for the time absent, legal acts may be performed. It is, however, difficult to prove a lucid interval, because the total absence of all delusions cannot easily be ascertained. In a case where the testamentary capacity of a person was in question, the sanity of the moment was, in a great measure, inferred from the internal character of wisdom of the act itself, and the will was established. But with respect to marriage, the entire absence of wisdom in the act will certainly not be conclusive against the sanity of the party. The man, in the best exercise of his reason, might not be a wise man, and the question in such a case is as to the sanity of the party and the wisdom of the act. Lord Stowell was of opinion that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved." *Cartwright v. Cartwright*, 1 Phill. 90, *Turner v. Mengers*, 1 Hagg. Con. C. 411, Hammick's Marriage Laws of England, 2nd Ed., p. 16. **A**

**(8) Burden of proof as to lucid interval—Opinion of Lord Thurlow**

"The question of insanity has been discussed in several elaborate judgments by eminent judges. With respect to lucid intervals, Lord Thurlow ruled that 'the burden of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers, and it is of equal importance that the evidence in support of the allegation of a lucid interval should be as strong as where the object of the proof is to establish derangement.'" *Att. Gen. v. Parthen*, 3 Br. C.C. 411. **B**

**(9) Incapacity of body at time of celebration**

If, at the time of its solemnization, either of the parties to a marriage is impotent, the marriage is voidable *ab initio*, and the Court may pronounce a decree declaring it null and void. *B — n v. M — e*, 2 Robert 581 (1852). See also *P v. S.*, 37 L.J.P. 80. **C**

**N B** —On this point, see Ss. 18 and 19 of the Divorce Act (IV of 1969) and notes thereunder.

**(10) Duress or Fraud, effect of, on marriage**

Consent must also be free from the influence of either duress or fraud. *Harford v. Morris*, 2 Hagg. C.C. 436, *Scott v. Sebright*, 1886, 12 P.D. 21. **D**

**General—(Continued).****ENGLISH LAW—(Continued).****(11) Want of consent—Effect of force or fear on marriage.**

- (a) Another ground for a petition for nullity of marriage is the want of consent in the parties or one of them—*consensus non cubitus facit matrimonium*. Browne and Powles on Divorce, 7th Ed., 1905, p. 115 **E**
- (b) Thus a marriage contracted when either party was under duress, or under the influence of force or fear, is invalid *Harford v. Morris*, 2 Hagg. Con. C. 423 (1776). **F**

**(12) Consanguinity and affinity—English Law**

- (a) Marriage by parties is prohibited, in the ascending and descending line *in infinitum*, see Stephen's Com. 8th Ed., Vol. 2 p. 241, and cases there cited. **G**
- (b) Marriage is also prohibited in the collateral line to the third degree inclusive, as computed by the civil law (*Ibid*) **H**
- (c) Before 5 and 6 Will. 4, too near a relationship created a canonical disability only. (*R. v. Inhabitants of Wye*, 7 Ad. & El. 771) That statute made it a civil disability also, and these marriages are now "absolutely null and void to all intents and purposes whatsoever." 5 & 6 Will. 4 C. 51 S. 2. But see 7 Edw. 7 Ch. 97 **I**

**N.B.**—On this point, see Ss. 18 and 19 of the Divorce Act (IV of 1869) and notes thereunder.

**(13) Consanguinity and affinity before 5 & 6 Will. 4, c. 54, S. 2.**

"Previous to the 5 & 6 Will. 4, c. 51 (passed the 31st of August, 1835), marriage, within the prohibited degrees of consanguinity and affinity were only voidable by a decree of the Ecclesiastical Court, and remained valid unless disputed during the lifetime of the parties. Section 2, however, renders all such marriage, if contracted in England, absolutely null and void to all intents and purposes whatever." See Browne and Powles on Divorce, 7th Ed., 1905, p. 115 **J**

**(14) Marriage of minors—English law.**

Want of age, or minority, is not a disability. Marriage between minors is not void on that account, though it be without the consent of guardians. The statute requires consent, but does not now invalidate a marriage solemnized without it. 1 Geo. 1 c. 76, Ss. 16, 17, c. 1, sect. 101, *R. v. Birmingham*, 8 B. & C. 35 **K**

**N.B.**—See S. 19, *infra*.

**(15) Impotence.**

- (a) Impotence is rightly excluded from the above list of disabilities, because a marriage is only void on the ground of impotence *when so pronounced*. Dixon on Divorce, 4th Ed., 1908, p. 27. **L**

**N.B.**—See Ss. 18 and 19 of the Divorce Act (IV of 1869) and notes thereunder.

- (b) Impotence renders it voidable by the party proceeding, at any time after the impotence of the other party can be proved, *but not before*, (*Ibid*). **M**

**(16) Requisites for a valid marriage when solemnized in England**

- (a) "To render a marriage legal (if contracted in England), it is requisite, unless the parties to it are either Jews or Quakers, in whose favour

**General—(Continued)**

**ENGLISH LAW—(Continued).**

special statutory provisions have been enacted, that it should be solemnized by a duly ordained clergyman of the Established Church, or by some duly authorized person under the Marriage Act, 1898, after due publication of banns, or after the parties have obtained a *Special Licence*, an *Ordinary's Licence*, a *Superintendent-Registrar's Licence*, or a *Superintendent-Registrar's Certificate* authorising its celebration." Browne and Powles on Divorce, 7th Ed, 1905, p. 91. **N**

- (b) Under English law, to constitute a valid marriage the parties must be capable and the form, place, and time must be according to the following statutes: 1 Geo. 4, c. 76, 6 & 7 Will. 4 c. 85, 49 & 50 Vict. c. 11, S. 1, 57 & 58 Vict. c. 58. **O**

**(17) Marriage Acts in England**

The mode of entering into the marriage contract in England has been dealt with by a variety of statutes of which the following are the most important. See Browne and Powles on Divorce, 7th Ed, 1905, p. 90. **P**

- (i) 1 Geo. 4, c. 76 and 6 & 7 Will. 4 c. 85, amended the law relating to marriages in England generally.
- (ii) 12 & 13 Vict. c. 68 and 31 & 32 Vict. c. 61 facilitate marriages of British subjects resident in foreign countries and establish the validity of certain consular marriages which were in doubt.
- (iii) 23 Vict. c. 18 and 35 Vict. c. 40 relate to the marriages of Quakers.
- (iv) The Registration Acts, 6 & 7 Will. 4, c. 86 and 19 & 20 Vict. c. 119, provide (*inter alia*) for civil marriage at the different registry offices.
- (v) 42 & 43 Vict. c. 29 removes doubt as to the validity of certain marriages of British subjects on board Her Majesty's ships.
- (vi) 47 & 48 Vict. c. 20 establishes the validity of certain marriages of members of the Greek Church in England.
- (vii) 49 Vict. c. 3 and 51 & 52 Vict. c. 23, remove doubts concerning the validity of certain other marriages.
- (viii) 49 Vict. c. 14 extends the hours within which marriage may be lawfully solemnized to 3 p.m.
- (ix) In 1889, "An Act to remove doubts as to the validity of certain marriages solemnized in Basutoland and British Bechuanaland," or, shortly, "The Basuto and British Bechuanaland Marriage Act, 1889" (52 & 53 Vict. c. 38), and in 1890 and 1891 two statutes, numbered respectively 53 & 54 Vict. c. 47 and 54 & 55 Vict. c. 74, were passed relating to foreign marriages.

**N B.**—Both these last statutes, however, are repealed by the Foreign Marriage Act, 1893 (55 & 56 Vict. c. 23), entitled "An Act to consolidate enactments relating to the marriage of British subjects outside the United Kingdom." See Hammick's Marriage Laws of England cited in Browne and Powles on Divorce, 7th Ed, 1905, pp. 90, 91. **Q**

- (x) The Marriage Act, 1898 (61 & 62 Vict. c. 58), permits marriages to be celebrated in Non-conformist chapels, subject to certain conditions, without the presence of a Registrar. Browne and Powles on Divorce, 7th Ed., 1905, p. 91. **R**

**General—(Continued).****ENGLISH LAW—(Continued).**

(xi) The Marriage Act, 1899 (62 & 63 Vict. c. 27), removes doubts as to the validity of certain marriages in England and Ireland where one of the parties has not been resident in the same country as the other, and there have been certain irregularities in the publication of banns. *(Ibid)*. **S**

(xii) The Marriages Legalisation Act, 1901 (1 Edw. 7, c. 23), and the Marriages Legalization Act, 1903 (3 Edw. 7, c. 26), legalize and render valid marriages already solemnized in certain chapels and places as to which some doubt had previously existed. *(Ibid)*. **T**

**(18) The solemnization of marriage must be in an established Church or public chapel or other registered building, unless by special licence.**

Marriage among Christians in England must be solemnized in a *Parish Church* or public *Chapel*, or the *Superintendent-Registrar's Office*, or in some other *building registered* for the solemnization of marriages except when solemnized by special licence. Browne and Powles on Divorce, 7th Ed., 1905, p. 92 **U**

**(19) Modes in which may be solemnized in England.**

Generally speaking marriage can be effected in England in four ways — **Y**

- (i) By banns
- (ii) By common licence
- (iii) By special licence.
- (iv) By a registrar's certificate.
- (a) With licence.
- (b) Without licence.

See Dixon on Divorce, 4th Ed. p. 33.

**(20) Absence of above requisites, effect of.**

(a) All such requisites as "banns," "licences," &c., &c., are *formal*. Browne and Powles on Divorce, 7th Ed., 1905, p. 93; *Rex v. Wroston*, 4 B. & Ad. 641. **W**

(b) A marriage is void only when they are deficient, and known to be wanting by both parties to the marriage. *Rex v. Wroston*, 4 B. & Ad. 641, 1 N. & M. 712. **X**

(c) "On the other hand, all such requisites as being free to contract, not being within the prohibited degrees of *consanguinity* or *affinity*, *consent*, *mental competence*, *physical capacity* to perform the duties of matrimony, &c., are essential, and the marriage is void by English law, wherever solemnized, whenever they are wanting, if the parties to it are domiciled in England." Browne and Powles on Divorce, 7th Ed., 1905, pp. 93, 94. **Y**

(d) And this is so, although the marriage may be perfectly legal in the country in which it was solemnized. *Brook v. Brook*, 9 H.L. Cas. 198. *(Ibid)*. **Z**

(e) Void and voidable marriages entered into by parties incapable of marrying, on grounds affecting society—as where blood relations, too nearly akin, intermarry, or where one of the parties commits bigamy, and so wrongs the other party, who is ignorant of the previous marriage—are void *ab initio*. See Dixon on Divorce, pp. 33, 34. **A**

**General—(Continued).**

**ENGLISH LAW—(Continued).**

(f) But when the wrong done is only a wrong if the party to whom it is done treats it as such, the marriage remains good until it is set aside. *A. v. B.*, L.R., 1 P & D. 562 **B**

**(21) Special license—Where granted**

"The distinction between a special license and an ordinary one is, that by the former only the parties may be married at any time in any church or chapel or other meet and convenient place, it is granted by the Archbishop of Canterbury alone, and his proper officers." See 4 Geo. 4, c. 76, S. 20, 6 & 7 Will. 4, c. 85, S. 1, 25 Hen. 8. **C**

**(22) Ordinary's license, who may grant.**

"Licenses are granted by the Archbishops of Canterbury and York, according to their rights, and the several other bishops, for the marriage of persons within their respective dioceses, one of whom shall be president at the time within the diocese of the bishop in whose name such license shall be granted." Browne and Powles on Divorce, 7th Ed., 1905, p. 96 **D**

**(23) Marriage without license or banns**

A marriage is valid, though celebrated without banns or license first had and obtained unless both parties were aware of the irregularity at the time of the ceremony. *Greaves v. Greaves*, L.R., 2 P & D 423. **E**

**(24) Form and ceremony of marriage.**

The next incident of a valid marriage is the legality of the form and ceremony of marriage. These are regulated in England by 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85. **F**

**(25) Ceremony of marriage.**

(a) The ceremony, if after banns in a church, must be by a clergyman between the hours of 8 and 3 P.M. See 4 Geo. 4, c. 76, S. 21. See also 1 Cardwell, Synod. 282, Canon 62, but see now Marriage Act, 1886, c. 14, S. 1, App. A **G**

(b) And it must be attested by two other witnesses. 4 Geo. 4, c. 76, S. 28 **H**

**(26) Marriage in the vestry.**

(a) A marriage in the vestry and before one witness has been held sufficient, the vestry being a room in the church. Dixon on Divorce, 4th Ed., 1908, p. 28. **I**

(b) *Prima facie* it is a part of the church (*Ibid*).<sup>\*</sup> **J**

(c) A petition for nullity, on the ground that solemnization of the marriage took place in the vestry, which does not aver that the vestry formed no part of the church, is insufficient. *Wing v. Taylor*, 30 L.J. Mat. 259, *Wilson v. M. Grath*, 3 Phillim. 92 **K**

(d) The statute 4 Geo. 4, c. 76, S. 28, was here construed by the Divorce Act as directory only. Dixon on Divorce, 4th Ed. 1908, p. 28. **L**

**(27) Presence of priest, if necessary.**

(a) As to the words *by a clergyman*,—at the time of the Marriage Act, 26 Geo. 2, c. 33, "a contract of marriage, *verba de praeenti*, did not constitute a full and complete marriage in itself unless made in the presence and with the intervention of a priest in holy orders (*R. v. Mills*, 10 Cl. & F. 594). **M**



**General—(Continued).****ENGLISH LAW—(Continued).**

**N.B.** :—Marriage by a pretended priest was bad before 4 Geo. 4, c. 76, S. 22, but good if the fraud was the priest's only : *Costard v. Winder*, Croke, 775, and see *Hank v. Corri*, 2 Hag. C.C. 280, and 51 and 52 Vict. c. 28. **M-1**

(b) Hence the above expression must be taken to signify a priest in holy orders, but he need not of necessity have a cure. See Dixon on Divorce, 4th Ed. 1908, p. 28. **N**

(c) A marriage solemnized in Ireland by a minister suspended, as regards a cure, prior to the date of the marriage, but still accustomed to celebrate marriages, was held valid. *Harris v. Harris*, I. R. 3 C L. 302. **O**

(d) A priest, marrying himself to the bride in the absence of another priest, did not perform a valid marriage ceremony. See Dixon on Divorce, 4th Ed. 1908, p. 29. **P**

(e) A clergyman, as a bridegroom, possessed no advantage in this respect over a layman *Beamish v. Beamish*, 9 H.L. Ca. 274 *et seq.* **Q**

(f) The ceremony performed after an incorrect, and therefore *insufficient publication of the banns*, i.e., in the wrong name of one of the parties, but with the knowledge of both, was declared null and void at the instance of the woman. See Dixon on Divorce, 4th Ed., 1908, p. 29. **R**

(g) For "if any person shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons having authority, to grant the same first had and obtained—the marriage of such persons shall be null and void to all intents and purposes whatsoever." See 1 Geo. 4, c. 76, S. 22. **S**

(h) Hence, "where there was not a due publication of banns, the Court pronounced the marriage null and void," *Mulgley v. Wood*, 30 L.J., Mat. 57. **T**

(i) But a marriage by license is not invalidated by an *erroneous description* of a party to it, as having two additional Christian names *Haswell v. Haswell, and Gilbert*, 51 L.J., Mat. 15. **U**

(j) The ceremony may also be performed, as already seen, *without the publication of banns*, by virtue of a common or a special license, the former being that of the ordinary of the place or his surrogate (see 4 Geo. 4, c. 76, and 10 & 11 Vict. c. 28, S. 5), and the latter that of the Archbishop of Canterbury. See 25 Hen. 8, c. 21, 4 Geo. 4, c. 76, ss. 10, 20, 6 & 7 Will. 4, c. 85, S. 1. **V**

(k) Clergymen are forbidden to perform the ceremony in cases where three months have elapsed since the publication of the banns or the granting of the license. 4 Geo. 4, c. 76, ss. 9, 11. **W**

**(28) British subjects abroad**

(a) British subjects abroad may be duly married, with or without license, on proper notice to the consul of the place where they propose to be married, and on conforming to the regulations of the Consular Marriage Act of 1849, see 12 & 13 Vict. c. 68. **X**

(b) and, on board an English man-of-war, at a foreign station, by a Protestant clergyman, without license or banns, by the Common Law of England, *Culling v. Culling and N.*, P. 1896, 116. **Y**

**General—(Concluded).**

**ENGLISH LAW—(Concluded)**

(c) By the Foreign Marriages Act of 1890, Ss. 2, 53 & 54 Vict., marriages properly solemnized under this Act in the house of the British Ambassador or other accredited minister abroad are valid. *See* Dixon on Divorce, 4th Ed., 1908, p. 32. Also marriages on Her Majesty's ships on foreign stations. (*Ibid.*) **Z**

(d) A marriage between British subject according to the rites of the *Roman Catholic Church* in the British dominions is valid anywhere, if there be no established church there. *James v. James and Smyth*, 51 L.J., Mat. 24. **A**

**(29) Law prior to 1850 in this country**

The Law prior to 1850 is laid down by Sir Lushington Perry in *Maclean v. Gristall* (Perry v. O. C. 75). Priests were never necessary in the days of the Company. They could not be had, and Collectors and Judges acted as their substitutes. *See* the Argument of Wedderburn in 14 M. 342 (346). **B**

**(30) Marriages per verba de presenti**

"In distant lands, where the ordinary facilities for obtaining the solemnization of marriage are wanting, and the *lex loci* is not available, marriages may be lawfully contracted *per verba de presenti* according to the law of England as it was before the 26 Geo. 2, c. 23 (Lord Hardwick's Marriage Act). But it has been decided by the House of Lords, in *Rey v. Mills*, that unless the contract *per verba de presenti* has been entered into in the presence of a minister in episcopal orders, it does not constitute a valid marriage. A marriage between English subjects, celebrated according to the rites of the Church of England, but not in the presence of an ordained clergyman, is invalid at common law.

"It is doubtful, however, whether the decision in *Rey v. Mills*, would apply to a marriage *bona fide* contracted in foreign parts, or in the colonies, or on board ship, where it was impossible to procure the attendance of an ordained minister of religion, but where no such difficulty exists, the presence of a clergyman must be deemed indispensable, and it appears to be doubtful whether the services of a Roman Catholic priest would be sufficient." Hammick's Marriage Laws of England, p. 263 **C**

**6. The Local Government, so far as regards the territories**

Grant and revocation of licenses to solemnize marriages.

under its administration, and the Governor-General in Council, so far as regards any Native State, may, by notification<sup>1</sup> in the local official Gazette or in the Gazette of India, as the case may be, grant licenses<sup>2</sup> to Ministers of Religion to solemnize marriages within such territories and State, respectively, and may, by a like notification, revoke such licenses.

**(Notes).**

**General.**

**N.B.**—This section was substituted for the original S. 6 by the Indian Christian Marriage Act (1872), Amendment Act II of 1891, S. 1 (i).

**1.—“Notification.”**

**N.B.**—For notifications in the North-Western Provinces and Oudh, under the powers conferred by Ss. 6, 7, 9, 62, 82, 83, and 85, *see* North Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42.

**2.—“Grant licenses ”**

**N.B.**—As to validation of licenses granted under former Acts, *see* Act II of 1891 (Indian Christian Marriage Act, 1872, Amendment Act), S. 1 (2) (3).

**7** The Local Government may appoint one or more Christians, either by name or as holding any office for the time being, to be the Marriage-Registrar or Marriage-Registrars<sup>1</sup> for any district subject to its administration.

Where there are more Marriage-Registrars than one in any district, the Local Government shall appoint one of them to be the Senior Marriage-Registrar.

When there is only one Marriage-Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage-Registrar thereof during such absence, illness or temporary vacancy.

**1.—“ Marriage Registrar or Marriage Registrars.”**

**N.B.**—For notifications under the powers conferred by this section in—

- |   |  |
|---|--|
| (1) Ajmer-Merwara                         | . <i>see</i> A J.R. & O. ,   |
| (2) Bombay                                | .. <i>see</i> Bom. R. & O.   |
| (3) British Baluchistan                   | . <i>see</i> Gazette of India, 1892, Pt. II, p. 53. ,  |
| (4) Burma                                 | . <i>see</i> Bur. R. M. ,  |
| (5) Central Provinces                     | .. <i>see</i> C. P. R. & O. ,  |
| (6) Punjab                                | ... <i>see</i> Punj. R. & O. ,   |
| (7) the United Provinces of Agra and Oudh | .. <i>see</i> North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42 |

**8** The Governor-General in Council may, by notification in the Gazette of India, appoint any Christian, either by name or as holding any office for the time being, to be a Marriage-Registrar in respect of any district or place within the territories of any Native Prince or State in alliance with Her Majesty

The Governor-General in Council may, by like notification, revoke any such appointment.

**9. The Local Government** <sup>1</sup> or (so far as regards any Native State) the Governor-General in Council may grant a license to any Christian, either by name or as holding any office for the time being, authorizing him to grant certificates of marriage between Native-Christians.

Any such license may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the official Gazette

(Note).

**1.—“Local Government.”**

**N B.**—For instances of such licenses granted in Burma, see Burma Gazette, 1899, Pt. I, p. 281

**PART II**

**TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED.**

**10.** Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening

Provided that nothing in this section shall apply to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special license in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such license, or

<sup>1</sup> (3) a Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland.

(Notes).

**General.**

**N B.**—Clause 3 of this section was added by the Indian Christian Marriage Act (1872), Amendment Act, II of 1891, S. 2.

**1.—“Time for solemnizing marriage.”**

ENGLISH LAW.

**Hours during which persons may marry—English Law.**

(a) The hours during which marriages may now be solemnized in England are regulated by 19 Vict., c. 14, and are between 8 A.M. and 3 P.M. **D**  
Browne and Powles on Divorce, 7th. Ed., 1905, p. 111.

(b) Marriages by special license may be solemnized at any hour. “Hammick’s Marriage Laws of England,” Chap. 1, pp. 3–12. **E**

**11** No Clergyman of the Church of England shall solemnize a marriage in any place other than a church  
Place for solemnizing marriage 3 where worship is generally held according to the forms of the Church of England.<sup>1</sup>

unless there is no such<sup>2</sup> church within five miles distance by the shortest road from such place, or

unless he has received a special license authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary

For such special license, the Registrar of the  
Fee for special license. Diocese may charge such additional fee as the said Bishop from time to time authorizes.

(Notes).

**1.—“Where worship is . . . England”**

**N.B.**—The above words were added by Act II of 1891, S. 3.

**2.—“Such.”**

**N.B.**—This word was introduced by Act II of 1891, S. 3

**3.—“Place for solemnizing marriage”**

ENGLISH LAW

**(1) Place for solemnizing marriage—English Law.**

(a) In addition to a church, the place of marriage may be any registered place of worship registered also for marriages, see 6 & 7 Will. 4, c. 85, S. 11, and 7 Will. 4 & 1 Vict., c. 22, S. 35, and on a change of the place of worship, see 6 & 7 Will. 4, c. 85, S. 19 **F**

(b) A marriage may also be performed by a civil ceremony in two ways, namely by a registrar’s certificate, and with or without license under 6 & 7 Will. 4, c. 85, 1 Vict., c. 22, 3 & 4 Vict., c. 72, 19 & 20 Vict., c. 119; 23 Vict., c. 18. **G**

(c) The ceremony may also take place *without a licence, and without banns* or ecclesiastical license, in a church in the registrar’s district, 7 Will. 4 & 1 Vict., c. 22, S. 36 **H**

(d) In all cases of these last two descriptions, the marriage shall not be solemnized in the registered building without the consent of the officiating minister or an authorised person. See Dixon on Divorce, p. 32. **I**

(e) “And, if the building selected be a church or chapel of the United Church of England and Ireland, not without the consent of the officiating minister, who must be a duly qualified clergyman of that church.”  
See 19 & 20 Vict., c. 119, S. 11. **J**

**3.—“Place for solemnizing marriage”—(Concluded).**

**ENGLISH LAW—(Concluded)**

**(2) Place of celebration to be that specified in the preparatory notice and certificate thereupon.**

(a) The place of celebration must be that specified in the preparatory notice and certificate thereupon, and if any of the material provisions are transgressed, and the marriage unduly solemnized with the knowledge of the parties, it is thereupon null and void, *C & 7 Will. 4, c. 85, S. 12 K*

(b) No superintendent registrar shall grant a license for celebration of the marriage in a church or chapel out of his district. *Ibid*, S. 11 **L**

**(3) Place of celebration—Marriage by special license.**

“The place where the marriage may be solemnized depends on the license or certificate. With a special license the ceremony may be performed at any time in any church, chapel or other meet and convenient place.”  
Browne and Powles on Divorce, 7th Ed., 1905, p. 110. **M**

**(4) By ordinary's license or banns—Marriage in parish church or public chapel—4 Geo. 4, C. 76, S. 2.**

If performed by virtue of an ordinary's license or banns, the place of the ceremony is governed by 4 Geo. 4 C. 76, S. 22, which enacts that, “if any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel, wherein banns may be lawfully published, unless by special licence the Marriages of such persons shall be null and void to all intents and purposes whatsoever.” Browne and Powles on Divorce 7th Ed., 1905, p. 110. **N**

**(5) Marriage in vestry.**

A marriage solemnized in a vestry, belonging to and forming part of the church is a good marriage. *Wing v. Taylor*, 2 S. & T. 278 **O**

**(6) Mixed marriage in Ireland in sacristy of chapel; closed doors—Irish Marriage Act, 33 & 34 Vict. C. 110**

“In an Irish case decided in 1890, a Catholic priest celebrated a marriage between a Catholic and a protestant—according to the rites of the Catholic Church at 1 o'clock p.m. in the sacristy of a Catholic Chapel, in the presence of two witnesses, but with closed doors. No notice was given to the registrar nor certificate issued by him in accordance with S. 38 of 33 & 34 Vict. C. 110 an Irish Marriage Act. There was no evidence of any intention on either side to contract a sham marriage, or that the parties had knowingly and wilfully disregarded the statutory formalities. The Irish Court of Appeal refused to allow one of the contracting parties to dispute the validity of the marriage.” Knox, *Int. & 23 L.R. (Ir.) 512.* **P**

**PART III**

**MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION  
LICENSED UNDER THIS ACT.**

**12.** Whenever a marriage is intended to be solemnized by a Minister of Religion licensed to solemnize marriages under this Act—

Notice of intended marriage.

one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

- (a) the name and surname, and the profession or condition, of each of the persons intending marriage, <sup>1</sup>
- (b) the dwelling-place of each of them,
- (c) the time during which each has dwelt there, and
- (d) the church of private dwelling in which the marriage is to be solemnized

Provided that, if either of such persons has dwelt <sup>2</sup> in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

(Notes).

General

**(1) Marriage without due publication of banns or without proper license void**

If any persons shall knowingly and wilfully intermarry without due publication of banns, or without a license from a person having authority to grant the same, the marriages of such persons shall be null and void to all intents and purposes whatsoever. See 4 Geo. C. 76, S. 22 Q

**(2) Informality—Marriage without banns or license knowingly and wilfully.**

(a) By section 22, "If any persons shall knowingly and wilfully intermarry without due publication of banns or licence, the marriage of such persons shall be null and void to all intents and purposes whatsoever " On the subject of banns, see "Hannick's Marriage Laws of England," pp 64—80 R

(b) But both of the parties must knowingly and wilfully consent to such informal solemnization to avoid the marriage. *Re v. Wroxtton*, 4 B & Ad 641. S

**(3) Knowledge of informality by both parties necessary to invalidate marriage.**

It has been held that a marriage is not null and void on the ground of informality in the following cases --See Browne and Powles on Divorce, 7th Ed., 1905, p. 98. T

(i) Where it was solemnized the day before license granted, the wife being ignorant of the fact. *Greaves v. Greaves*, L.R. 2 P. & D. 423. U

(ii) Where a license has been obtained by fraud unless both parties are cognizant of the fraud. *Clowes v. Clowes*, 3 Curt 193 (1842). Y

(iii) Where a wife has imposed on her husband a false description of her name and condition *Ibid*, 185 W

(iv) Where persons have obtained licenses in names which they had assumed, *Cope v. Burt*, 1 Hagg. Con. C. 434. X

**I—"Name and surname, and the profession or condition, of each of the persons intending marriage."**

**ENGLISH LAW.**

**(1) General Rules as to the effect of publishing banns in wrong names.**

**(i) First rule**

"If there be a total variation of a name or names, that is, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication is invalid." See Dixon on Divorce, 4th Ed, p. 44. **Y**

And it is immaterial, in such cases, whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not. (*Ibid*). **Z**

**(ii) Second Rule.**

(a) "If there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, or if the names have been such as the parties have used and been known by at one time and not at another —In such cases the publication may or may not be void. (*Ibid*). **A**

(b) The supposed misdescription may be explained, and it becomes a most important part of the inquiry whether the misdescription was consistent with honesty of purpose, or arose from a fraudulent intention. *R v Tibshelf*, 1 B. & Ad 195 **B**

(c) The undue publication of banns is to be deemed a fraud upon the rights of an interested party "to effect a marriage, the celebration of which might else, possibly, have been prevented" (*Ibid*). **C**

(d) "It may be open to explanation, but where none is tendered the Court concludes against the *bona fides* of the respondent, and pronounces the marriage null and void. *Green v Dalton*, 1 Add. 290. See also *Tree v Quin*, 2 Phillim 15. **D**

(e) "Wherever the disguising effect of the variation does not appear on the very face of the name, it is open to explanation calculated to show that the party has not forfeited his right by what is shown neither to be nor to *operate* as a fraud. —that is, if no explanation is offered, the Court may generally conclude against the *bona fides* of the variations. —The falsehood of the publication is the whole of the case, prove that, and everything is proved without it, nothing" *Sullivan v. Sullivan*, 2 Haggs C R 257 **E**

**(2) Publication of banns in false names**

The publication of banns is a notice to all the world that the two parties intend to contract a marriage, and the words of the Act or Parliament are direct, that the true Christian and surname of the parties must be used and therefore, if the banns are published in the false names of both parties, the marriage is invalid. *Clowes v. Clowes*, 3 Curt 192 **F**

**(3) Publication of banns in an assumed name—No fraud—Effect.**

A marriage by banns, under an assumed name borne for some years prior to the marriage, in the absence of fraud, was held good. *R v. St Faith's*, 3 Dowl. & R. 348 **G**



**1.—‘Name and surname, and the profession or condition, of each of the persons intending marriage—(Continued).**

ENGLISH LAW—(Continued).

**(4) Publication of banns intended to conceal identity of one of the parties**

Publication in a manner calculated to conceal the identity of one of the parties, and known to both parties, is void and invalidates the marriage.  
*Wiltshire v. Prince* 3 Hagg. E.R. 334 **H**

**(5) Total mis-description of the woman**

Where there was a total mis-description of the woman, procured by her husband, but not known to her until after the ceremony was performed, the marriage was held valid *R v. Wroton*, 3 B. & Ad 610, and see *Wright v. Elwood*, 1 Curt. 49 **I**

**(6) What is proper description of the name**

(a) All parts of a baptismal name ought to be set forth, as comprising altogether the name and legal description of the party. See *Dixon on Divorce*, 4th Ed., 1905, p. 13 **J**

(b) But where no fraud was intended, nor any deception practised, the omission of a dormant name would not be fatal, *Pouget v. Tompkins*, 2 Hagg. C.R. 112 *Stanhope v. Baldwin*, 1 Add. 95, and *Green v. Dalton*, *Ibid.* 283, *Pouget v. Tompkins*, 1 Phillim. 493 **K**

**(7) Publication of banns in husband's name acquired by repute.**

“A marriage by banns, in the publication of which the husband's name was not his own by baptism, but had been his name by repute for three years prior to the marriage was held valid *R v. Billinghamst*, 3 Maule & S. 250 **L**

**(8) Necessity to publish banns in name acquired by reputation**

(a) In some cases there may be a —, But in such cases, the circumstances must be very exceptional to render a marriage, celebrated in the actual names of the parties, invalid. See *Dixon on Divorce*, 4th Ed. p. 43 **M**

(b) It could only be, where the woman has so far obtained another name by repute as to obliterate the original name *Pendall v. Goldsmid*, 2 P.D. 264. **N**

(c) A man cannot change his Christian name. See *Dixon on Divorce*, 4th Ed., p. 43 **O**

(d) But he can change his surname in various ways, as by royal license, or by use and reputation (*Ibid.*) **P**

(e) If he has not withheld his reputed name to deceive the registrar, and to conceal his intended marriage, the latter would not be declared null and void. *L. v. Smith*, 4 F. & F. 1099 and 19 & 20 Vict. c. 119, S. 2. **Q**

**(9) New name acquired by reputation.**

“A man may change his name by use and reputation, and if by use and reputation, he has acquired a new name, he is not indictable for using a new name in signing a notice for the purpose of procuring his marriage.” *Browne and Fowles on Divorce*, 7th Ed., 1905, p. 102. **R**

**1.—“Name and surname, and the profession or condition of each of the persons intending marriage”—(Continued).**

**ENGLISH LAW—(Continued)**

- (10) Lady's name clandestinely published wrongly—Correct name entered in the register—Effect.**

A lady's name had been *clandestinely published* as Morumild instead of Worruald, and, at the celebration of the marriage, the clergyman called out the names, causing the lady to correct him. He thereupon entered her right name in the register. The publication was subsequently held to be null and void. *Worruald v Neale*, 19 L T, N S. 43. **S**

- (11) Petitioner consenting to misdescription of the name on respondent's misrepresentation as to its effect on the married status**

“Where petitioner had consented to a misdescription, on the respondent's representation that it would not invalidate the marriage, the marriage was declared null notwithstanding.” *Midgley v. Wood*, 30 L J, Mat 57. **T**

- (12) Publication of banns in wrong name from mere levity**

In a case of publication of *banns in a wrong name from mere levity*, the marriage was held void *ab initio*. *Mather v. New*, 3 Maule & S 265, and 26 Geo 2, c. 13. **U**

- (13) Undue publication of banns, effect of where there was no one who had a legal right to question it**

It is doubtful whether undue publication of banns makes invalid a marriage, if, when it was celebrated, there was no one who had a legal right to question it. *Holmes v. Simmons*, L R., 1 P & D 523. **V**

- (14) Partial misdescription in license**

A partial departure from the true name of one of the parties to a marriage in a license obtained in the altered name by the other party for the purpose of concealing the intended marriage is no ground for nullity if the altered name may represent the person, and if such license was obtained for and by the direction of such person. *Beavan v. McMahon*, 2 S & T. 230. **W**

- (15) Party described by mistake as having two additional Christian names**

Nor would the marriage be null and void, because a party has been by mistake described in the license as having two additional Christian names. *Haswell v. Haswell*, 31 L J P. 15. **X**

- (16) Parties wrongly described in license—Mistake as to the qualities of the person.**

No disparity of fortune or mistake as to the qualities of the person would impeach the *vinculum* of the marriage. *Ewing v. Wheatley*, 2 Hagg. Con. C. 175. **Y**

- (17) Mock clergyman**

It is questionable whether a marriage effected by imposing on an innocent party a pretended clergyman, and *supposititious license*, would not bind the guilty party. *Hawke v. Corn*, 2 Hagg. Con. C 288. **Z**

- (19) Fraud in inducement.**

“Recently it has been held that the Court of Divorce has no power to pronounce a decree of nullity of marriage, or to dissolve a marriage, because of fraud in its inducement.” *Templeton v. Tyree*, L.R. 2 P. & D 420. **A**

**N.B.**—See proviso to S. 19 of Act IV of 1899 (Divorce) and notes thereon.

**1.—Name and surname, and the profession or condition, of each of the persons intending marriage"—(Continued).****ENGLISH LAW—(Continued).****(19) Marriages held valid in spite of irregular publication of banns.**

In the following cases the marriages have been upheld in spite of irregularities in the publication of banns. See Browne and Powles on Divorce, 7th Ed., 1905, p. 99. **B**

**(i) Assumed name generally used**

Where the name given has been assumed by the party so long, or under such circumstances, that it has for all practical purposes superseded his or her real name, the marriage has been held to be good. *Diddear v. Faucit*, 3 Phill. 580 **C**

**(ii) "Spinster" instead of "widow."**

Although a woman was published as "widow" when she ought to have been published as "spinster," the validity of the marriage was not affected. Browne and Powles on Divorce, 7th Ed., 1905, p. 99. **D**

**(iii) Wrong name—No fraud.**

Also where the description has been by a wrong name, *there being no fraud* the marriage was held good. *Mayhew v. Mayhew*, 2 Phill 11 (1812). **E**

**(20) Illegitimate children being published in the name of either parent.**

Where illegitimate children have been published by the name of either parent, the marriage was held to be good. *Walefield v Mackey*, 1 Phill. 134 (notes) **F**

**Divorced woman being described by her married name.**

Where a petitioner, having obtained a decree dissolving her marriage with the respondent, subsequently re-married him after publication of banns, in which she was described by her married name, she having in the interval usually passed by her maiden name—*Held* the marriage was valid and binding. *Fendall v Goldsmid*, 2 P.D. 263. **G**

**(21) Marriages held null and void on ground of undue publication of banns.**

In the following cases the marriages have been held null and void on the ground that there has been an undue publication of banns *with the knowledge and consent of both parties*. Browne and Powles on Divorce, 7th Ed., 1905, p. 101 **H**

**(i) Absolutely wrong names.**

Where the banns are published in absolutely wrong names the marriage would be null and void. *Brealy v. Read*, 2 Curt. 833 (1841). **I**

**(ii) No banns ever published.**

Where the man was published by his Christian name only instead of by his Christian and surname the marriage is void. *Midgley v. Wood*, 30 L.J.P. 57. **J**

**(iii) Adding false names.**

Where names have been added that did not belong to the parties, the marriage would not be good. *Green v. Dalton*, 1 Add. 289 (1822). **K**

**(iv) Omitting real names of parties.**

Where names have been omitted that did belong to the parties the marriage would not be good. *Wiltshire v. Prince*, 3 Hagg. 332 (1830). **L**

**1.—“Name and surname, and the profession or condition of each of the persons intending marriage”—(Concluded).**

**ENGLISH LAW—(Concluded).**

**(v) Illegitimate daughter described wrongly.**

Where an illegitimate daughter has been published by a name that no longer belonged to her mother, and as the daughter of her mother's brother, the marriage would not be good *Tooth v Barrow*, 1 Ecc. & Add. 371 (1854) **M**

**(vi) Marriage without any publication of banns at all.**

Also, where parties have been married without any publication of banns at all, the marriage would be null and void *See Browne and Powles on Divorce*, 7th Ed., 1905, p. 101. **N**

**(vii) Irregularities to be consented to by parties**

“In some of the cases above cited there was apparently no intention to deceive any one, and no one was deceived by the undue publication, but in every case the irregularity was committed with the knowledge and by the consent of the parties to the marriage” *Browne and Powles on Divorce*, 7th Ed., 1905, p. 101 **O**

**N.B.**—See also notes under S. 38, *infra*

**2 —“If either of such persons has dwelt, etc.”**

**Evidence as to the required period of residence—English Law.**

The period of residence under the English Law is to be taken as proved, and no evidence to the contrary can be received in any suit touching the validity of the marriage *See Browne and Powles on Divorce*, 7th Ed., 1905, p. 97 **P**

**13** If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered be entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered it to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

**14.** If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

**15.** When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless  
Sending copy of notice to Marriage Registrar when one party is a minor within twenty-four hours after its receipt he returns the same under the provisions of section 13, send by the post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

**16.** The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of  
Procedure on receipt of notice. the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

**17** Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on  
Issue of certificate of notice given and declaration made being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made.

Proviso                      Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister,

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue; and

(3) that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf.

**18.** The certificate mentioned in section 17 shall not be issued until one of the persons intending marriage has  
Declaration before issue of certificate appeared personally before the Minister and made a solemn declaration—

(a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage,

and, when either or both of the parties is or are a minor or minors,

- (b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be

(Notes).

*1.—“That he or she believes, etc.”*

**Nature of declaration required under this section—Effect of false declaration.**

- (a) The maxim *ignorantia juris non excusat* cannot be applied to a declaration, though in fact false, made under this section, inasmuch as the declaration required by this section to be made is a declaration as to the belief only of the person making it. 16 A 212. Q

- (b) And further, in order to entail the penal consequences provided for by S. 66 of this Act, such false declaration must be made “intentionally” 16 A 212. R

19. The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor’s marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

Consent of father,  
or guardian, or  
mother<sup>1</sup>.

(Notes).

*1.—“Consent of father or guardian or mother.”*

ENGLISH LAW,

**(1) Minor, consent to marriage of.**

By 4 Geo. 4, c. 76, S. 16, the consent of parents and guardians is required to the marriage of a minor, “unless there shall be no person authorized to give such consent” *Holmes v. Simmons*, L R , 1 P. & D 523. S

**(2) Want of consent of parents, &c.**

“(a) The want of the consent of the party whose consent is required will not vitiate a marriage *R. v. Birmingham*, 8 B & C 29 (1828), 2 M. & R. 230. T

(b) But if a false oath be taken for the purpose of obtaining a license, it is punishable as a misdemeanour. *R. v. Chapman*, 1 Den CC 432. U

20. Every person whose consent to a marriage is required under section 19 is hereby authorized to prohibit

Power to prohibit  
by notice issue of  
certificate.

the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorized with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

**21.** If any such notice be received by such Minister, he shall not issue his certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition,

or until the said notice is withdrawn by the person who gave it.

**22.** When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

**23.** When any Native Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Native Christian into some language which he understands

**24.** The certificate to be issued by such Minister shall be in the form contained in the second schedule hereto annexed, or to the like effect

**25.** After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt

Provided that the marriage be solemnized in the presence of at least two witnesses <sup>2</sup> besides the Minister.

**(Notes).**

**1. – “Solemnization of marriage.”**

ENGLISH LAW.

**(1) Minister bound to marry.**

A license is a legal authority for marriage, and a minister may not refuse to marry pursuant to a proper license from his ordinary unless he suspects fraud. *Argar v. Holdsworth*, 2 Lee, 515.

**1.—“Solemnization of marriage” —(Concluded).**

ENGLISH LAW—(Concluded).

**(2) Conscience clause in Divorce Act.**

“But by section 57 of the Matrimonial Causes Act, 1857, a clergyman of the Established Church may refuse to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery.” *Brown and Powles on Divorce*, 7th Ed., 1905, p. 97. See also Divorce Act IV of 1869, S. 58. **W**

**2.—“Two witnesses.”**

ENGLISH LAW.

**Witnesses to marriage.**

(a) “The statutory and rubrical provisions, which require that two witnesses should be present at a marriage, and should sign the register, are merely directory.” *Brown and Powles on Divorce*, 7th Ed., 1905, p. 100. **X**

(b) “A marriage solemnized in the presence of one witness only is therefore a good marriage.” *Wing v. Taylor*, 2 S. & T. 278. **Y**

**26.** Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any) thereon shall be void,

Certificate void if marriage not solemnized within two months<sup>1</sup>.

and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid

(Note)

**1 —“Two months.”**

ENGLISH LAW.

**Marriages after the prescribed period from publication of banns—English Law**

“Although 4 Geo. 4, c. 76, S. 9, requires marriages by banns to be solemnized within three months after the complete publication of banns, a marriage will not be held invalid because the parties have married after the prescribed time if they have not done so knowingly and wilfully.” *Reg. v. Clarke*, 10 Cox C. C. 174, 16 L.T. 429. **Z**

**PART IV.**

**REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION.**

**27.** All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered in manner hereinafter prescribed.

Marriages when to be registered.



**28** Every Clergyman of the Church of England shall keep a register of marriages and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every [marriage which he solemnizes under this Act

Registration of marriages solemnized by Clergymen of Church of England.

**29.** Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

\* Quarterly returns to Archdeaconry.

Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

Contents of returns.

The said Registrar upon receiving the said returns shall send one copy thereof to the Registrar-General of Births, Deaths and Marriages.

**(Note)**

**N.B**—The words "Registrar-General . . . Marriages" at the end of this section were substituted for the words "Secretary to the Local Government" by Act VI of 1886, S. 30 (b)

**30.** Every marriage solemnized<sup>f</sup> by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

Registration and returns of marriages solemnized by Clergymen of Church of Rome.

and such person shall forward quarterly to the Registrar-General of Births, Deaths and Marriages returns of the entries of all marriages registered by him during the three months next preceding.

**(Note).**

**N.B**—The words "Registrar-General.....Marriages" in the 2nd para of this section were substituted for the words "Secretary to the Local Government" by Act VI of 1886, S. 30 (b).

Registration and  
returns of marriages  
solemnized by  
Clergymen of  
Church of Scotland.

**31.** Every Clergyman of the Church of Scotland shall keep a register of marriages,

and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the Registrar-General of Births, Deaths and Marriages, through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in section 29, of all such marriages.

(Note).

**N.B.**—The words "Registrar General of Births, Deaths and Marriages" in the 3rd para of this section, were substituted for the words "Secretary to the Local Government," by Act VI of 1886, S. 30, cl. (b)

**32** Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall, immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same, (that is to say) in a marriage-register-book to be kept by him for that purpose, according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil

**33** The entry of such marriage in both the certificate and marriage-register-book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization

Entries of such  
marriages to be sign-  
ed and attested

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book

**34.** The person solemnizing the marriage shall forthwith separate the certificate from the marriage-register-book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the district in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

Certificate to be for-  
warded to Marriage  
Registrar, copied and  
sent to Registrar-  
General.

who shall cause such certificate to be copied into a book to be kept by him for that purpose,

and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the Registrar-General of Births, Deaths and Marriages

(Note).

**N.B.**—The words "Registrar-General of Births, Deaths and Marriages" at the end of the section were substituted for the words "Secretary to the Local Government" by Act VI of 1886, S. 30, cl. (b).

**35.** Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate.

Copies of certificates to be entered and numbered

**36.** The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the Registrar-General of Births, Deaths and Marriages.

Registrar to add number of entry to certificate, and send to Registrar-General.

(Note).

**N.B.**—The words "Registrar-General, etc." at the end of the section were substituted for the words "Secretary to the Local Government" by Act VI of 1886, S. 30, cl. (b).

**37.** When any marriage between Native Christians is solemnized under Part I or Part III of this Act, the person solemnizing the same shall, instead of proceeding in the manner provided by sections 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or, if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Registration of marriages between Native Christians under Part I or III.

Custody and disposal of register-book

Whoever has the control of the book at the time when it is filled shall send it to the Marriage Registrar of the district, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with the records of his office.

**(Note).**

**N B.**—The words "Registrar-General.....Marriages" at the end of the section were substituted for the words "Secretary to the Local Government" by the Act VI of 1886, S. 30, cl. (b).

**PART V.**

**MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE-REGISTRAR.**

**38.** When a marriage is intended to be solemnized by, or in the presence of, a Marriage Registrar, one of the parties to such marriage shall give notice in writing, in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the district within which the parties have dwelt ;

or, if the parties dwell in different districts, shall give the like notice to a Marriage Registrar of each district,

and shall state therein the name and surname, and the profession or condition, of each of the parties intending marriage, the dwelling place of each of them, the time during which each has dwelt therein, and the place at which the marriage is to be solemnized :

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

**(Notes).**

**I.—"Notice."**

**ENGLISH LAW.**

**(1) Notice, provisions for in English law.**

- (a) When a marriage is contemplated—other than by license or banns—upon production of the registrar's certificate one of the parties shall give notice, in the form of Schedule A annexed to the English Act, or to the like effect, to the Superintendent Registrar of the district within which the parties shall have dwelt for not less than seven days, or if they have dwelt in different districts, then to the registrar of each, containing their full and correct names, addresses, and descriptions, the time they resided in the district, the church or building where they are to be married, and that one or other of them has dwelt in the place specified a month and upwards if it is so.

This notice the registrar keeps, after entering a copy in "The Marriage Notice Book" (fee 1 s.), for gratuitous public reference. On it shall be subscribed a solemn declaration by the party giving it that there is no impediment of kindred or lawful hindrance to the marriage, and that the parties have resided where specified for seven days if the ceremony is to be without license, or, if by license, that one of them has resided

## I.—“Notice”—(Continued).

## ENGLISH LAW—(Continued).

where specified for fifteen days immediately before the notice. And where either party, neither a widower nor a widow, is under twenty-one, the party declaring shall further declare that the requisite lawful consent has been given, or if it be so, that no consent is required. Upon the due signature of this declaration by the party making it, and attestation by the registrar or his deputy, the required certificate or license is granted. If the marriage is to be *without license*, a copy of the notice is suspended conspicuously in the registrar's office for twenty-one days after entry of the original in the “Book;” and if there be no impediment, or if the marriage be not forbidden as by Law authorized on sufficient grounds, the certificate issues, and upon it marriage may be solemnized within three months.” See Dixon on Divorce, 4th Ed., 1908, pp. 30, 31. A

(b) “When marriage, *with a license* is contemplated the notice already mentioned need only be given to the registrar of the district in which one of the parties resides and the notice need not be suspended for inspection.” (*Ibid.*) B

(c) “It must, however, state that the party giving it has for fifteen days immediately before been residing in the district of the registrar to whom the notice is given.” (*Ibid.*) C

(d) “Thereupon, if not forbidden, as in the former case of marriages without licenses, the registrar will issue a certificate with license, to be acted upon also, as before, within three months.” (*Ibid.*) D

(e) “Those who object to be married under 6 and 7 Will. 4, c. 85, *in a registered building* may, “after due notice and certificate”, solemnize the marriage in the Superintendent Registrar's Office with another registrar and witnesses present in the manner stated in 6 and 7 Will. 4, c. 85, S. 21.” (*Ibid.*) E

(f) “Under similar restrictions *Quakers and Jews* may marry according to their own usages.” (*Ibid.*) F

## (2) “Due notice,”—English Statute Law.

(a) “Due notice,” under 19 and 20 Vict. 119, is a notice in accordance with the formalities prescribed by the statute See Dixon on Divorce, 4th Ed., 1908, p. 45. G

(b) The notice will be sufficient, though in other respects—for instance, regarding the christian name, ages, and other details relating to the parties—it is inaccurate (*Ibid.*) H

(c) In any suit touching the validity of the marriage, evidence of the non-observance of the requirements of the Act is positively prohibited. *Prowse v. Spurway*, 46 L.J., Mat. 51. I

(d) “Whether a notice in a wholly false name (which must be given fraudulently) could be properly held a notice at all may still be a question.” *Prowse v. Spurway*, 46 L.J., Mat. 51. J

## (3) Proof of marriage—Non-registration, effect of.

“Where the legality of a marriage was in question, it was decided that, even if the marriage was not registered at all, yet if the fact of marriage could be proved, the non-registration would not affect its validity.” *Woods v. Woods*, 2 Curt 521. K

**1.—“ Notice ”—(Concluded).**

**ENGLISH LAW—(Concluded).**

**4) Marriage by banns—Marriage by notice before Registrar—Difference.**

(a) “There is no analogy between a marriage by banns and a marriage by notice before the registrar. The decisions as to what constitutes undue publication of banns under 4 Geo. 4, c. 76, are not, therefore, applicable to a question as to what constitutes undue notice under the Registration Acts.” *Holmes v. Simmons*, L. R. 1. P & D. 523. J,

**N.B.:**—See notes under S. 12, *supra*.

(b) The repetition of the words of the marriage service is necessary. When the hands of the parties are joined together, and the clergyman pronounces them to be man and wife, they are married if they understand that, by that act, they have agreed to cohabit together, and with no other person. *Harrod v. Harrod*, 1 K. & Johns, 4. M

**39.** Every Marriage-Registrar shall, on receiving any such Publication of notice, cause a copy thereof to be affixed in some conspicuous place in his office.

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same District who shall likewise affix the copy in some conspicuous place in his own office.

**40.** The Marriage Registrar shall file all such notices and keep them with the records of his office,

Notice to be filed and copy entered in Marriage Notice Book.

and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the Local Government, and to be called the “Marriage Notice Book;”

and the Marriage Notice Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

**41.** If the party by whom the notice was given requests the Marriage Registrar to issue the certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made :

Certificate of notice given and oath made.

Provido.

Provided—

that no lawful impediment be shown to his satisfaction why such certificate should not issue ;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf by this Act ;

that four days after the receipt of the notice have expired ; and further,

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

(Note).

General.

**Marriage between a Christian and a Jewess divorced according to Jewish law—Registrar refusing to take any steps—Direction from Court to solemnize marriage.**

Where a Jewess was divorced according to the Jewish law, a Christian desiring to marry her gave notice to the Registrar under the provisions of this Act. The Registrar having refused to solemnize the marriage, the Court on application ordered the Registrar to receive and publish the notice and, upon compliance with the provisions of S. 41 of the Act, take all such steps as are necessary for the solemnization of the marriage. 16 C.W N. 417. N-O

**42.** The certificate mentioned in section 41 shall not be issued

Oath before issue of certificate. by any Marriage Registrar, until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath <sup>1</sup>—

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage-Registrar,

and, where either or each of the parties is a minor,—

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

(Notes).

1.—“Oath.”

**Definition of Oath.**

“Oath” shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing. See Act X of 1897, S. 3 (36). P<sup>4</sup>

**43.** When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by section 41

Petition to High Court to order certificate in less than fourteen days.

And, on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

**44.** The provisions of section 19 apply to every marriage under this Part, either of the parties to which is a minor ;

Consent of father or guardian.

and any person whose consent to such marriage would be required thereunder may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word " forbidden " opposite to the entry of the notice of such intended marriage in the Marriage Notice Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.

Protest against issue of certificate.

When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said Marriage, or until the protest be withdrawn by the person who entered it.

Effect of protest.

Petition where person whose consent is necessary is insane, or unjustly withholds consent.

**45.** If any person whose consent is necessary to any marriage under this Part is of unsound mind,

or if any such person (other than the father) without just cause withholds his consent to the marriage,



the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of the said towns, then to the District Judge :

And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegation of the petitions in a summary way :

And, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be, shall declare the marriage to be a proper marriage.

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage ;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

**46.** Whenever a Marriage-Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

(Note).

General.

**Marriage between a christian and a Jewess divorced according to Jewish Law—Registrar refusing to take any steps—Direction from Court to solemnize marriage.**

**47.** Whenever a Marriage-Registrar resident in any Native State refuses to issue his certificate, either of the parties intending marriage may apply by petition to the Governor General in Council, who shall decide thereon.

Petition when Marriage-Registrar in Native State refuses certificate.

Such decision shall be final, and the Marriage Registrar to whom the application was originally made shall proceed in accordance therewith.

**48.** Whenever a Marriage Registrar, acting under the provisions of section 44, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or, if such district be not within any of the said towns, then to the District Judge.

Petition when Registrar doubts authority of person forbidding.

The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same,

Procedure on petition.

and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case ;

and if, upon such examination, it appears that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

Whenever a Marriage Registrar appointed under section 8 to act within any Native State is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall send a statement of all the circumstances of the case, together with all documents relating thereto, to the Governor General in Council.

Reference when Marriage Registrar in Native State doubts authority of person forbidding.

If it appears to the Governor General in Council that the person forbidding the issue of such certificate is not authorized by law so to do, the Governor General in Council shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue of the certificate had not been forbidden.

49. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under section 44, or a Judge of the High Court or the District Judge, under section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

50. The certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in the form contained in the second schedule to this Act annexed or to the like effect,

and the Local Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

51. After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the Marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect -

" I do solemnly declare that I know not of any lawful impediment why I, *A B*, may not be joined in matrimony to *C D* "

And each of the parties shall say to the other as follows or to the like effect -- " I call upon these persons here present to witness that I, *A B*, do take thee, *C D*, to be my lawful wedded wife [*or husband*]. "

**52.** Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage-Registrar, as required by section 40, the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall

When marriage not had within two months after notice new notice required

be void.

and no person shall proceed to solemnize the marriage, nor shall any Marriage-Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid

**53** A Marriage-Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage

Marriage Registrar may ask for particulars to be registered.

**54.** After the solemnization of any marriage under this Part, the Marriage-Registrar present at such solemnization shall forthwith register the marriage in duplicate that is to say, in a marriage-register-book according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

Registration of marriage solemnized under Part V.

The entry of such marriage in both the certificate and the marriage-register book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage-Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage-Registrar and person solemnizing the marriage

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

**55.** The Marriage-Registrar shall forthwith separate the certificate from the marriage-register book and send it, at the end of every month, to the Registrar-General of Births, Deaths and Marriages

Certificates to be sent monthly to Registrar-General.

The Marriage-Registrar shall keep safely the said register-book until it is filled, and shall then send it to the Registrar-General of Births, Deaths and Marriages, to be kept by him with the records of his office

Custody of register-book.

**(Notes)**

**N.B.**—The words "Registrar-General of Births, Deaths and Marriages" in the two paras of this section were substituted for the word, "Secretary to the Local Government" by the Act VI of 1886, S. 30, cl (b)

**56.** The Marriage-Registrars in Native States shall send the certificates mentioned in section 54 to such officers as the Governor-General in Council from time to time, by notification in the Gazette of India, appoints in this behalf

Officers to whom Registrars in Native States shall send certificates.

**(Notes).****General.**

**N.B. 1** —Compare this section with S. 24 (2) of Act VI of 1886 (Births, Deaths and Marriages Registration).

**N.B. 2** —The Commissioner of Ajmer-Merwara has been appointed under this section for the Rajputana State, see A. J. R. & O., the Agent, Governor-General, Central India Agency, for States in Central India, see Brit. Enact. N.S. (C.I.), Ed. 1899, p. 45, the Registrar-General of Births, Deaths and Marriages, Madras, for the Mysore States, see *ibid* (Mad. and Mys.), p. 47 the First Assistant to the Resident for the Hyderabad State, see *ibid* (Hyd.), p. 26

**R**

**57.** When any Native Christian about to be married gives a notice of marriage, or applies for a certificate from a Marriage-Registrar, such Marriage-Registrar shall ascertain whether the said Native Christian understands the English language, and, if he does not, the Marriage-Registrar shall translate, or cause to be translated, such notice or certificate, or both of them, as the case may be, to such Native Christian into a language which he understands,

Registrar to ascertain that notice and certificate are understood by Native Christians

or the Marriage-Registrar shall otherwise ascertain whether the Native Christian is cognizant of the purport and effect of the said notice and certificate

**58** When any Native Christian is married under the provisions of this part, the person solemnizing the marriage shall ascertain whether such Native Christian understands the English language, and if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Native Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act

Native Christians  
to be made to un-  
derstand decla-  
rations

**59.** The registration of marriages between Native Christians under this Part shall be made in conformity with the rules laid down in section 37 so far as they are applicable, and not otherwise

Registration of  
marriages between  
Native Christians

## PART VI (D).

### MARRIAGE OF NATIVE CHRISTIANS

**60.** Every marriage between Native Christians applying for a certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not otherwise :-

On what condi-  
tions marriages of  
Native Christians  
may be certified

(1) the age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years,

(2) neither of the persons intending to be married shall have a wife or husband still living,

(3) in the presence of a person licensed under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other :-

“ I call upon these persons here present to witness that I, *A B*, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee, *C D*, to be my lawful wedded wife [or husband] ” or words to the like effect

Provided (2) that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 has been given to the intended marriage, or unless it appears that there is no person living authorised to give such consent.

**(Notes).****1.—“Part VI.”**

**N B**—As to validation of past marriages solemnized under Pt. VI between persons of whom one only was a Native-Christian, and penalty for solemnizing such marriages under Pt. VI in future, see Act II of 1892.

**(1) Scope and object of the section.**

“The object of Part VI which has been added to the Bill since it was framed by Mr. Ritchie, is to meet the cases of the numerous classes of Native Christians scattered over the British Territories in India. These classes number several thousand persons, the majority of whom are far away from Clergymen in Holy Orders or Ministers of the Church of Scotland, or Marriage Registrars, and their Pastors are frequently natives like themselves.

“It is impossible to expect from these classes of Native Christians, marriages solemnized in the regular manner prescribed in the previous sections.

“The point is one which ought not to be left in uncertainty and in order effectually to clear up the doubts that now exist, legislation of some kind would seem to be required. Moreover, a summing the legality of marriages between Native Christians, resting simply on the verbal declaration of the parties thereto, some provision of law would appear to be absolutely necessary for the registration of such marriage and for affording easy means of establishing the same.

“It is considered that the provisions contained in Part VI of the Bill, as it is now drawn, will do all that is really required in respect to the solemnization of the marriages of Native Converts to Christianity who may be prevented by distance or any other cause from availing of the other provisions of the Bill and that while the Part in question makes sufficient provision for the due regulation of such marriages, for preserving an official record of the same, and for preventing abuses, it will be found to afford to all classes of Native-Christians, a simple, convenient, and inexpensive mode of solemnizing their marriages, and of establishing the marriage when proof may be required either in respect to the succession to property or otherwise.

“One of the conditions contained in Section XLII of the Bill, as essential to the granting of a certificate of Marriage under that Part, is that the parties shall not stand to each other within the prohibited degrees of affinity or consanguinity.

“It is to be observed that this is no new provision as respects Native Christians, though probably it is not always attended to. There seems to be no doubt that the legal impediments of kindred or affinity in respect of marriage which apply to European Christians apply equally to Native Christians, and so long as such impediments apply to European, it is considered to be impossible, with any degree of propriety, to exempt Native Christians from them, or to make any distinction in this respect between the two classes.” See Proceedings in the Legislative Council.

**2.—“ *Proviso* ”**

**(1) Object of the Proviso**

The most important change introduced by this Act was in regard to the certifying of marriages between Native Christians.

By the older Act V of 1865, if the persons intending marriage had attained the age of sixteen years in the case of the male, and thirteen years in that of the female, the marriage might be certified without any reference to the consent of parents or guardians. This was, as the legislature thought, most justly represented to be a great hardship where the parties to such marriages were minor, and had, up to the time of marriage, lived with or under the control of their parents or guardians.

To meet this defect in the then existing law, it is provided in the present section that—

“No marriage shall be certified under this part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section nineteen has been given to the intended marriage. \* \* \* The intention of this was to make the consent of parent or guardians a essential condition to the legal contracting of marriage between minors, in those cases in which the parent or guardian ought obviously to have a voice in the matter, without at the same time imposing the obligation of giving notices, which would be burdensome to the poorer and uneducated classes who formed the bulk of the Native Christian community and which was doubtless a main object of just legislation on this matter to avoid.” See the speech of the Hon. Mr. Corbett in the Imperial Legislative Council on 14th Feb. 1872 that the Indian Christian Marriage Bill, be referred to a select committee. **T**

**61** When, in respect to any Marriage solemnized under this Part, the conditions prescribed in section 60 have been fulfilled, the person licensed as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas grant a certificate of the marriage.

The certificate shall be signed by such licensed person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

**62** (1) Every person licensed under section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the Local Government by which he was licensed may from time to time prescribe, a register-book of all marriages solemnized

Grant of certificate

Keeping of register-book and deposit of extracts therefrom with Registrar-General.



under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths and Marriages for the territories under the administration of the said Local Government, in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals

(2) Where the person keeping the register-book was licensed as regards a Native State by the Governor-General in Council, references in sub-section (1) to the Local Government therein mentioned shall be read as references to the Local Government to whose Registrar-General of Births, Deaths and Marriages certified copies of entries in registers of births and deaths are for the time being required to be sent under section 24, sub-section (2), of the VI of 1886. Births, Deaths and Marriages Registration Act, 1886

(Notes)

**N B**—This section was substituted for the original section 62 (relating to the keeping and form of the register book) by the Act II of 1891, S. 4.

**I.**—“*As the Local Government by which he was licensed may from time to time prescribe*”

(a) For notifications issued under the powers conferred by this section in—

(1) Assam, see Assam Gazette, 1901, Pt. II, p. 397.

(2) Bengal, see Ben. R. & O.

(3) Burma, see Bur. R. & M.

(4) the Central Provinces, see C. P. R. & O.,

(5) Punjab, see Punj. R. & O.,

(6) the United Provinces of Agra and Oudh, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42. **U**

(b) For notifications in the United Provinces of Agra and Oudh, under the powers conferred by Ss. 62, 6, 7, 9, 82, 83 and 85, see North-Western Provinces and Oudh List of Local Rules and Orders. Ed. 1894, p. 42. **Y**

**63** Every person licensed under this Act to grant certificates of marriage, and keeping a marriage-register-book under section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of an entry therein

Searches in register-book and copies of entries.

**64.** The provisions of sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under section 37.

Books in which marriages of Native Christians under Part I or Part III are registered.

**65.** This Part of this Act, except so much of sections 62 and 63 as are referred to in section 64, shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864,<sup>1</sup> previous to the twenty-third day of February, 1865.

Part VI not to apply to Roman Catholics. Saving of certain marriages.

**(Notes)**

**I.—“ Act XXV of 1864 ”**

**N B**—Act XXV of 1864 was repealed by Act V of 1865, which was repealed by the Act.

**PART VII**

**PENALTIES**

False oath, declaration (1) notice or certificate for procuring marriage

**66** Whoever, for the purpose of procuring a marriage or license of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rites and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine

**(Notes)**

**General**

**N.B.**—This section was substituted for the original S. 66 by the Act II of 1891, S. 5.

**I.—“ False declaration ”**

**(1) What is false declaration**

(a) The maxim *ignora iuris non excusat* cannot be applied to a declaration, though in fact false, made under S. 18 inasmuch as the declaration required by that section to be made is a declaration as to the belief of the person making it. 11 A. 212 **W**

(b) Further, in order to entail the penal consequences provided for by this section, such false declaration must be made “intentionally” 16 A. 212. **X**

(c) The facts of the above case were as follow :—

*I — "False declaration"—(Concluded)*

The accused person, who was an Englishman and a member of the Church of England, was contemplating marriage with the sister of his deceased wife. With a view to procuring the solemnization of the intended marriage a sworn declaration was made by Robinson and the lady he intended to marry, the material words of which were — "Deponents further make oath and say (each as to his and her own belief), that there is no let or impediment of pre-contract, kindred or alliance, or any other lawful cause whatsoever, or any suit pending in any Ecclesiastical Court, to bar or hinder the said intended marriage."

The defendant was brought into Court upon the allegation that at the time he made the said declaration he knew a matter of fact that it was untrue. That he was aware that the person he intended to marry was the sister of his previous wife was beyond doubt, but his defence was based on the statement that he was not aware at the time of making the declaration that such affinity constituted an impediment within the meaning of § 18 of this Act to bar or hinder the said marriage.

Then Lordships after laying down the law that such a marriage would be illegal as being within the prohibited degrees went on to say —

"We have now to consider whether this is a case to which the doctrine of *"ignorantia juris non excusat"* can be held to apply. Section 66 of Act No. XV of 1872 makes penal the "intentionally making a false oath." The alleged false declaration was made "to the best of the deponent's belief." The word 'intentionally' would be superfluous if the law is taken to impute knowledge whether it in fact exists or not. The limitation "to the best of his belief" would be removed by holding that such belief or non belief was immaterial. But § 18 of Act XV of 1872 imposes a declaration of belief only. It is in these words "that he or she believes that there is not any impediment of kindred, or affinity, or other lawful hindrance to the said marriage." We therefore are of opinion that the Magistrate rightly tried the question whether it was proved satisfactorily that the accused was conscious that he was making a false declaration when he deposed that he did not in fact know that there was any legal impediment to the intended marriage. Indeed, we do not think the contrary proposition was seriously maintained or raised in the petition of appeal.

The standard of proof in a criminal trial is not the same as in an ordinary civil case. No conviction should be arrived at unless upon clear, cogent and coherent evidence which leaves upon the mind no substantial doubt. *Held* under the above circumstances the accused was not guilty. 16 A. 212 (215 and 216). **Y**

**67** Whoever forbids the issue, by a Marriage-Registrar, of a

Forbidding, by false personation issue of certificate by Marriage Registrar.	certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section 205 of the Indian Penal Code
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68. Whoever, not being authorized by section 5 of this Act to solemnize marriages solemnizes or professes to solemnize in the absence of a Marriage-Registrar of the district in which the ceremony takes place, a marriage between persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

or, if the offender is an European or American, with penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of Europeans and American convicts* ' ' )

and shall also be liable to fine

(Notes;

General

**N.B** 1—This section was substituted for the original S. 68 by Act II of 1891, S. 6.

**N B** 2—The words "and to amend the law relating to the removal of such convict" at the end of the Act were repealed by the Repealing and Amending Act XII of 1891.

(1) **Marriage solemnized by an unauthorized person—"Knowingly"—Presence of Marriage-Registrar**

(a) The lay trustee of a church in which the solemnization of marriage between Christians had been purchased, solemnized a marriage between them according to the rite of the Church of England. The Marriage-Registrar attended the ceremony in a private and un-official capacity. The person who solemnized the marriage was not of any of the classes of persons authorized to solemnize a marriage in the absence of a Marriage Registrar and he was convicted of an offence under this section. *Held* that the conviction was right. 11 M. 312. **Z**

(b) The following observations of the learned Judges in the case are worthy of being noted. "With regard to the contention that no offence has been committed, because a Marriage Registrar was, in fact, present, it is clear that the Act means that the Registrar must be present *qua* Registrar and sections 28 to 30 provide that certain notices, publication of notices and other formalities shall take place before a marriage can be solemnised either by or in the presence of a Marriage-Registrar. It is not pretended that any of these provisions were complied with. Mr. Johnson did not attend as Registrar, but was in attendance merely as a relation of the bride for the purpose of giving her away, it is impossible to believe that under these circumstances the marriage has taken place in accordance with sub S. 1, S. 3 of this Act." 14 M. 312 (340, 351). *Per* Collyer, C. J. **A**

(c) "The proper construction of the words, "in the absence of the Marriage-Registrar" is that in order that there may be a valid defence, he should be present in the exercise of his statutory authority as Marriage-

**General—(Continued).**

Registrar, and that they do not include a case in which he is present as a mere spectator or as a relative of the bride." 11 M. 342 (354).  
(*Per* Muthusami Ayyar, J.) **B**

- (d) "The only facts necessary to support a conviction under S. 68 are these—first, it must be proved that the accused was *not* authorized under the Act to solemnise a marriage in the absence of the Marriage-Registrar, and secondly, that he knowingly solemnised a marriage in the absence of such Registrar between persons one or both of whom was a Christian or Christians." 11 M. 342 (353). (*Per* Collins, C. J.) **C**

- (e) "The word 'knowingly' only applies to the fact that the person so solemnising the marriage is aware that he is solemnising a marriage and that the person or persons he is professing to marry is or are a Christian or Christians." 11 M. 342 (352). (*Per* Collins, C. J.) **D**

- (f) "The substantial question for decision is what effect is to be given to the word 'knowingly' used in S. 68 and how far it is necessary to prove in order to support a conviction under this section that the offender knew *in fact* that he was doing an unauthorised Act. The Judge finds, upon the evidence, that Mr. Fischer had not guilty knowledge, but that the absence of such knowledge was due to gross negligence or carelessness on his part. The absence of such knowledge is due in the case before us to his omission to refer to the Act of the Legislature of which S. 4 and S. 5 are as plain as any provision of law can be, as to a marriage being void if solemnised otherwise than by persons enumerated in S. 5, or by or in the presence in his official capacity of a Marriage-Registrar. It is true that there must be 'a mind at fault before there can be a crime.' But in applying this principle it must be remembered that every man is presumed to be cognizant of the statute law of the country and construe it aright; that if any individual should infringe it through ignorance or carelessness, he must abide by the consequence of his error; that it is not competent to him to aver in a Court of Justice that he was ignorant of the Criminal Law of the land, and that no Court of Justice is at liberty to receive such a plea. There may be some important ingredient of a particular offence independently of the mere ignorance of law, such as dishonest intention in the case of theft, which may be shown not to exist owing to an error in applying the law to the facts of a particular case. But in the case before us, we are asked to presume that the very knowledge of the existence of the statute law must be proved as a matter of fact and to assume that the Legislature framed S. 68 on that view. I do not think that I can accede to such a suggestion. Starting then with the presumption that Mr. Fischer must be presumed to have been aware of the law, I am unable to refer the word 'knowingly' to a knowledge of the existence of the law. I can only refer it to the other fact mentioned in S. 68 as constituting the offence, *viz.*, the status of the parties or one of them being a Christian or Christians. There is no authority to warrant the contention that ignorance of the existence of a penal provision of law is pleadable as a good defence. I agree with the learned Chief Justice in holding that it is sufficient to support the conviction under S. 68 to show that Mr. Fischer was not authorised by the Act to solemnise the marriage, and that he solemnised

**General—(Continued)**

the marriage in the absence of the Marriage Registrar in his official capacity, knowing that the parties between whom he solemnised the marriage were Christian. 11 M. 312 (351, 355) (*Per* Muthusami Ayyar) **E**

**(2) Unauthorised marriage of a Christian child -Persons professing Christian Religion**

(a) The accused who was charged with having committed an offence under Indian Christian Marriage Act, section 68, was acquitted on its appearing that the Christian whose marriage he purported to solemnize was a child of the age of three years. The child had been baptized and her father was a Christian.

*Held*, that the child was a person professing the Christian religion within the meaning of section 3 of the Indian Christian Marriage Act, and that the acquittal was wrong. 18 M. 230. **F**

(b) The words 'person who professes the Christian religion' as used in Act XV of 1872 mean in our opinion not only adult who profess that religion, but also then children, who are in law presumed to follow their father's religion. 18 M. 230 (232). **G**

(c) S., an Episcopally ordained Priest of the Syrian Church under the jurisdiction of the Patriarch of Antioch, solemnized two marriages according to Roman ritual without publishing or causing to be affixed the notices of such marriages required by Part III of the Act. It was proved that S used the Roman ritual with the sanction of his Bishop who was appointed by the Patriarch. *Held*, that S, having received Episcopal ordination was authorized to solemnize the marriages according to the rule, rite, ceremony and customs of his church and that it was not shown that a marriage solemnized with the Roman ritual under the sanction of the Bishop of the Syrian Church was not solemnized according to the rules, rites, ceremonies and customs of the Syrian Church. 19 M. 273. **H**

(d) *Held* further that Part III of the Act only applies to ministers of religion licensed under the Act and not to Episcopally-ordained persons. 19 M. 273. **I**

(e) Part III relates to marriages solemnized by ministers of religion licensed under this Act and does not apply to marriages solemnized by persons who have received Episcopal ordination. 19 M. 273 (279, 280). **J**

(f) The Act authorizes a person Episcopally ordained to solemnize a marriage according to the rules, rite, ceremonies and customs of the church of which he is a minister. 19 M. 273 (281). **K**

(g) Section 73 does not require that a person who has received Episcopal ordination (and who is not one of the classes specially excepted by that section) should publish a notice of any marriage which he intends to solemnize. 19 M. 273 (281). **L**

(h) S. 73 is a highly penal section and must be construed strictly, and in favour of the liberty of the subject. 19 M. 273 (284). **M**

**General—(Concluded)****(3) Solemnization of marriage under Hindu rites between a Native Christian and a Hindu by a person not authorized to perform marriages under S. 5 of the Act.**

A person who performs a ceremony of marriage according to a Hindu form between a Native-Christian and a Hindu commits an offence under section 68 of Act XV of 1872, unless he is authorized to solemnize marriages under S. 5 of the Act. 17 M. 391=1 Wen 813. **N**

**(4) "Solemnize" meaning of**

(a) In this section the word "Solemnize" is equivalent to the words "conduct, celebrate or perform." 20 M. 12=1 Weir 820 **O**

(b) Therefore any unauthorized person not being one of the persons being married, who take part in performing a marriage, that is, in doing any act supposed to be material to constitute the marriage is liable to be convicted under that section, and a charge of abetment is sustainable against the persons being married. 20 M. 12=1 Wen 820 **P**

(c) The following observations of the learned Judge in the case may also be noted --

"We cannot accept the Judge's interpretation that the word "solemnize" as used in the Act applies to only such marriage ceremonies as are performed by some person possessing or claiming authority to perform them by virtue of ecclesiastical authority. The Judge's view is quite inconsistent with the provisions of the Act which use the word "solemnization" with reference to marriage before the Marriage-Registrar who is an official possessing no ecclesiastical character, and before whom no ceremonies are necessary. A marriage before him is a mere civil marriage and yet the word in question is applied to such a marriage equally with marriages accompanied by religious ceremonial. We, therefore, take the meaning of the word to be equivalent to conduct, celebrate or perform. In this view any person, not being the persons being married, who actually took part in performing this marriage, that is in doing any act that was supposed to be material to constitute the marriage was clearly guilty under S. 68 of Act XV of 1872 as parties either solemnizing a marriage or professing to do so.

In the case of the person being married we consider a charge of abetment is sustainable as without their presence and aid the marriage could not possibly take place. On this ground the acquittal by the Judge of the third accused was wrong. For these reasons we set aside the acquittal of all the accused and direct that they be retried with reference to the merits of the case." 20 M. 12 (16) **Q**

**(5) Law under the old Act V of 1865**

A Hindu priest was charged with knowingly and wilfully solemnizing a marriage between persons one of whom professed the Christian religion, the said priest not being duly authorized under S. 6 of Act V of 1865, an offence punishable under S. 56 of the same Act. The Session Judge discharged the accused without trial on the ground that the enactment in question was inapplicable to the celebration of a marriage according to the Hindu form by a Hindu priest, though one of the contracting parties was a Christian convert. *Held*, that this view of the law was erroneous and that the accused was *prima facie* liable under S. 56 of the Act. 6 M.H.C. App. 20. **R**

**69** Whoever knowingly and wilfully solemnizes a marriage between persons one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Solemnizing marriage out of proper time, or without witnesses.

This section does not apply to marriages solemnized under special licenses granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special license in that behalf mentioned in section 10.

Saving of marriage solemnized under special license

Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.

**(Note)**

**N.B.**—The last part of this section was added by S. 7, Act II of 1891

**70** Any Minister of Religion licensed to solemnize marriages under this Act, who, without a notice in writing, or, when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Solemnizing, without notice or within fourteen days after notice, marriage with minor

Issuing certificate, or marrying without publication of notice.

**71** A Marriage-Registrar under this Act, who commits any of the following offences —

(1) knowingly and willingly issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage, as directed by this Act,

(2) after the expiration of two months after the copy of the notice has been entered as required by S. 40 in respect of any marriage, solemnizes such marriage,

Marrying after expiry of notice.



(3) solemnizes, without any order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage-Registrar of the district if there be more Marriage-Registrars of the district than one, and if he himself be not the Senior Marriage-Registrar,

solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice,

(4) issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine

issuing certificate against authorized prohibition

**(Note).**

**N.B.**—Clause (2) of this section was substituted for the original cl. (2) by Act II of 1891, S. 8 (1)

**72** Any Marriage-Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of two months<sup>1</sup> after the notice has been entered by him as aforesaid,

Issuing certificate after expiry of notice, or, in case of minor, within fourteen days, after notice, or against authorized prohibition

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under section 166

**XLV of 1860** of the Indian Penal Code

**(Note).**

<sup>1</sup> —“Two Months.”

**N.B.**—The words “Two Months” in this section were substituted for the words “Three Months” by S. 8 (2), Act II of 1891

**73** Whoever, being authorized under this Act to solemnize a marriage,

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome).

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a license from the Anglican Bishop of the diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and customs of that church,

knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage-Registrar, or, if there be more Marriage-Registrars than one, to the Senior Marriage-Registrar of the district

or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue.

or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same,

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine

**74.** Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

Unlicensed person granting certificate pretending to be licensed.

issuing certificate for, or solemnizing, marriage with minor without publishing notice, or after expiry of certificate.

issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice.

issuing certificate authorized for bidden

solemnizing marriage authorized forbidden

Whoever, being licensed to grant certificates of marriage under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees

**(Note)**

**N.B.**—The last para of this section was added by S. 9, Act II of 1891

**75.** Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counterfoil certificates,

or wilfully inserts any false entry in any such register-book or counterfoil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine

**76** The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

## PART VIII

### MISCELLANEOUS

**77** Whenever any marriage has been solemnized in accordance with the provisions of Ss. 4 and 5, it shall not be void merely on account of any irregularity in respect of any of the following matters, namely—

(1) any statement made in regard to the dwelling of the persons married, or to the consent of any person whose consent to such marriage is required by law

(2) the notice of the marriage

(3) the certificate or translation thereof

(4) the time and place at which the marriage has been solemnized

(5) the registration of the marriage

**78.** Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry, may, within one month next after the discovery of such error, in the presence of

**Correction of errors.**

**Destroying or falsifying register-books**

**Limitation of prosecutions under Act**

**What matters need not be proved in respect of marriage in accordance with Act**

the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof

And every entry made under this section shall be attested by the witnesses in whose presence it was made

And in case such certificate has been already sent to the Registrar-General of Births, Deaths and Marriages, such person shall make and send in like manner a separate certificate of the original erroneous entry and of the marginal correction therein made.

**(Note)**

**N B**—The words "Registrar-General of Marriages" were substituted for the words "Secretary to the Local Government" by S. 30 (b) of Act VI of 1886.

**79** Every person solemnizing a marriage under this Act, and hereby required to register the same,  
Searches and  
copies of entries.

and every Marriage-Registrar or Registrar-General of Births, Deaths and Marriages having the custody for the time being of any register of Marriages, or of any certificate, or duplicate or copies of certificate, under this Act,

shall, on payment of the proper fees, at all reasonable times, allow searches to be made in such register, or for such certificate, or duplicate, or copies, and give a copy under his hand of any entry in the same

**(Note)**

**N.B**—The words "Registrar-General of Marriages" in this section were substituted for the words "Secretary to the Local Government" by S. 30 (b) of Act VI of 1886

**80.** Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of any entry of a marriage in such register, or of any such certificate or duplicate shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to

\* Certified copy of entry in marriage-register, etc., to be evidence.

be so certified therein, without further proof of such register or certificate or duplicate, or of any entry therein, respectively, or of such copy.

**81.** The Registrar-General of Births, Deaths and Marriages and the officers appointed under S 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them, respectively, during such quarter, the certificates of the marriages of which the Governor General in Council may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by them respectively, to the Secretary of State for India.

**(Notes).**

**General.**

**N.B.**—This section was substituted for the old S 81 by Act XIII of 1911. The old S 81 ran as follows —

“ The Registrar-General of Births, Deaths and Marriages and the officer appointed under S 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them respectively during such quarter, the certificates of the marriages of which the Governor General in Council may desire that evidence shall be transmitted to England,

and shall send the same certificates, signed by them respectively, to the Secretary to the Government of India in the Home Department, for the purpose of being forwarded to the Secretary of State for India and delivered to the Registrar-General of Births, Deaths and Marriages in England

Provided that, in the case of the Government of Madras and Bombay, the said certificates shall be forwarded by such Government respectively directly to the Secretary of State for India

**82.** Fees shall be chargeable under this Act for—receiving and publishing notices of marriages, issuing certificates for marriage<sup>1</sup> by Marriage-Registrars, and registering marriages by the same, entering protests against, or prohibitions of, the issue of certificates for marriage<sup>1</sup> by the said Registrars ;

searching register-books or certificates, or duplicates or copies thereof ; giving copies of entries in the same under sections 63 and 79.

The Local Government shall fix the amount of such fees<sup>2</sup> respectively,

and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

**(Notes)**

**1.—“Certificates for Marriage”**

**N.B.**—The words “Certificates for Marriage” in this section were substituted for the words “certificate of marriages” and “Marriage-Certificates” respectively by the Repealing and Amending Act I of 1903, S. 3 and Sch. II

**2.—“The Local Government shall fix the amount of such fees, etc.”**

**N B.**—For notifications fixing the amount of such fees in—

- (1) Ajmer-Merwara, see Aj. R. & O. ,
- (2) Assam, see Assam Gazette, 1901 Pt. II, p. 397 ;
- (3) Baluchistan, see Bal. Code ,
- (4) Bengal, see Ben. R. & O. ,
- (5) Bombay, see Bom. R. & O. ,
- (6) Burma, see Bur. R. M.,
- (7) Central Provinces , see C P R. & O.,
- (8) Madras, see Fort St. George Gazette, 1905, Pt. I, p. 636
- (9) Punjab (including the North-West Frontier Province), see Punjab. R. & O. ,
- (10) United Provinces of Agra and Oudh, see North-Western Provinces and Oudh Local Rules and Orders, 1894, p. 42.

**83** The Local Government may make rules in regard to the disposal of the fees mentioned in section 82, the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act

Power to make rules<sup>1</sup>.

**(Notes)**

**1 —“Power to make rules”**

For rules under S. 83 for.—

- (1) A-sam see Assam Gazette, 1901, Pt. II, p. 397 ,
- (2) Baluchistan see Bal. Code .
- (3) Bengal, see Ben. R. & O. ,
- (4) Burma, see Bur. R. M. .
- (5) Central Provinces see C P R. & O. ,
- (6) Madras, (applicable also to the Native States of Travancore, Cochin, Pudukkottai, Sandur and Banganapalli), see Fort St. George Gazette, 1905, Pt. I, p. 636
- (7) Punjab (including North-West Frontier Province), see Punjab. R. & O.
- (8) United Provinces, see North-Western Provinces and Oudh Local Rules and Orders, 1894, p. 42. **S-T**

**84** The powers conferred on the Local Government by sections 82 and 83 may, so far as regards Native States, be exercised by the Governor General in Council

Power to prescribe fees and rules for Native States<sup>1</sup>.

be so certified therein, without further proof of such register or certificate or duplicate, or of any entry therein, respectively, or of such copy.

**81.** The Registrar-General of Births, Deaths and Marriages and the officers appointed under S. 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them, respectively, during such quarter, the certificates of the marriages of which the Governor General in Council may desire that evidence shall be transmitted to England, and shall send the same certificates, signed by them respectively, to the Secretary of State for India.

(Notes).

**General.**

**N.B.**—This section was substituted for the old S. 91 by Act XIII of 1911. The old S. 91 ran as follows —

“ The Registrar-General of Births, Deaths and Marriages and the officers appointed under S. 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them respectively during such quarter, the certificates of the marriages of which the Governor General in Council may desire that evidence shall be transmitted to England,

and shall send the same certificates, signed by them respectively, to the Secretary to the Government of India in the Home Department, for the purpose of being forwarded to the Secretary of State for India and delivered to the Registrar-General of Births, Deaths and Marriages in England

Provided that, in the case of the Governments of Madras and Bombay, the said certificates shall be forwarded by such Governments respectively directly to the Secretary of State for India.

**82.** Fees shall be chargeable under this Act for—receiving and publishing notices of marriages, issuing certificates for marriage\* by Marriage-Registrars, and registering marriages by the same, entering protests against, or prohibitions of, the issue of certificates for marriage<sup>1</sup> by the said Registrars;

searching register-books or certificates, or duplicates or copies thereof; giving copies of entries in the same under sections 63 and 79.

The Local Government shall fix the amount of such fees<sup>2</sup> respectively,

and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

**(Notes).**

**1.—“Certificates for Marriage.”**

**N.B.**—The words “Certificates for Marriage” in this section were substituted for the words “certificate of marriages” and “Marriage-Certificates” respectively by the Repealing and Amending Act I of 1903, S. 3 and Sch. II.

**2.—“The Local Government shall fix the amount of such fees, etc.”**

**N.B.**—For notifications fixing the amount of such fees in—

- (1) Ajmer-Merwara, *see* Aj. R. & O.,
- (2) Assam, *see* Assam Gazette, 1901, Pt. II, p. 397,
- (3) Baluchistan, *see* Bal. Code,
- (4) Bengal, *see* Ben. R. & O.,
- (5) Bombay, *see* Bom. R. & O.,
- (6) Burma, *see* Bur. R. M.,
- (7) Central Provinces, *see* C.P. R. & O.,
- (8) Madras, *see* Fort St. George Gazette, 1905, Pt. I, p. 636.
- (9) Punjab (including the North-West Frontier Province), *see* Punj. R. & O.,
- (10) United Provinces of Agra and Oudh, *see* North-Western Provinces and Oudh Local Rules and Orders, 1894, p. 42.

**83.** The Local Government may make rules in regard to the disposal of the fees mentioned in section 82, the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act

Power to make rules<sup>1</sup>.

**(Notes).**

**1.—“Power to make rules”**

For rules under S. 83 for.—

- (1) Assam, *see* Assam Gazette, 1901, Pt. II, p. 397,
- (2) Baluchistan, *see* Bal. Code,
- (3) Bengal, *see* Ben. R. & O.,
- (4) Burma, *see* Bur. R. M.,
- (5) Central Provinces, *see* C.P.R. & O.,
- (6) Madras, (applicable also to the Native States of Travancore, Cochin, Pudukkottai, Sandur and Banganapalli), *see* Fort St. George Gazette, 1905, Pt. I, p. 636.
- (7) Punjab (including North-West Frontier Province), *see* Punj. R. & O.,
- (8) United Provinces, *see* North-Western Provinces and Oudh Local Rules and Orders, 1894, p. 42.

**S-T**

Power to prescribe fees and rules for Native States<sup>1</sup>.

**84.** The powers conferred on the Local Government by sections 82 and 83 may, so far as regards Native States, be exercised by the Governor General in Council.



(Notes).

**1.—“Power to prescribe fees and rules for Native States.”**

**N.B. 1.**—For notification issued by the Governor-General in Council for all Native States, except those which are situate within, or border on, the Presidencies of Fort St. George and Bombay, but including the territories of the Maharaja of Mysore and the Baluchistan Agency Territories, see Brit. Enact. N.S. (W I), Ed. 1900, p. 16, and *ibid.* (N I.), Ed. 1899, p. 323, for the Baluchistan Agency Territories.

**N.B. 2.**—For notification as to retention of fees by Marriage-Registrars in Native States situate within the limits of the Madras Presidency, see *ibid.* (Mad. & Mv.), 1900, p. 24.

**N.B. 3.**—For notification by the Government of Madras in respect of rules under Ss. 82 and 83, see Fort St. George Gazette, 1905, Pt. I, p. 637.

Power to declare who shall be District Judge<sup>1</sup>.

**85.** The Local Government may, by notification in the official Gazette, declare who shall, in any place to which this Act applies, be deemed to be the District Judge

(Notes)

**1.—“Power to declare who shall be District Judge.”**

**N.B.**—For District Judges under the Act appointed for—

- (1) Ajmer-Merwara, see Aj. R. & O.
- (2) Assam, see Assam Gazette, 1901, Pt. II, p. 397.
- (3) Bengal, see Ben. R. & O.,
- (4) Bombay, see Bom. R. & O.,
- (5) Central Provinces, see C P R. & O.,
- (6) Punjab (including the North-West Province), see Punj. R. & O.,
- (7) United Provinces of Agra and Oudh, see North-Western Provinces and Oudh Local Rules and Orders, 1891, p. 42.

Power to delegate functions under this Act of Governor-General in Council.

**86.** The powers and functions given by this Act to the Governor General in Council may be delegated to and exercised by such officers as the Governor General in Council from time to time appoints<sup>1</sup> in this behalf.

And all such powers and functions may be exercised, as regards Native States situate within or bordering on<sup>2</sup> the presidencies of Fort Saint George<sup>3</sup> and Bombay, by the Governors in Council of those Presidencies respectively.

(Notes)

**1.—“Governor General. . .appoints.”**

(1) Notifications delegating powers and functions under Ss. 6, 8 and 9.

For——to,——

- (1) The Agent to the Governor-General in Baluchistan, see Brit. Enact. N.S. (N.I.) 1899, p. 322.

**1.—“Governor-General . . . appoints ”—(Concluded).**

- (2) The Lieutenant-Governors of Bengal, the United Provinces of Agra and Oudh, the Punjab and Burma, and the Chief Commissioners of Assam and the Central Provinces, for States under those Provinces. *See ibid.*, p. 24. **Y**
- (3) The Agent, Governor-General, Central India, for States under that Agency. *See Brit Enact (C.I.) 1899*, p. 45. **W**
- (4) The Resident in Mysore for that State. *See ibid (Mad & My.)* p. 47. **X**
- (5) The Resident at Hyderabad for the Hyderabad State. *See ibid. (Hyd)* 1900, p. 24. **Y**
- (6) The Agent, Governor-General, Rajputana, for the Rajputana States. *See Ibid. (Raj)*, 1899, p. 29. **Z**
- (7) As to States under the Government of Bombay. *See* under the several Agencies in *ibid.*, (W.I.), Ed. 1900. **A**

**2 —“ Situate within or bordering on.”**

**N.B.**—The words “ Situate within or bordering on” in para (2) of this section were substituted for the words “situate within the local limits of” by S. 10, Act II of 1891 and are to be read as if enacted when Act XV of 1872 was passed

**3 —“ Presidencies of Fort Saint George, etc.”**

**N.B.**—As to notification by Government of Madras, *see* notes under Ss. 82, 83, 84

Nothing in this Act applies to any marriage performed by any Minister, Consul or Consular Agent between subjects of the State which he represents and according to the laws of such State.

Saving of Consular marriages.

Non-validation of marriages within prohibited degrees

**88.** Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.



## SCHEDULE II.

(See sections 24 and 50.)

## CERTIFICATE OF RECEIPT OF NOTICE.

I,

do hereby certify that, on the \_\_\_\_\_ day of \_\_\_\_\_, notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of \_\_\_\_\_ one of the parties (that is to say) . —

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of residence.	Church, chapel or place of worship in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different districts.
<i>Martha Green.</i>	<i>Widower</i>	<i>Carpenter.</i>	<i>Of full age.</i>	<i>16, Chive Street</i>	<i>23 days.</i>	<i>Free Church of Scotland, Church, Calcutta.</i>	
<i>Spunster.</i>			<i>Minor</i>	<i>20, Hastings Street.</i>	<i>More than a month</i>		

and that the declaration, [or oath]<sup>1</sup> required by S 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the XV of 1872. said (*James Smith*).

Date of notice entered  
Date of certificate given

) The issue of this certificate has not  
been prohibited by any person autho-  
rized to forbid the issue thereof.

Witness my hand, this \_\_\_\_\_ day of \_\_\_\_\_ seventy-two

(Signed)

This certificate will be void, unless the marriage is solemnized on or before the \_\_\_\_\_ day of \_\_\_\_\_

[The *italics* in the schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]



## SCHEDULE IV.

(See sections 32 and 54.)

## MARRIAGE REGISTER BOOK.

Number.	WHEN MARRIED.			NAMES OF PARTIES.		Age.	Condition	Rank or profession.	Residence at the time of marriage	Father's name and surname.
				Christian name.	Surname.					
	Day.	Month.	Year.							
1				James	White	26 years	Widower	Carpenter	Agra.	William White,
				Martha	Duncan	17 years	Spinster	...	Agra	John Duncan.

Married in the

This marriage was solemnized between us ( James White, ) in the pre- ( John Smith.  
sence of us ( Martha Duncan, ) John Green.

## CERTIFICATE OF MARRIAGE.

Number.	WHEN MARRIED.			NAMES OF PARTIES		Age.	Condition	Rank or profession.	Residence at the time of marriage	Father's name and surname.
				Christian name	Surname					
	Day.	Month.	Year							
1				James	White	26 years	Widower	Carpenter	Agra	William White,
				Martha	Duncan	17 years	Spinster	...	Agra	John Duncan.

Married in the

This marriage was solemnized between us ( James White, ) in the pre- John Smith.  
sence of us ( Martha Duncan, ) John Green.

## SCHEDULE V.

(See section 2)

## ENACTMENTS REPEALED.

Number and year.	Title.	Extent of Repeal.
Statute 58 Geo. 3, 'cap. 84.	An Act to remove Doubts as to the Validity of certain marriages had and solemnized within the British territories in India.	The whole.
Statutes 14 and 15 Vict., cap. 40	An Act for Marriages in India.	The whole.
Act No. V of 1852	An Act for giving effect to the provisions of an Act of Parliament, passed in the 15th year of the reign of Her present Majesty, intituled "An Act for Marriages in India."	So much as has not been repealed.
Act No V of 1865	The Indian Marriage Act, 1865	The whole Act, except so far as it relates to the Straits Settlements.
Act No XXII of 1866	An Act to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts and the Cantonments of Secunderabad, Trimulgerry and Aurungabad	The whole.

**RULES AND ORDERS MADE UNDER ACT XV OF 1872  
(CHRISTIAN MARRIAGE).**

**I — BENGAL.**

**Registration of births, deaths and marriages**

*Notifications Nos. 118, 119 and 120, dated the 8th January, 1901 (published in the Calcutta Gazette of 1901, Pt. I, pp. 31—40.*

No. 118.—In exercise of the power conferred by section 85 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant-Governor is pleased to declare that, in every place in Bengal to which the said Act applies and for which a District Judge has been appointed under the Bengal, North-Western Provinces, and Assam Civil Courts Act., XII of 1887, such Judge shall be deemed to be the District Judge for the purposes of the first mentioned Act.

No. 119.—In exercise of the powers conferred by section 62 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant Governor is pleased to direct—

- (1) That the register-book referred to in that section shall be kept in the first form prescribed in Schedule IV to the said Act, and
- (2) That the extracts referred to in that section shall be made in the form prescribed in the Appendix I to this notification, and shall be deposited in the office of the Registrar-General of Births, Deaths and Marriages on the 31st December of each year.

#### 11—RULES

No. 120.—In exercise of the powers conferred by sections 82 and 83 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant-Governor is pleased to fix the following fees and to make the following rules for the disposal of such fees, the supply of register-books, and the preparation and submission of returns of marriages solemnized under the said Act.

I. Fees shall be levied and disposed of in the manner prescribed in the following table —

For what purpose levied.	To be levied						How fees to be disposed of		
	By Marriage Registers			By Licensed Ministers.					
	Under sections 37, 61, 63, or 64.								
	2			3			4	5	
	Rs.	A.	P.	Rs.	A.	P.	Rs.	A.	P.
(1) For receiving each notice of marriage.	1	0	0	1	0	0			
(2) For publishing each notice of marriage.	2	0	0	2	0	0			
(3) For the issuing of each certificate by a Marriage-Registrar	5	0	0				0	1	0
(4) For registering each marriage by a Marriage-Registrar.	3	0	0						
(5) For every protest against, or prohibition of, the issue of a marriage certificate by a Marriage-Registrar.	10	0	0						
(6) For allowing a search to be made in the marriage register-book or for searching certificates, duplicates, or copies for a period of not more than one year or (in cases under sections 37, 61, 63 or 64) two years.	1	0	0	1	0	0	0	8	0
(7) Ditto for every additional year.	0	1	0	0	1	0	0	2	0
(8) For giving copies or duplicates of certificates	1	0	0	1	0	0	0	1	0

Fees levied by Marriage-Registrars must be paid into the Government Treasury. Fees levied by other persons may be retained by them. Marriage-Registrars are authorised to remit any portion, not exceeding three-fourths of the fees, in cases where they may consider the parties unable to pay.

Fees levied by Marriage-Registrars must be paid into the Government Treasury. Fees levied by other persons may be retained by them. Marriage-Registrars are authorised to remit any portion, not exceeding three-fourths of the fees in cases where they may consider the parties unable to pay.

Supply of registers and forms gratis. 2 (1) Registers and forms shall, whenever required, be supplied to Marriage-Registrars by the Superintendent of Stationery free of charge

(2) One full set of registers and forms shall be supplied by the Superintendent of Stationery free of charge to licensed ministers and to persons authorised to grant certificates of marriages between Native-Christians.



3. (1) Registers and forms required by any person referred to in sub-rule (2) of rule Supply of regis- 2 after one full set has been furnished under that sub-rule may  
ters and forms on be supplied by the Superintendent of Stationery on payment  
payment. being made for the same out of the fees received by such persons  
under rule 1.

(2) When the Superintendent of Stationery receives an indent under sub-rule (1), he shall intimate to the indenting officer the cost of the registers and forms required.

(3) The indenting officer must send the amount of such cost to the nearest civil treasury, with a chalan, in duplicate, stating the date of the Superintendent's intimation.

(4) One copy of such challan shall be retained in the treasury, and the other shall be returned, duly receipted, to the remitter for transmission to the Superintendent of Stationery.

(5) On receipt of the receipted chalan, the Superintendent shall comply with the indent.

Indents when to be submitted to the Superintendent of Stationery direct and when through another officer. 4 (1) Indents for registers and forms required by the Registrar of the Archdeaconry, the Senior Chaplain of the Church of Scotland, the most Reverend Archbishop Dr. Paul Goethals, s. j., or the Vicar-General of the Portuguese Missions in Bengal, shall be submitted by them direct to the Superintendent of Stationery.

(2) Indents for registers and forms required by other officers shall be submitted by or through the Commissioner of the Division, or the Senior Marriage-Registrar, Calcutta, to the Superintendent of Stationery.

Forms of indent. 5 The forms prescribed in Appendices VIII (a) to VIII (d) shall be used for indents.

Certificate on returns of solemnization of marriages. 6. (1) Every return submitted under sections 29, 30 or 31 of the Indian Christian Marriage Act, 1872, shall have endorsed on it a certificate of truth in the form prescribed in Appendix IV.

(2) Such certificate must be written or printed on the face of the form on which the returns are made, and the number of entries recorded must be mentioned in the certificate.

7. If during any quarter no marriages have been recorded, a certificate of no occurrence in the form prescribed in Appendix V shall be forwarded both by the officers who are required to furnish returns of marriages and by those who are required by sections 34, 55 and 56 of the said Act to submit certificates of marriages in original.

Separate returns for each quarter. 8. Returns of marriages for each quarter shall be kept distinct.

9. The officers to whom returns of marriages are submitted and who are, by sections 29, 30 and 31 of the said Act, entrusted with the duty of forwarding a copy of such returns to the Registrar-General, shall perform that duty within two months of the end of the quarter to which the returns relate.

## MARRIAGE RETURNS

No returns other than those prescribed by the Indian Marriage Act are required.

The procedure to be observed in the submission of the original certificates of marriages, by ministers of religions other than those who are empowered to submit returns, and by Marriage-Registrars is laid down in the Indian Marriage Act and shall be observed.

See Bengal Local Statutory Rules and Orders, 1903, Vol II, 593 to 598.

APPENDIX I.

*Marriages solemnized at*

When married.				Names of parties.		Age.	Condition.	Rank or profession.	Residence at the time of marriage.	Father's name and surname.	By banns or license or notice.	Signature of the parties.	Signature of two or more witnesses present.	Name and designation of person by whom the ceremony was performed.
Year.	Month.	Day.	Christian	Surname.										
1	2	3	4	5	6	7	8	9	10	11	12	13	14	

See Bengal Statutory Rules and Orders, 1903, Vol II, p. 598.

## II—BOMBAY

*The Collector and District Magistrate to act as Marriage-Registrar in a district where there is no Resident Marriage-Registrar*

Under the provisions of section 7 of Act XV of 1872, His Excellency the Governor in Council is pleased to declare that in a district where there is no Resident Marriage-Registrar, the Collector and Magistrate of such district shall be considered and shall act as Registrar of Marriages. *Notification, dated 15th November, 1872, B.G.G., 1872, Pt. I, p. 1202.*

*Orders appointing Marriage-Registrars*

With reference to Notification in the Ecclesiastical Department, dated 19th November, 1872, published at page 1202, Part I, of the *Bombay Government Gazette*, dated 21st idem, His Excellency the Governor in Council, is pleased to appoint the City Magistrate of Poona, whenever he is a Christian, to be a Marriage-Registrar for the District of Poona under the provisions of section 7 of Act XV of 1872. *Notification No. 30, dated 21st August, 1886, B.G.G., 1886, Pt. I, p. 695.*

Under Section 7 of the Indian Christian Marriage Act, XV of 1872, His Excellency the Governor in Council is pleased to appoint the District Magistrate and the Cantonment Magistrate, Ahmedabad, Senior Marriage-Registrar and Marriage-Registrar, respectively, for the district of Ahmedabad. *Notification, No. 12, dated 27th February, 1888, B.G.G., 1888, Pt. I, p. 206.*

Under Section 7, Part I, of the Indian Christian Marriage Act, XV of 1872, His Excellency the Governor in Council is pleased to appoint the Political Resident, Aden, to be Marriage-Registrar at Aden. *Notification, No. 1, dated 8th January 1891, B.G.G., 1892, Pt. I, p. 38.*

Under Section 7, Part I of the Indian Christian Marriage Act, XV of 1872, His Excellency the Governor in Council is pleased to appoint the Deputy Commissioner, Upper Sind Frontier, to be Marriage Registrar, Upper Sind Frontier District. *Notification, No. 45, dated 10th August, 1892, B.G.G., 1892, Pt. I, p. 806.*

*Order appointing a District Judge for the purpose of Section 85 and prescribing fees chargeable under Section 82.*

In the exercise of the power vested in him by Act XV of 1872 (The Indian Christian Marriage Act), His Excellency the Governor in Council is pleased to declare and direct as follows:—

That the District Judge, for the purpose of Section 85 of Act XV of 1872, shall be the District Judge appointed under Act XIV of 1869 (The Bombay Civil Courts' Act), and that his jurisdiction shall extend to the local limits fixed by the Bombay Government under Section 3 of Act XIV of 1869. *Notification, dated 9th April, 1873, B.G.G., 1873, Pt. I, p. 337.*

That the fees chargeable under Act XV of 1872, Section 82, shall be as follows:—

	Rs. A. P.
For receiving, publishing and issuing a certificate of the receipt of a notice of marriage	8 0 0
For registering and granting a certificate of marriage	4 0 0
For entering a protest against or prohibition of the issue of a marriage certificate	10 0 0
For searching the register or book of certificates, or copies thereof, and granting an extract therefrom	2 0 0

That a Marriage Registrar may, at his discretion, remit any part not exceeding three-fourths of the above fees to persons who may appear to him to be in indigent circumstances. (*Ibid*)

That all fees under the provisions of Act XV of 1872, received by a Marriage Registrar, shall be paid by him into the Government Treasury, and all such fees received by a person other than a Marriage Registrar solemnizing a marriage, may be retained by him. (*Ibid.*)

That the form prescribed by Schedule IV of Act XV of 1872 shall be the form of register book to be kept in accordance with Section 62. (*Ibid.*)

*Fees to be charged for a Certificate of Marriage.*

Under S 82 of Act XV of 1872 (The Indian Christian Marriage Act), and with reference to Notification, dated 9th April 1873, His Excellency the Governor in Council is pleased to direct that no fee shall be demanded or paid for a certificate demanded at the time of a marriage taking place under Part V of the said Act, but when a certificate shall be demanded at any subsequent time, the fee of Rs. 2 should be paid for the labour imposed upon the Marriage Registrar in searching his register books and granting the certificate.—*Notification, dated 7th October 1874, B G G, 1874, Pt. I, p. 620*

See Bombay Local Rules and Orders, 1896, Vol. I, pp. 100, 101.

**III.—RULES AND ORDERS OF THE GOVERNMENT OF THE U.P. OF  
AGRA AND OUDH RELATING TO MARRIAGES.**

**Marriage banns, Publication of.**

The Governor-General in Council is advised that no person can claim to have his banns published in any particular church, except so far as may be arranged by the Ecclesiastical authorities for the convenience of residents in particular districts. His Excellency in Council is further advised that, although a marriage solemnized in India without banns or license is not invalid on that account, no person can claim to be married by a clergyman of the Church of England without either a license or the publication of banns, and that if a clergyman abstains from solemnizing a marriage unless one or other of these two conditions is fulfilled, no person can compel him to solemnize it. G.G.O. No 17, dated the 23rd May, 1887, printed in the Manual of Orders of Government, U.P. of Agra and Oudh, 1902, Vol. I, Dept. III, p. 77

**Hindu marriage expenses.**

Government will gladly see Magistrates doing what they can, without the exercise of any official pressure, in the way of aiding the various societies formed throughout the country with the object of reducing Hindu marriage expenses. G.O. No 13-A, dated 3rd May 1875. Printed in the Manual of Orders of Government, U.P. of Agra and Oudh, 1902, Vol. I, Dept. III, p. 77

So far as, without official interference, aid can be given, it may with advantage be done. No pressure in any form must be brought to bear, but if Magistrates can enlist the sympathies of the people on the side of reform, they will be acting unobjectionably and usefully. G.O. No 13-A., dated 3rd May 1875. Printed *Ibid*

**Marriages of Roman Catholic Native-Christians**

The following is the manner of registration of marriage of Roman Catholic Native Christians.—

The priests are supplied with a register in triplicate, which they fill up in their own vernacular, or in Latin or English as may be most convenient to them, and one copy or set of entries is torn off by them and submitted to the Roman Catholic Bishop, and by him forwarded to the Marriage-Registrar of the district. G.G.O. No 791-A., dated 19th August 1873. Printed *Ibid*.

**License to clergymen of the Episcopal Methodist Church of America.**

It would be unsafe to accept clergymen of the Episcopal Methodist Church of America as coming within the purview of section 5, clause I of the Indian Christian Marriage Act of 1872, and they should therefore apply to be specially licensed. G.G.O. No 289, dated 9th February 1886, printed (*Ibid*).

**Rules under the Christian Marriage Act, XV of 1872.**

The following are the rules under Ss 6, 7, 9, 62, 82, 83 and 85 of Act XV of 1872 (the Indian Christian Marriage Act), as amended by Act VI of 1886. (See G.O. No. 733 VII—249 B., dated 5th August 1891.)

1. Licenses are granted by the Local Government on applications submitted through the Magistrate of the district and the Commissioner of the division.

2. The Magistrate of the district, if of the Christian religion, is *ex-officio* Senior Marriage-Registrar for the purposes of the Act.

3. The Commissioner of Kumaun is deemed to be a "District Judge" within his division under S. 85 of Act XV of 1872

4. The following books are supplied to each person on receiving a license to solemnize marriages, or to be a Marriage-Registrar under sections 6 and 7, to grant certificates under section 9 of the Act —

- (1) A copy of the Act.
- (2) A book of notices of marriage.
- (3) A book of certificates of notices given and declarations made.
- (4) A marriage register book with certificates in counterfoil.
- (5) A similar book for Native Christians, with an additional column at the end showing the hour at which the marriage was performed.

5. Every Minister, on receiving intimation that he has been licensed, should take over the books kept by his predecessor, if there was one, and report to the Registrar-General of Births, Deaths and Marriages that he has done so, specifying the books received.

6. If he is not succeeding any other Minister licensed to solemnize marriages, or if any of the books are wanting, the requisite books will be supplied from the Office of the Registrar-General of Births, Deaths and Marriages on application being made.

7. Every Minister or other person licensed under the Act, who quits his district permanently, or intends no longer to solemnize marriages, is required to make over all the books in his possession to his successor if one has been appointed, or to the Magistrate of the district if there be no successor, and to report to the Registrar-General of Births, Deaths and Marriages that he has done so.

8. The Magistrate will forward these books to the Registrar-General of Births, Deaths and Marriages, should no successor have been appointed within one month.

9. Registers which have been filled up will also be forwarded to the Magistrate of the district for transmission to the Registrar-General of Births, Deaths and Marriages.

10. Under S. 62 it is directed that persons licensed under S. 9 of the aforesaid Act to grant certificates of marriages between Native Christians shall use the form of register and certificate prescribed in Schedule IV of the Act, with the addition of a column at the end showing the hour at which the marriage was performed, and shall forward extracts from the registers kept by them to be deposited in the office of the Registrar-General of Births, Deaths and Marriages within one month from the date of the marriage.

# **App. I.] Act XV of 1872 (THE INDIAN CHRISTIAN MARRIAGE ACT). 637**

	Rs.	A	P
11. The following are the fees fixed under S. 82 —			
For receiving and publishing each notice of marriage	...	3	0 0
For issuing certificate of marriage by Marriage-Registrars and registering marriage by the same	...	8	0 0
For entering protest against or prohibition of the issue of a marriage certificate	..	10	0 0
For searching register books or certificates, or duplicates or copies thereof if the search extends over a period of not more than one year .	..	1	0 0
For every additional year	..	0	4 0
For giving copy of entry in the same under Ss. 63 and 79	..	1	0 0

12. The Marriage-Registrar may, at his discretion, remit any part, not exceeding three-fourths, of the above fees, if the party or parties appear to him to be in indigent circumstances.

13. All fees received under the provisions of this Act by a Marriage-Registrar or Registrar-General of Births, Deaths and Marriages are to be accounted for and paid over by him to Government, and all fees received by a person solemnizing a marriage, not being a Marriage-Registrar, may be retained by him.

14. Every Clergyman of the Church of Scotland and such Clergymen of the Church of Rome as are authorized in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which they solemnize marriages, should forward quarterly, *i.e.*, on the 1st January 1st April, 1st July and 1st October, to the Registrar-General of Births, Deaths and Marriages, returns of the entries of such marriages registered by him during the three months next preceding, and every Marriage-Registrar should forward to the Registrar-General of Births, Deaths and Marriages, on the 1st of each month, certificates of all marriages registered by him during the preceding month.

15. The quarterly returns are only required for marriages of Europeans.

16. Ministers licensed to solemnize marriages should submit certificates of marriages solemnized by them at the end of every month to the Senior Marriage-Registrar of their district, who should cause all such certificates which he may receive during any one month to be copied into a book to be kept by him for that purpose and transmit them with such number and signature added thereto as is required in Ss. 35 and 36 to the office of the Registrar-General of Births, Deaths and Marriages. *See G. O. No. 733, VII—294 B dated 5th August, 1891, printed in the Manual of Orders of Government, U.P. of Agra and Oudh, 1902, Vol. I, Dept. III, pp. 77 to 79.*

## **Powers of Local Government as regards Native States**

In exercise of the power conferred by S. 86 of the Indian Christian Marriage Act (XV of 1872) the Governor-General in Council has been pleased to delegate to the Lieutenant-Governor of the United Provinces the powers and functions given to the Governor-General in Council by Ss. 6, 8, and 9 of the said Act as regards the Native States respectively under their political control. G. O. (F.D.) No. 3471-I B, dated 1st October 1897, printed in the Manual of Orders of Government, U. P. of Agra and Oudh, 1902, Vol. I, Dept. III, p. 80.

When issuing notifications granting licenses under Ss. 6, 8 and 9 of the Indian Christian Marriage Act (XV of 1872) as regards Native States, it is desirable to lay down in them specifically that they give authority to the licensees only so far as regards Christian subjects of His Majesty. (G. O. (F.D.) Nos. 570-I B, dated 26th February 1898, and 1566 I.B., dated 4th June 1898, printed *ibid*).

## **Definition of Native Christians**

A difficulty having arisen as to (1) what constitutes a Native Christian subject of His Majesty, and (2) what steps should be taken in reference to Native Christians,

living in Native States who may desire to be married according to Christian form—it has been ruled that the phrase “Native Christian” is explained in the Indian Christian Marriage Act (XV of 1872); and that the expression “subject of His Majesty” may be taken to include a British subject by birth, naturalization, cession, conquest or, in the case of a woman, by marriage. A British subject by birth, *i. e.*, a natural born British subject, is a person who was himself born in the dominions of His Majesty, or whose father or grandfather was so born; and a naturalized British subject is a person who is not by birth or descent, as aforesaid, a British subject, but has acquired British nationality by means of naturalization. In this connection it should be borne in mind that the Indian Naturalization Act (XXX of 1852) will not confer upon a person who has been naturalized in British India under its provisions the privilege of British Nationality elsewhere than within British India. A Native Christian born in British India does not cease to be a Native Christian subject of His Majesty merely by reason of his settling in a Native State; and the children and grandchildren of such a person, though born in a Native State, are *prima facie* British subjects. If in any given case there is doubt as to the facts the political authorities should be consulted.

As regards the second question, if both the parties who desire marriage are British subjects and one or both are Christians, no difficulty arises. If these conditions are not satisfied, a Christian Minister should ascertain whether marriage by him would be recognized by the Law of the Native State. If any doubt exists he should decline to solemnize the marriage. G. O. (F. D.) No. 23731—B., dated 31st August 1898, printed in the Manual of Orders of Government, United Provinces of Agra and Oudh, 1902 Vol. I, Dept. III, p. 99.

**N.B**—See also list of Local Rules and Orders, North-west Provinces and Oudh, 1898, p. 43

### **Marriages and divorces amongst emigrants to Trinidad**

Magistrates when registering emigrants for Trinidad should specially call their attention to the following extract from an ordinance passed by the Legislative Council of Trinidad for regulating marriages and divorces among Indian immigrants.—

5 (1) An immigrant who, at the time of his arrival in this colony, professes Christianity, shall, immediately upon such arrival, and

(2) an immigrant who, at any time after his arrival in this colony, is converted to Christianity, shall, immediately upon such conversion as to marriages, capacity or incapacity to contract marriage and the conditions subject to which and the manner in which marriage may be contracted, be subject to the general law of the colony.

Abandonment of Christianity shall not affect the operation of this section. See G O No. 1732, dated 8th November 1891, printed in the Orders of the Government of the U.P. of Agra and Oudh, 1902, Vol. I, Dept. III, p. 23.

6. A marriage contracted after the commencement of this ordinance between immigrants both of whom at the date of the marriage profess the same religion, not being the Christian religion, and are subject to the same personal law, shall, if contracted according to the religion and personal law of such immigrants and registered, according to this ordinance, be deemed to be valid as from the date of marriage specified in the register, or, if no such date is specified as from the date of registration provided that both of the following conditions are satisfied (that is to say) —

(1) the man at the date of the marriage must be not under the age of sixteen years; and

(2) the woman at the date of the marriage must be not under the age of thirteen years. (*Ibid*).

IV.—PUNJAB.

Acts of the Governor-General in Council.				Rules and Orders.		
1	2	3	4	5	6	7
Year.	No	Sub-ject.	Sec-tion	Subject.	No and date of Notification.	Where Published.
1872	XV	Chris-tian Mar-riage.	7	Appointing all Deputy Commissioners in the Punjab, being Chris-tians, to be <i>ex-officio</i> Marriage Registrars.	No. 3892, 22nd November, 1876.	Gazette of India, 1876, Part I, p. 505.
"	"	Do	8	Appointing the Resident in Kashmir, being a Ch-ristian, to be a Marriage Registrar within the territories of H H the Maharaja of Jammu and Kashmir	No. 1595 E, 5th August 1886.	1886, Part I, p. 400 (Gazette of India.)
"	"	Do.	8 & 9	Appointing the Deputy Commissioner of Umballa, being a Christian, to be a Marriage Registrar in respect of all places within the territories of H H. the Maharajah of Patiala, and licensing such officer to grant certificates of marriage between Native Christians within the said territories.	No. 4460, 27th December, 1894.	1894, Part I, p. 674 (Gazette of India).
"	"	Do.	56	Appointing the Registrar-General of Births, Deaths and Marriages for the Punjab to whom Marriage Registrar in Patiala shall send the certificates mentioned in section 51	No. 2173, I. A., 9th June, 1897.	1897, Part I, p. 483 (Gazette of India).
"	"	Do.	62	Prescribing a register of all marriages solemnized under Part VI of the Act.	No. 283, 23rd January, 1873 No. 612 9th July, 1891.	1873, Part I, p. 74. 1891, Part I, p. 279.
"	"	Do.	82	Fixing fees chargeable under the Act		
"	"	Do.	85	Appointing Commissioners of Divisions to be "District Judges" under the Act		



## IV.—PUNJAB—(Concluded).

Acts of the Governor-General in Council.				Rules and Orders.		
1	2	3	4	5	6	7
Year.	No.	Subj.	Sec.	Subject.	No. and date of Notification.	Where Published.
1872	XV	Christian Marriage.	82	Exempting soldiers, sailors, and non-commissioned officers and petty officers of Her Majesty's Regular Forces from payment of fees under sections 6, 7 and 8 of Notification No. 283, dated 23rd January 1873.	No. 864, 24th August 1893.	1893, Part I, p. 466
"	"	Do.	82	Fixing fees and making rules as to disposal of fees realised under the Act	No. 283, 23rd January 1873. No 612, 9th July 1891.	1873, Pt. I, p. 74. 1891, Part I, p. 279, (Gazette of India).
"	"	Do.	84	Fixing fees and making rules for the disposal of such fees, so far as regards the Christian subjects of His Majesty within the territories of Native Princes and States in India in alliance with His Majesty	No. 1586 E., 29th August 1892.	1892, Part I, p. 564 (Gazette of India).
"	"	Do.	64	Explaining the procedure to be followed in the Marriages of Native Christians under the Act	Punjab Government Circular 2—227, dated 29th January, 1886.	
"	"	Do.	86	Delegating to Lieutenant Governors of Bengal, North-Western Provinces, Punjab and Burma the powers and functions of the Governor-General in Council, under sections 6, 8 and 9 of the Act as regards the Native States under their political control.	No. 3741 I. B, 1st October 1897,	1897, Part I, p. 873 (Gazette of India).

See List of Rules and Orders, Punjab, 1902, pp. 50 to 52.

# THE MARRIAGE VALIDATION ACT, 1892<sup>1</sup>.

## (ACT II OF 1892.)

[*Passed on the 29th January, 1892.*]

*An Act to validate certain marriages solemnized under Part VI of the Indian Christian Marriage Act, 1872.*

WHEREAS provision is made in Part VI of the Indian Christian Marriage Act, 1872, for the solemnization of marriages between **XV** of 1872. persons of whom both are Native Christians, but not of marriages between persons of whom one only is a Native Christian ;

And whereas persons licensed under S. 9 of the said Act have in divers parts of British India, through ignorance of the law, permitted marriages to be solemnized in their presence under the said Part between persons of whom one is a Native Christian and the other is not a Native Christian,

And whereas it is expedient that such marriages, having been solemnized in good faith, should be validated ; It is hereby enacted as follows :—

### (Notes).

#### 1.—“*The Marriage Validation Act, 1892.*”

##### (1) Statement of Objects and Reasons.

For ———, *See Gazette of India, 1891, Pt. V, p. 142.*

**A**

##### (2) Report of the Select Committee.

For ———, *See Gazette of India, 1892, Pt. V, p. 5.*

**B**

##### (3) Proceedings in Council.

For ———, *See Gazette of India, 1891, Pt. VI, p. 117 and Ibid., 1892, Pt. VI, p. 11.*

**C**

##### (4) Act, where declared in force.

This Act has been declared in force in —

(i) Upper Burma (except the Shan States), *See Burma Laws Act XIII of 1898.*

**D**

(ii) Santhal Parganas, *See Santhal Parganas Settlement Reg. III of 1872, S. 3, as amended by the Santhal Parganas Justice and Laws Reg III of 1899. See also Gazette of India, 1895, Pt. I, p. 310.*

**E**

##### (5) Reasons for the passing of this Act.

The following extract from the proceedings in Council throws light on the above point :—“ Part VI of the Indian Christian Marriage Act is only intended for the solemnisation of marriages between persons both of whom

**1.—“The Marriage Validation Act, 1892”**—(Concluded).

are Native Christians, but by a mistake apparently arising from ignorance of this provision some of the persons licensed to solemnise such marriages have solemnised them between persons only one of whom was a Native Christian, and the result is that as the law at present stands these marriages are invalid; but it has been generally felt that this has arisen out of a mere misconception of the law and that there was no intention on the part of any of the parties concerned to do otherwise than contract valid marriages.” It was however felt desirable, while taking all the care we possibly can to prevent any such irregularity in the future, that these persons—or rather their children—should not suffer by the error, and it was therefore proposed to validate these marriages in the past so far as may be practicable.

“Originally, in order to give time for this Act to become known, it was proposed to validate not only marriages already solemnised up to the passing of the Act, but those which might be solemnised for three months after the passing of it. As, however, the Bill was brought in so long ago, and as every one by the time it was passed into Law was presumed to know everything about it, this course was considered unnecessary, and so this Act validates only such marriages as have already been solemnised under Part VI of the Act. Further, this Act provides that, in case any of these invalid marriages have already been judicially pronounced void, such marriages should not be validated, as vested rights may have been acquired under the decisions thus given, this validation will therefore only extend to marriages which, though invalid under the law, have up to the present time been regarded by the contracting parties as valid.

“I may here mention that, amongst the opinions offered with regard to the Bill, we find one from certain clergymen in the North-Western Provinces who consider that a marriage between a person who is a Native Christian and a person who is not a Native Christian is invalid in itself, —on what principle I do not know, but these gentlemen have thought fit to declare that they will disregard the validation which the Bill contemplates, and that if any of the persons whose marriage has been so validated should wish to set aside the marriage, and to contract a marriage which would be valid before the Church, they would consider it their duty to solemnise such second marriage. I can only say that, so far as the business of this Council is concerned, it is no part of our duty to offer advice to these gentlemen, but I think they should know that any such action on their part would probably bring them within the provisions of the Criminal law and render them liable to prosecution.” See the Speech of Sir A. Miller in the Legislative Council

Commencement.

1 This Act shall come into force at once.

2. In this Act the expression “Native Christian” has the same meaning as in the Indian Christian Marriage Act, 1872.

Definition.

XV of 1872.

3. All marriages which have already been solemnized under XV of 1872. Part VI of the Indian Christian Marriage Act, 1872, between

persons of whom one only was a Native Christian, shall be as good and valid in law as if such marriages had been solemnized between persons of whom both were Native Christians

Provided that nothing in this section shall apply to any marriage which had been judicially declared to be null and void, or to any case where either of the parties has, since the solemnization of such marriage and prior to the commencement of this Act, contracted a valid marriage.

**(Note).**

**General.**

**Scope of the section.**

The following extract from the report of the select committee may be noted:—  
This section as originally drafted proposed to validate all marriages of the kind referred to which may be solemnized within three months after the commencement of the Act. We have omitted this provision as we understand that the attention of all Local Governments has already been drawn by the Government of India to the requirements of the law, and that all persons licensed under S 9 of the Indian Christian Marriage Act, 1872, must by this time have been informed how the law really stands. We think therefore that any further extension of time is unnecessary, and might be mischievous.

We have at the same time inserted a provision that the validation contemplated by S 3 shall not apply to (1) marriages already judicially declared to be void, or to (2) cases in which, subsequent to the solemnization of any such invalid marriage, and before the commencement of this Act, one of the parties has contracted a valid marriage. The equity of these additional provisions is obvious.

In one of the opinions on the Bill which have been referred to us we find that it has been stated by certain clergymen in Allahabad that "the consensus of Christendom and the rule of the English Church do not admit the validity of a marriage between a person baptized and a person unbaptized," and that should any Christian who has entered into such a union desire to forsake it they would encourage him to do so, and that if he wished subsequently "to enter upon a Christian marriage valid before the Church" they would, if there were no special reasons for refusing, solemnize it notwithstanding secular sanction to the previous union. The committee cannot of course presume to offer these gentlemen advice, but we deem it our duty to warn them that by such action they will apparently render themselves liable to a prosecution for abetment of an offence under Chapter XX of the Indian Penal Code "

**4. Certificates of marriages which are declared by the last foregoing section to be good and valid in law, and register-books, and certified copies of true and duly authenticated extracts therefrom, deposited in compliance with the law for the time being in force, in so far as the register-books and extracts relate to such marriages as aforesaid,**

Validation of records of irregular marriages.

shall be received as evidence of such marriages as if such marriages had been solemnized between persons of whom both were Native Christians.

XV of 1872.      Application of Act to marriages under Act V of 1865.      3. References in this Act to the Indian Christian Marriage Act, 1872, shall, so far as may be requisite, be construed as applying also to the corresponding portions of the Indian Marriage Act, 1865<sup>1</sup>.

V of 1865.

(Note).

*1.—“Indian Marriage Act, 1865.”*

**N.B.**—This Act has been repealed (except as to Straits Settlements) by Act XV of 1872.

6. If any person licensed under section 9 of the said Act to grant certificates of marriage between Native Christians shall at any time after the commencement of this Act solemnize or affect to solemnize any marriage under Part VI of the said Act or grant any such certificate as therein mentioned, knowing that one of the parties to such marriage or affected marriage was at the date of such solemnization not a Christian, he shall be liable to have his license cancelled, and in addition thereto he shall be deemed to have been guilty of an offence prohibited by Section 73 of the said Act, and shall be punishable accordingly.

Penalty for solemnizing irregular marriages.

# THE NATIVE CONVERTS' MARRIAGE DISSOLUTION ACT, 1866 <sup>1</sup>.

(ACT XXI OF 1866.)

[*Passed on the 2nd April, 1866.*]

*An Act to legalize, under certain circumstances, the dissolution of marriages of Native Converts to Christianity.*

WHEREAS it is expedient to legalize, under certain circumstances, the dissolution of marriages of Native Converts to Christianity deserted or repudiated on religious grounds by their wives or husbands; It is enacted as follows :—

(Notes).

N.B. —For notes on this Act, see generally notes under Act XXI of 1850 (Caste Disabilities Removal) printed *supra*.

## I.—“*The Native Converts' Marriage Dissolution Act, 1866.*”

### (1) Statement of Objects and Reasons.

For ———, see Gazette of India, 1865, p. 59.

A

### (2) Report of Select Committee.

For the ———, see Gazette of India, 1866, p. 163.

B

### (3) Discussions on the Bill.

For ———, see Gazette of India, 1865, Supplement, p. 5 and 1866, Supplement, p. 201.

C

### (4) Act where declared in force.

This Act has been declared in force in —

(a) British India, except the Scheduled Districts, see Laws Local Extent Act XV of 1874, S. 3.

(b) Santhal Parganas. see Santhal Parganas Settlement Regulation III of 1872.

(c) Arakan Hill District, except so much as relates to a stamp, see Arakan Hill District Laws Reg. IX of 1874.

(d) It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely —

(i) Sindh	See Gazette of India, 1880, Pt. I, p. 672.
(ii) West-Jalpaiguri	Do. 1881, Do. 74.
(iii) The District of Darjeeling	Do. 1886, Do. 500.

**I.—“The Native Converts' Marriage Dissolution Act, 1866 ”—(Concluded).**

(iv) The Districts of Hazaribagh, Lohardaga (now the Ranchi District, *see* Calcutta Gazette, 1899, Pt I, p. 44), and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum ... *See* Gazette of India, 1881, Pt. I, p. 504.

(v) The Poruhat Estate in the Singhbhum District ... Do. 1897, Do. 1059.

(vi) The Scheduled Districts in Ganjam and Vizagapatam ... Do. 1898, Do. 870.

(vii) The Scheduled portion of the Mirzapur District .. Do. 1879, Do. 383.

(viii) Jaunsa Bawar .. Do. 1879, Do. 382.

(ix) The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan (portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the districts of Peshawar and Kohat, now form the North-West Frontier Province, *see* Gazette of India, 1901, Pt I, p. 857, and *ibid.*, 1902, Pt. I, p. 575, but its application to that of the Hazara District known as Upper Tanawal, is barred by the Hazara (Upper Tanawal) Regulation, 1900 (II of 1900) ... Do. 1886, Do. 48.

(x) The District of Sylhet ... Do. 1879, Do. 631.

(xi) The rest of Assam (except the North Lushai Hills) ... Do. 1897, Do. 299.

(xii) The District Lahaul ... Do. 1886, Do. 301.

(e) It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely .—

(i) Kumaon and Garhwal ... *See* Gazette of India, 1876, Pt. I, p. 606.

(ii) The Tarai of the Province of Agra . . . Do. 1876, Do. 505. **D**

**(5) Provisions of Hindu law as to the effect of conversion on the status of marriage.**

**(6) It is a general principle of Hindu Law that conversion of the husband or wife does not dissolve the marriage tie 2 N W P. 300.**

**N. B** —On the above point, *see* notes on pp. 430, 432, *supra*.

**(7) Effect of change of religion on claim for restitution of conjugal rights—Effect of this Act on the provisions of Hindu Law.**

*See* notes at pp 432-435, *supra*. **E**

**(8) Effect of conversion in Mahomedan law—(i) on rights of inheritance and (ii) on marital rights.**

*See* notes on pp 435-440, *supra*. **F**

**(9) This Act implies that a non-Christian marriage is not dissolved by the conversion of one or both of the parties to Christianity.**

It is clear from the provisions of this Act that a non-Christian marriage is not dissolved by the mere fact of the conversion of one or both of the parties to Christianity. 19 C. 252, *see*, also, U. B. R. (1897-1901), Vol. II, p. 483. **G**

Short title.

1. This Act may be cited as the Native Converts' Marriage Dissolution Act, 1866. •

2. [*Commencement of Act*]. Rep. by the Repealing Act, 1874 (XVI of 1874).

3. In this Act—

Interpretation  
clause. "Native husband."

"Native husband" shall mean a married man domiciled in British India, who shall have completed the age of sixteen years, and shall not be a Christian, a Muhammadan nor a Jew :

"Native wife."

"Native wife" shall mean a married woman domiciled in British India, who shall have completed the age of thirteen years, and shall not be a Christian, a Muhammadan nor a Jewess .

"Native law

"Native law" shall mean any law, or custom having the force of law, of any persons domiciled in British India other than Christians, Muhammadans and Jews

"Month" and  
'year "

"Month" and "year" shall respectively mean month and year according to the British calendar

"High Court "

"High Court " shall mean the highest Civil Court of appeal in any place to which this Act extends .

Number

and, unless there be something repugnant in the subject or context, words importing the singular number shall include the plural and words importing the plural number shall include the singular.

When convert  
deserted by his wife  
may sue for conjugal  
society.

4. If a native husband change his religion for Christianity, and if in consequence of such change his Native wife for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society.

When convert  
deserted by her husband  
may sue.

5. If a Native wife change her religion for Christianity, and if in consequence of such change her Native husband for the space of six continuous months desert or repudiate her, she may sue him for conjugal society.

Court in which  
suit shall be brought.

6. If the respondent, at the time of commencement of such suit, reside within the local limits of the ordinary original civil jurisdiction of any of the High Courts of Judicature the suit shall be commenced



in such Court; otherwise it shall be commenced in the principal Civil Court of original jurisdiction <sup>1</sup> of the district in which the defendant shall reside at the commencement of the suit.

(Notes).

**1.—“Principal Civil Court of original jurisdiction.”**

**(1) Court of Deputy Commissioner in the Punjab.**

- The Court of the Deputy Commissioner in the Punjab is a principal Civil Court of Original Jurisdiction of the district within the meaning of S. 3 of the Native Converts' Marriage Dissolution Act (XXI of 1866).  
44 P. R. 1871. **H**

**7** The suit shall be commenced by a petition in the form in the first schedule to this Act, or as near thereto as the circumstances of the case will allow

Suit to be commenced by verified petition.

The statements made in the petition shall be verified by the petitioner in the manner required by law for the verification of plaints; and the petition \* \* \* may be amended by permission of the Court

(Notes).

**General.**

**N. B.**—The words “shall bear a stamp of two rupees, and” were repealed by the Court Fees Act, VII of 1870, Sch. III.

**8.** A copy of the petition shall be served upon the respondent, and the Court shall thereupon issue a citation under the seal of the Court and signed by the Judge.

On service of petition, citation to respondent.

**9.** In ordinary cases the citation shall be in the form in the second schedule to this Act, or as near thereto as the circumstances of the case will allow

Form of citation

But where the respondent is exempt by law from personal appearance in Court, or where the Judge shall so direct, the citation shall be in the form in the third schedule to this Act, or as near thereto as the circumstances of the case will allow.

**10.** A copy of the citation sealed with the seal of the Court shall be served on the respondent; and the provisions of the Code of Civil Procedure, as to service and endorsement of summonses shall apply, *mutatis mutandis*, to citations under this Act.

Service of citation.

**11.** If the respondent shall not obey such citation and comply with every other requirement made upon her or him under the provisions of this Act, she or he shall be liable to punishment under section 174 **XLV of 1860.** of the Indian Penal Code.

**Points to be proved on appearance of petitioner.** **12** On the day fixed in the citation the petitioner shall appear in Court, and the following points shall be proved.—

- (1) the identity of the parties :
- (2) the marriage between the petitioner and the respondent :
- (3) that the male party to the suit has completed the age of sixteen years, and that the female party to the suit has completed the age of thirteen years :
- (4) the desertion or repudiation of the petitioner by the respondent :
- (5) that such desertion or repudiation was in consequence of the petitioner's change of religion
- (6) and that such desertion or repudiation had continued for the six months immediately before the commencement of the suit.

**13.** The respondent, if such points be proved to the satisfaction of the Judge, shall thereupon be asked whether she or he refuses to cohabit with the petitioner, and, if so, what is the ground of such refusal.

**First interrogation of respondent.**

In ordinary cases such interrogation and every other interrogation prescribed by this Act shall be made by the Judge, but when the respondent is exempt by law from personal appearance in Court, or when the Judge shall in his discretion excuse the respondent from such appearance, the interrogations shall be made by commissioners acting under such commission as hereinafter mentioned.

**14.** Every interrogation mentioned in this Act and made by the Judge may, at the discretion of the Judge, take place in open Court or in his private room.

**Interrogations by Judge may be public or private.**

If any such interrogation take place in open Court, the Judge may, so long as it shall continue, exclude from the Court all such persons as he shall think fit to exclude.

**15.** If the respondent be a female and in answer to the interrogatories of the Judge or Commissioners, as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall make an adjournment for order adjourning the case for a year, and directing that, in the *interim* the parties shall, at such place and time as he shall deem convenient have an interview of such length as the Judge shall direct, and in the presence of such person or persons (who may be a female or females) as the Judge shall select with the view of ascertaining whether or not the respondent freely and voluntarily persists in such refusal.

**16.** At the expiration of such adjournment the petitioner shall again appear in Court and shall prove that the said desertion or repudiation had continued up to the time last hereinbefore referred to, and if the points mentioned in section 12 and this section of this Act shall be proved to the satisfaction of the Judge, and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to cohabit with the petitioner, the respondent shall be taken to have finally deserted or repudiated the petitioner :

and the Judge shall, by a decree under his hand and sealed with the seal of his Court, declare that the marriage between the parties is dissolved.

**17.** If the respondent be a male, and in answer to the interrogatories of the Judge or Commissioners as the case may be, shall refuse to cohabit with the petitioner, the Judge, if upon consideration of the respondent's answers and of the facts which may have been proved by the petitioner he shall be of opinion that the ground for such refusal is the petitioner's change of religion, shall adjourn the case for a year

At the expiration of such adjournment, the petitioner shall again appear in Court ; and if the respondent on being interrogated by the Judge or Commissioners, as the case may be, again refuse to

cohabit with the petitioner, the Judge shall thereupon pass such a decree as last aforesaid :

Provided that, if the petitioner shall so desire (but not otherwise), the proceedings in the suit shall, *mutatis mutandis*, be the same as in the case of a female respondent.

**18.** Notwithstanding anything hereinbefore contained, if it shall appear at any stage of the suit that both or either of the parties had not attained puberty at the date of their marriage, and that such marriage has not been consummated, and if, in answer to the interrogatories made pursuant to section 13 of this Act, the respondent shall refuse to cohabit with the petitioner, and allege, as the ground for such refusal, that the petitioner has changed his or her religion, the Judge shall thereupon pass such a decree as last aforesaid.

Decree if respondent so refuse in case of unconsummated marriage, either party being *impubes* at time of marriage

(Notes).

General.

**(1) Right of maintenance of a woman whose marriage has been dissolved under this section.**

- (a) A woman against whom an order declaring her marriage with her husband dissolved has been passed under S. 18 of this Act cannot claim maintenance after her husband's death from her husband's relations either as his widow or as a female member of the family. 2 C. P. L. R. 158. I
- (b) Such maintenance could not in any case be claimed as against her husband's relations irrespective of possession of his property as his heirs. 2 C.P.L.R. 158. J
- (c) The following observations of the Judge in the above case may also be noted — "It has been contended that this decree does not bind, the plaintiff inasmuch as she was a minor at the time when the suit was brought. I am of opinion that this contention cannot be allowed. It is not proved that the plaintiff was a minor. It must be presumed that she was a "native wife" as defined in the Act, i.e., that she had completed the age of thirteen years, and therefore it is quite clear that she could be divorced. The act provides for the divorce of "Native wives" who have completed the age of thirteen years. Besides as regards the present claim it must be taken as long as the decree stands that the plaintiff has been divorced. Then I think it is clear that the plaintiff having been divorced she cannot be regarded as a Narayan's widow. Supposing he had married again and died before his second wife, it seems to me quite clear that the plaintiff could have had no claim against the second wife to his estate.

The only question seems to me to be, whether the plaintiff having by her marriage to Narayan become a member of his family, ceased, when divorced, to be a member of that family. I am inclined to the

**General—(Concluded).**

opinion that the woman only continues a member of her husband's family while her marriage subsists. But it seems unnecessary to decide this because the plaintiff could not in my opinion have had any claim for maintenance against Narayan Rao. The Act contemplates this for (S. 28) it gives the Court power to order the husband to make an allowance to his divorced wife for her life. Moreover it expressly provides that the dissolution shall not affect the status or rights of children, while it makes no provision for the preservation of the divorced wife's rights in her husband's estate. Then, if the plaintiff could not claim maintenance from her husband, neither could she claim it from his relations. If she had no right in her husband's property when he was alive, neither could she have any after his death when the property had passed to his relations."

2 C.P.L.R. 158 (159, 160).     **K**

**19.** When any decree dissolving a marriage shall have been passed under the provisions of this Act, it shall be as lawful for the respective parties thereto to marry again as if the prior marriage had been dissolved by death, and the issue of any such re-marriage shall be legitimate, any Native law to the contrary notwithstanding :

Provided always that no minister of religion shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved under this Act, or shall be liable to any suit or penalty for refusing to solemnize the marriage of any such person.

**(Notes).****General.**

**N.B.**—Compare this section with S. 57 of the Divorce Act (IV of 1869) and S. 43 of the Parsi Marriage Act (XV of 1865).

**20.** In suits instituted under this Act, the Judge shall order a commission to issue to such persons, whether males or females, or both, as he shall think fit, for the examination on interrogatories or otherwise of any persons so exempt as aforesaid.

The provisions of the Code of Civil Procedure shall, as far as practicable, apply to commissions issued under this section.

**21.** At any stage of a suit instituted under this Act, cohabitation as man and wife shall be sufficient presumptive evidence of the marriage of the parties, and proof of the respondent's refusal or voluntary neglect to cohabit with the petitioner, after his or her change of religion and after knowledge thereof by the respondent, shall be sufficient evidence of the respondent's desertion or

Judge to order commission to issue for examination of exempted persons.

Proof of marriage and desertion or repudiation of petitioner in consequence of conversion.

repudiation of the petitioner, and shall also be sufficient evidence that such desertion or repudiation was in consequence of the petitioner's change of religion, unless some other sufficient cause for such desertion or repudiation be proved by the respondent.

22. The provisions of the Code of Civil Procedure as to the summoning and examination of witnesses shall apply in suits instituted under this Act.

Civil Procedure  
Code applied.

(Notes).

General.

**N.B.**—Compare this section with S. 45 of the Divorce Act (IV of 1869) and S. 40 of the Parsi Marriage Act (XV of 1865).

23. If at any stage of the suit it be proved that the male party to the suit is or was at the institution thereof under the age of sixteen years, or that the female party to the suit is or was at the same time under the age of thirteen years, or that the petitioner and the respondent are cohabiting as man and wife, or the Court is satisfied by the evidence adduced that the respondent is ready and willing so to cohabit with the petitioner, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

Dismissal of suit  
if either party under  
age required by Act,  
or if parties cohabit-  
ing, or respondent  
willing to cohabit.

24. If, at any time within twelve months after a decree dismissing the suit upon any of the grounds mentioned in the last preceding section, the respondent again desert or repudiate the petitioner upon the ground of his or her change of religion, the suit may be revived by summoning the respondent; and, upon proof of the former decree and of such renewed repudiation or desertion, the suit shall recommence at the stage at which it had arrived immediately before the passing of such decree; and after the proofs, interrogations, interview and adjournment which may then be requisite under the provisions hereinbefore contained, the Judge shall pass a decree of the nature mentioned in section 16 of this Act.

Revival of suit  
after such dismissal.

25. If at any stage of the suit it be proved that the respondent has deserted or repudiated the petitioner solely or partly in consequence of the petitioner's cruelty or adultery, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

Petitioner's cruel-  
ty or adultery to bar  
suit.

**A suit dismissed under this section shall not be revived.**

**26.** If the petitioner, being a male, has at the time of the institution of the suit two or more wives, he shall make them all respondents; and if at any stage of the suit it be proved that he is cohabiting with one of such wives as man and wife, or that any one of such wives is ready and willing so to cohabit with him, the Court shall pass a decree dismissing the suit and stating the ground of such dismissal.

The provisions as to revival contained in section 24 of this Act shall apply, *mutatis mutandis*, to a suit dismissed under this section.

**27.** A dissolution of marriage under the provisions of this Act shall not operate to deprive the respondent's children (if any) by the petitioner of their status as legitimate children or of any right or interest which they would have had, according to the Native law applicable to them, by way of maintenance, inheritance or otherwise, in case the marriage had not been so dissolved as aforesaid.

**28.** If a suit be commenced under the provisions of this Act, and it appear to the Court that the wife has not sufficient separate property to enable her to maintain herself suitably to her station in life and to prosecute or defend the suit, the Court may, pending the suit, order the husband to furnish the wife with sufficient funds to enable her to prosecute or defend the suit and also for her maintenance pending the suit.

If the suit be brought by a husband against a wife, the Court may by the decree order the husband to make such allowance to his wife for her maintenance during the remainder of her life as the Court shall think just, and having regard to the condition and station in life of the parties.

Any allowance so ordered shall cease from the time of any subsequent marriage of the wife.

(Notes).

General.

**N.B.**—Compare this section with Ss. 36 to 38 of the Divorce Act (IV of 1869) and Ss. 33 to 35 of the Parsi Marriage Act (XV of 1865).

**29.** No appeal shall lie against any order or decree made or

No appeal under Act ; but Judge may state case raising question whether conversion has dissolved marriage

passed by any Court in any suit instituted under this Act ; but if, at any stage of the suit, the respondent shall allege by way of defence that the marriage between the parties has been dissolved by the conversion of the petitioner, and that consequently the petitioner is not a Native husband or a Native wife

(as the case may be) within the meaning of this Act, the Judge, if he shall entertain any doubt as to the validity of such defence, shall either of his own motion or on the application of the respondent, state the case and submit it with his own opinion thereon for the decision of the High Court.

**30** Every such case shall concisely set forth such facts and

Case to state necessary facts and documents, and suit to be stayed.

documents as may be necessary to enable the High Court to decide the questions raised thereby, and the suit shall be stayed until the judgment of such Court shall have been received as hereinafter provided .

**31.** Every such case shall be decided by at least three Judges

Case to be decided by three Judges.

of the High Court, if such Court be the High Court at any of the presidency-towns, and the petitioner and respondent may appear and be

heard in the High Court in person or by advocate or vakil.

(Notes).

General.

**N B.:**—With regard to the provision as to the number of Judges that are enjoined to sit for deciding the case, compare this section with S. 17 of the Divorce Act (IV of 1869).

**32.** If the High Court shall not be satisfied that the state-

High Court may refer case to Judge for additions or alterations.

ments contained in the case are sufficient to enable it to determine the questions raised thereby, the High Court may refer the case back to the Judge by whom it was stated, to make such

additions thereto or alterations therein as the High Court may direct in that behalf.

**33** It shall be lawful for the High Court,

High Court may decide question raised, and Judge shall dispose of case accordingly

upon the hearing of any such case, to decide the questions raised thereby, and to deliver its judgment thereon containing the grounds on which such decision is founded ;



and it shall send to the Judge by whom the case was stated a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Judge shall, on receiving the same, dispose of the case conformably to such judgment.

**34.** Nothing contained in this Act \* \* \* \* shall be taken to render invalid any marriage of a Native convert to Roman Catholicism if celebrated in accordance with the rules, rites, ceremonies and customs of the Roman Catholic Church \* \* \* \*

Saving of Roman Catholic marriages.

(Notes).

General.

**N.B.** (1)—The words and figures "or in Acts XXV of 1864 and V of 1865" in the middle of this section were repealed by the Repealing Act XVI of 1874.

**N.B.** (2)—The words "and no clergyman of such Church shall be liable to any suit or penalty under the provisions of either of the two Acts last hereinbefore mentioned, for solemnizing any such marriage" at the end of the section were repealed by the Repealing Act XVI of 1874.

**35.** This Act shall extend to all the territories that are or shall become vested in Her Majesty or Her successors by the Statute 21 & 22 Vic., cap 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales' Island, Singapore and Malacca \* \*

21 & 22 Vic.,  
c. 106. Extent of Act.

(Notes).

**N.B.**—The remainder of this section, dealing with the power of the Governor-General in Council to extend the Act, etc., was repealed by the Repealing Act XVI of 1874.

## THE FIRST SCHEDULE.

(See Section 7.)

### FORM OF PETITION.

Stamp

To the Judge of the Civil Court of  
The day of 18 .

The petition of A. B. of  
Sheweth :—

1. That your petitioner was born on or about the day of  
18 .

2. That your petitioner was on the                      day of                      in                      the year 18                      lawfully married to C. D. at                      .

3. That the said C. D. is now of the age of                      years or thereabouts.

4. That after his said marriage, your petitioner lived and cohabited with his said wife at                      aforesaid until the                      day of                      18                      .

5. That previous to the                      day of                      18                      your petitioner changed his religion for Christianity, and that on such day                      he was baptized and became a member of the Church of                      .

6. That on the                      day of                      18                      [*at least six months prior to the date of the petition*], the said C. D. deserted your petitioner, and has not since resumed cohabitation with him.

7. That such desertion was in consequence of your petitioner's                      said change of religion.

8. That there is no collusion nor connivance between your                      petitioner and the said C. D.

Your petitioner therefore prays that Your Honour will order the said C. D. to live and cohabit with your petitioner, or declare that your petitioner's marriage is dissolved.

A. B.

### *Form of verification.*

I, A. B., the petitioner named in the above petition, do declare that what is stated therein is true to the best of my information and belief.

### **(Notes).**

**N.B.**—The words "Rs. two" printed below the word "stamp," were repealed by the Repealing and Amending Act XII of 1891.

## THE SECOND SCHEDULE...

*(See section 9.)*

### FORM OF CITATION IN ORDINARY CASES.

To C. D. of                      .

Whereas A. B. of                      , claiming to have been lawfully married to you, the said, C. D., has filed his [or her] petition against you in the Civil Court of                      , alleging that you, the said C. D., have deserted him [or her] for six months in consequence of his [or her] having changed his [or her] religion for Christianity,

and praying that, unless you consent to live and cohabit with him [or her], it may be declared that his [or her] marriage is dissolved : Now this is to command you that, at the expiration of days (*at least one month*) from the date of the service of this on you, you do appear in the said Court then and there to make answer to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that in default of your so appearing, you will be liable to punishment under section 174 of the Indian Penal XLV of 1860. Code.

Dated the                      day of                      18 .

(Signed) E. F.

Judge of the Civil Court of

(*Indorsement to be made after service*)

This citation was duly served by G. H. on the within-named C. D. of                      at                      on the                      day of                      18 .

(Signed) G. H.

### THE THIRD SCHEDULE.

(*See section 2.*)

#### FORM OF CITATION IN CASE OF RESPONDENT EXEMPT FROM APPEARANCE IN COURT.

To C. D. of                      ,

Whereas A. B. of                      , claiming to have been lawfully married to you, the said C. D., has filed his [or her] petition against you in the Civil Court of                      , alleging that you, the said C. D., have deserted him [or her] for six months in consequence of his [or her] having changed his [or her] religion for Christianity, and praying that, unless you consent to cohabit with him [or her], it may be declared that his [or her] marriage is dissolved. Now this is to command you that, at the expiration of                      days [*at least one month*] from the service of this on you, you do hold yourself in readiness to answer and do answer such interrogatories as may be put to you by commissioners duly authorised in that behalf under a commission issued by this Court in reference to the said petition, a copy whereof, sealed with the seal of the said Court, is herewith served upon you.

And take notice that, in default of your so holding yourself in readiness and answering such interrogatories, you will be liable to punishment under section 174 of the Indian Penal Code. XLV of 1860.

Dated the            day of            18            .

(Signed) E. F.

Judge of the Civil Court of

*(Indorsement to be made after service.)*

This citation was duly served by G. H. on the within-named

C. D. of at            on the            day of            18            .

(Signed) G. H.



# THE MARRIED WOMEN'S PROPERTY ACT, 1874<sup>1</sup>

(ACT III OF 1874.)

[*Passed on the 24th February, 1874.*]

An Act to explain and amend the law relating to certain married women, and for other purposes.

WHEREAS it is expedient to make such provision as hereinafter appears for the enjoyment of wages and earnings by women married before the first day of January, 1866, and for insurances on lives by persons married before or after that day :

And whereas by the Indian Succession Act, 1865, section 4, it is enacted that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done, if unmarried :

And whereas by force of the said Act all women to whose marriages it applies are absolute owners of all property vested in, or acquired by, them, and their husbands do not by their marriage acquire any interest in such property, but the said Act does not protect such husbands from liabilities on account of the debts of their wives contracted before marriage, and does not expressly provide for the enforcement of claims by or against such wives. It is hereby enacted as follows :—

## (Notes).

### 1.—“ *The Married Women's Property Act, 1874* ”

#### (1) Statement of Objects and Reasons

For ———, see Gazette of India, 1873 Pt V, p 457.

A

#### (2) Proceedings in Council

For ———, see Gazette of India, Extra Supplements, dated 2nd August and 6th September, 1873, respectively, pp 9 and 12, and *ibid*, 1874, Supplement, p 239

B

#### (3) Act where declared in force

This Act has been declared in force—

(a) the Arakan Hill District, see the Arakan Hill District Laws Regulation, IX of 1874, S. 3

C

**1.—“The Married Women's Property Act, 1874” — (Continued)**

(b) The Santhal Parganas, see the Santhal Parganas Settlement Regulation III of 1872, S. 3, as amended by the Santhal Parganas Justice and Laws Regulation, III of 1899 **D**

(c) Upper Burma generally (except the Shan States), see the Burma Laws Act, XIII of 1898, S. 4 (1) and Sch. I **E**

(d) It has been declared, by Notification under S. 3 (a) of the Scheduled Districts Act, XIV of 1874, to be in force in the following Scheduled Districts, namely:—

(i) The Districts of Hazaribagh, Lohardaga and Manbhum and Pargana Dhalbhum and the Kolhau in the District of Singhbhum, see *Gazette of India*, 1881, Pt. I, p. 501 **F**

(ii) The District of Lohardaga included at this time the Palamau District, which was separated in 1894 **G**

**N B**—Lohardaga is now called the Ranchi District, *Calcutta Gazette*, 1899, Pt. I, p. 44. **H**

(e) It has been extended, by Notification under S. 5 of the same Act, to the Scheduled District of the North-Western Provinces Terai, see *Gazette of India*, 1876, Pt. I, p. 503. **I**

**(1) Scope of the Act.**

(a) This Act has not retrospective effect, and is not intended to affect contracts made before and to alter the rights of persons or the obligations arising out of them. 22 W R. 175 **J**

(b) Where a contract is made after this Act came into operation there will be a remedy against the separate property of the wife, although there is a clause against alienation or anticipation in the marriage settlement. 22 W R. 175 **K**

**(5) Scope and application of the Act**

(a) This Act applies to persons having an English domicile. 4 C. 110 **L**

(b) Accordingly the separate property of a married woman (whose husband's domicile is English) is alone bound by all debts, obligations, and engagements incurred by her in the management of a business carried on by her alone. 4 C. 110. **M**

(c) An execution of any decree obtained against her in respect of such business should be limited to her separate property. 4 C. 110 **N**

(d) The principle that the wife is impliedly carrying on business as the agent of the husband is excluded by the provisions of Act III of 1874. 4 C. 140. **O**

(e) The following observations of Garth, C. J. may also be noted:—

“It being found, as a fact, that the business was carried on by the wife alone, and that the husband had no concern in it, we think it clear that the Judge was right in giving a decree against the wife alone. The husband could only be made liable in such a case upon the principle that the wife was impliedly carrying on the business as his agent, and we consider that any such implication is excluded by the provisions of the Act and the facts as found in the case.”

We also think that the decree should be executed only against the wife's separate property, and that the form of it should be limited accordingly. 4 C. 140 (141, 142). **P**

**1. — "The Married Women's Property Act, 1874" — (Concluded).**

**(6) Object of the Legislature in passing this Act**

(a) The object of the Legislature in passing Act X of 1866 and Act III of 1874 was to assimilate the position of a married woman to that of an unmarried one, as far as regards her dealings with her own property. 11 B. 348 (352). **Q**

(b) Section 4 of Act X of 1866, combined with section 7 of Act III of 1874 enables women married since the 1st of January, 1866, to possess and to sue and be sued in respect of such property as though they were unmarried. These sections do not, however, deal with their capacity to contract. Section 8 deals with that capacity, and applies to women married as well before as after the 1st of January, 1866, and provides that such women can contract as though they were unmarried at the date of the contract, but that on such contracts they will be liable only to the extent of their separate estate. If the law allowed property to be settled on an *unmarried* woman without power of anticipation, a person dealing with her could not obtain a charge upon such property not because she is a woman but because the donor gave her property subject to that condition and the law, *ex hypothesi*, enabled him to do so. In the case of a *married* woman, the law does allow property to be so settled, and the married woman is unable to charge it, not because she is a married woman, but because a condition against anticipation or alienation is validly attached to the property itself. It is like the pension of a military officer only that his liability to charge arises from the will of the Legislature and not the expressed wish of the donor. (See *Lucas v Harris*, L.R., 18 Q.B. Div., 127) 11 B. 348 (353). **R**

**(7) Property settled to separate use of married woman—Operation of Succession Act, S 4**

(a) The Indian Succession Act 1865, S 4, cannot prevent the operation of a marriage settlement restraining a wife from anticipating or alienating property settled to her separate use, such restraint being created not by the marriage but by the settlement. 22 W.R. 175. **S**

(b) By using the words "absolute owner" in the preamble of Act III of 1874, the Legislature did not intend to make a declaration which would have the effect of extending the provisions of S 4 of the Indian Succession Act, but to describe its legal effect. The word "absolute" is used with reference to the husband not acquiring any interest in the property. 22 W.R. 175. **T**

**1 — Preliminary**

**1** This Act may be called the Married Women's Property Act, 1874

**2** It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the dominions of Princes and States in India in alliance with Her Majesty

But nothing herein contained applies to any married woman who at the time of her marriage professed the Hindu, Muhammadan,



Buddhist, Sikh or Jaina religion, or whose husband, at the time of such marriage, professed any of those religions.

And the Governor-General in Council may from time to time, by order, either retrospectively from the passing of this Act or prospectively, exempt from the operation of all or any of the provisions of this Act the members of any race, sect or tribe, or part of a race, sect or tribe, to whom he may consider it impossible or inexpedient to apply such provisions

The Governor-General in Council may also revoke any such order, but not so that the revocation shall have any retrospective effect.

All orders and revocations under this section shall be published in the Gazette of India.

X of 1865.

The fourth section of the said Indian Succession Act shall not apply, and shall be deemed never to have applied, to any marriage one or both of the parties to which professed at the time of the marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion.

### 3 [*Repealed by Act XII of 1876*]

#### II—*Married Women's Wages and Earnings* <sup>1</sup>

**4** The wages and earnings of any married woman acquired or gained by her after the passing of this Act, in any employment, occupation or trade carried on by her and not by her husband, and also any money or other property so acquired by her through the exercise of any literary, artistic or scientific skill, and all savings from and investments of such wages, earnings and property, shall be deemed to be her separate property, and her receipts alone shall be good discharges for such wages, earnings and property.

(Notes).

**General.**

**N.B.**—Compare this section with S. 1 of the Married Women's Property Act, 1870 (33 and 34 Vict., c. 93) now repealed by the Married Women's Property Act, 1882 (45 and 46 Vict., c. 75). U

#### (1) **Corresponding English Law.**

(1) *Married woman to be capable of holding property and of contracting as a feme sole.*

"A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of

**General—(Continued)**

any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee

A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole " See the Married Women's Property Act, 45 and 46 Vict., c 75, S 1. **Y**

*(ii) Property of a woman married after the Act to be held by her as a feme sole*

"Every woman who marries after the commencement of this Act, viz., Married Women's Property Act, 1882, shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill " See Married Women's Property Act, 1882, 45 & 46 Vict., c 75, S 2 **W**

*(iii) Property acquired after the Act by a woman married before the Act to be held by her as a feme sole.*

"Every woman married before the commencement of this Act, viz., Married Women's Property Act, 1882, shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid " See Married Women's Property Act, 1882, 45 & 46 Vict., c 75, S 5 **X**

*(iv) As to stock, etc., to which a married woman is entitled.*

"All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the reduction of the national debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other Bank, which at the commencement of this Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body municipal, commercial, or otherwise,

**General—(Continued).**

or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or transfer the same, and to receive the dividends, interests, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the reduction of the national debt the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all Directors, Manager, and Trustees of every such Bank, Corporation, Company, public body, or society as aforesaid, in respect thereof." See Married Women's Property Act, 1882, 45 & 46 Vict., c. 75, S. 6. **Y**

**(2) Wife a feme sole.**

- (a) A feme covert is considered in equity as a feme sole in respect of her separate property. *Henden v. Rothen*, M'Clel. & Y 90. **Z**
- (b) A wife may dispose of her separate personal estate by her own act in her lifetime, or by will. *Peacock v. Monk*, 2 Ves 190. **A**
- (c) The moment a woman takes personal property to her sole use, she has the sole right to dispose of it. *Fettsplace v. Gorges*, 1 Ves J 48, 1 R.R. 79. **B**

**(3) Savings from separate estate of married woman**

- (a) The savings of a married woman's separate estate, like the income itself, become her separate estate in equity. *Duncan v. Cashin*, 44 L.J. C.P. 225, L.R. 10 C.P. 554, 32 L.T. 497. **C**
- (b) Furniture was settled upon a married woman to her separate use, and with money, also her separate property, she from time to time renewed such as wore out. The whole was seized by the sheriff for a debt of her husband. Held, that, as a Court of Equity would under the circumstances have restrained the sheriff from selling the accretions as well as the original furniture, a Court of law, upon an interpleader summons, must take notice of the equitable claim of the wife's trustee, and direct the sheriff to withdraw. (*Ibid.*) **D**

**(4) Money saved by wife from husband's income.**

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name belongs to her husband. *Barrack v. McCulloch*, 3 Kay & J. 110. **E**

**(5) Purchases out of savings. .**

The savings of the income of lands settled to the separate use of a married woman, and chattels purchased by her out of such income, are *prima facie* her separate property. *Pike v. Fitzgibbon*, 6 L.R. Ir. 486. **F**

**General—(Concluded).**

**(6) Pin-money—Separate maintenance settled on wife.**

A feme covert who has pin-money, or a separate maintenance settled on her, may, by writing in nature of will, dispose of what she saves out of it, and such disposition shall bind the husband. *Herbert v Herbert*, Pre. Ch. 44, 1 Eq. Abr. 66. **G**

**(7) Income of separate property invested in purchases by wife**

Where a woman by marriage agreement is to have the separate use of any estate during coverture, she shall have that and its produce after marriage, and, if invested in any purchase, equity will regard it as the produce of what she ought to have *Eastby v Eastby*, 2 Eq. Abr. 148. **H**

**(8) Gift of savings.**

A wife separated from her husband may make a gift of the savings of her separate allowance as a feme sole (*George v Lister*, 2 Bro. P C 4), or she may dispose of them by will (*Georgy v Chance*, Toth 97) S.P., *Pridgeon v Pridgeon*, 1 Ch Ca 116 **I**

**(9) Bequest of savings of alimony**

A married woman divorced *a mensa et thoro*, bequeathed the savings of alimony by will *Held*, that the legatee was entitled to such bequest, to the exclusion of the surviving husband *Moore v Barber*, 5 Giff. 43, 34 L J, Ch 607 **J**

**III —Insurances by Wives and Husbands.**

**5.** Any married woman may effect a policy of insurance on her own behalf and independently of her husband ; and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure as her separate property, and the contract evidenced by such policy shall be as valid as if made with an unmarried woman.

Married woman may effect policy of insurance

**(Notes)**

**General**

**N B.**—Compare this section with S. 10 para (1) of the Married Women's Property Act, 1870, 33 & 34 Viet , c 93

**Corresponding English Law**

(1) *Money payable under policy of assurance not to form part of estate of the insured.*

"A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life, or the life of her husband for her separate use, and the same and all benefit thereof shall enure accordingly

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or

**General—(Concluded).**

of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured, and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee such trustee or trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part." See Married Women's Property Act, 1882, 45 & 46 Vict., c. 75, S. 11. K

6. A policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or of his wife and children, or any of them, shall enure and be deemed to be a trust for the benefit of his wife, or of his wife and children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband, or to his creditors, or form part of his estate.

When the sum secured by the policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected is situate, and shall be received and held by him upon the trusts expressed in the policy, or such of them as are then existing.

And in reference to such sum he shall stand in the same position in all respects as if he had been duly appointed trustee thereof by a High Court, under Act No. XVII of 1864 (*to constitute an Office of Official Trustee*), section 10.

Nothing herein contained shall operate to destroy or impede the right of any creditor to be paid out of the proceeds of any policy of assurance which may have been effected with intent to defraud creditors.

(Notes).

General.

**N B.**—Compare this section with S 10, para (2) of the Married Women's Property Act, 1870 (33 and 34 Vic., c. 93). **L**

ENGLISH LAW.

**(1) Policy for "Wife and Children"—Joint tenancy**

(a) A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870. The husband died insolvent, and the wife being in poor circumstances, so that the income of the policy moneys was not sufficient to support her and the children, the moneys were distributed as if the husband had died intestate. *Mellor's Policy Trusts, In re*, 47 L J Ch 246, 7 Ch D. 200; 26 W. R. 909 (Eng.). But see *Adam's Policy Trusts, In re*, 52 L J. Ch 642; 23 Ch. D. 525 **M**

(b) A husband effected a policy for the benefit of his wife and children under the Married Women's Property Act, 1870, and died insolvent. His wife and one child of the marriage predeceased him. Upon a petition by his surviving children, under S. 10 of the Act for the appointment of a trustee of the policy-money and for a declaration as to the rights of the petitioners *Held*, that the Court had, under that section, no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for the wife for life with remainder to the children, or, in the alternative, for the wife and children as joint tenants, the order was directed to be prefaced with an expression of opinion that the wife took no interest and that the surviving children took as joint tenants (*Mellor's Policy Trusts, In re*, 6 Ch D. 127, 7 Ch D. 200, *Not Followed*) *Adam's Policy Trusts, In re*, 52 L J, Ch 642, 23 Ch D 525. **N**

(c) A policy effected by a husband under S 10 of the Married Women's Property Act, 1870, "for the benefit of his wife and children," should be read in conjunction with that section, and should, by virtue of the words, "separate use" in the section, be construed as giving the wife a life-interest only, with remainder to the children. *Ibid.* See also 45 & 46 Vict, c 75, S. 11. **O**

(d) A policy was taken out on the life of the assured for the benefit of his wife and children: *Held*, that his widow and children took as joint tenants (*Mellor's Policy Trusts, In re*, 7 Ch. D 525, *Explained*: *Adam's Policy Trusts, In re* 23 Ch D. 525, *Dissented from*). *Seyton, In re, Seyton v Satterthwaite*, 56 L J., Ch 775, 34 Ch. D. 511. **P**

(e) Under a policy of life assurance effected for the benefit of the wife and children of the assured pursuant to the provisions of the Married Women's Property Act, 1870, his widow and children become entitled to the policy moneys as joint tenants (*Seyton, In re*, 34 Ch. D. 511, *Followed* Dictum in *Adam's Policy Trusts, In re*, 23 Ch D. 525, *Not Followed*). *Davies' Policy Trusts, In re*, 61 L.J. Ch 650, (1892) 1 Ch 90. **Q**

**General—(Concluded).****ENGLISH LAW—(Concluded).****(2) Conviction of wife for murder of husband—Failure of trust in favour of wife—Resulting trust in favour—Husband's estate.**

A husband insured his life for the benefit of his wife under the provisions of S. 11 of the Married Women's Property Act, 1882 (45 and 46 Vict. c. 75). He died, and his wife was tried for and convicted of his murder: *Held*, that the effect of S. 11 was to create a trust in favour of the wife in respect of the sum insured, but that inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company. *Cleaver v. Mutual Reserve Fund Life Association*, 61 L. J. Q. B. 128; (1892) 1 Q. B. 147; 66 L. T. 220, 40 W. R. 230 (Eng.). R

**IV.—Legal Proceedings by and against Married Women.****7. A married woman may maintain a suit in her own name**

Married women  
may take legal pro-  
ceedings.  
X of 1865.

for the recovery of property of any description which by force of the said Indian Succession Act, 1865, or of this Act, is her separate property; and she shall have, in her own name, the same remedies, both civil and criminal, against all persons, for the protection and security of such property, as if she were unmarried, and she shall be liable to such suits, processes and orders in respect of such property as she would be liable to if she were unmarried.

**(Notes).****General.**

**N.B.**—Compare this section with the Married Women's Property Act, 1870 (33 and 34 Vict. c. 93), S. 11, now repealed by the Married Women's Property Act, 1882 (45 and 46 Vict. c. 75). S

**(1) Wife's property seized in execution against husband—Right of wife to sue.**

(a) The plaintiff was, at the time of her marriage in 1870, possessed in her own right of certain articles of household furniture, given to her by her mother. Since January 1875 she had lived separate from her husband, but the furniture remained in his house. In February 1875, her husband mortgaged the property to B, without the plaintiff's knowledge or consent. In June 1875, one KCB, a creditor, obtained a decree against the husband and B, in execution of which he seized the furniture as the property of the husband, and it remained in Court subject to the seizure. In July 1875, the plaintiff instituted a suit in her own name in trover to recover the articles of furniture or their value from her husband, on the ground that they were her separate property, and in August 1875 she preferred a claim in her own name to the property under S. 88 of Act IX of 1860. It was found on the facts that the furniture was the property of the plaintiff. The husband and wife were persons subject to the provisions of the Succession Act, S. 4, and the Married Women's Property Act, 1874. T

**General—(Concluded).**

*Held* that, under S. 7 of the latter Act, the suit was maintainable against the husband. 1 C. 285. **U**

(b) *Held*, also, that the judgment for the plaintiff in the suit, to recover the furniture or its value from the husband, could not, without satisfaction, have the effect of vesting the property in the husband from the time of the conversion, and therefore the claim under Act IX of 1850 was also maintainable. 1 C. 285. **Y**

**(2) Married woman having no separate property—Contract entered into by—Suit instituted against married woman.**

Plaintiff sued to recover from defendant, a married woman living apart from her husband, wages due for six months. It did not appear that the defendant had separate property *Held* therefore, that the case was not one coming within the provisions of Act III of 1874, and that being so, that the defendant was not liable upon the contract which she purported to make with the plaintiff 35 P. R. 1879. **W**

8. If a married woman (whether married before or after the first day of January, 1866) possesses separate property, and if any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, such person shall be entitled to sue her, and, to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the execution of the decree :

Wife's liability for postnuptial debts.

Provided that nothing herein contained shall affect the liability of a husband for debts contracted by his wife's agency, express or implied \* \* \* \*

**(Notes)**

**General.**

**N B** — The words "or render a married woman liable to arrest or to imprisonment in execution of a decree" at the end of this section were repealed by the Debtors Act, VI of 1888, S. 9. **X**

**(1) Corresponding English Law.**

(1) *Married woman to be capable of holding property and of contracting as a feme sole.*

"A married woman, shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee."

A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort, or



**General—(Continued).**

otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal [proceeding brought by or taken against her . and any damages or costs recovered by her in any such action or proceeding shall be her separate property , and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise.

Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." See Married Women's Property Act, 1882, 45 and 46 Vict., c. 75, S. 1. Y

(ii) *Effect of contracts by married women.*

" Every contract hereafter entered into by a married woman, otherwise than as agent,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract ,

(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to , and

(c) shall also be enforceable by process of law against all property which she may thereafter be possessed of or entitled to

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating." See Married Women's Property Act, 1893, 56 & 57 Vict. c. 63, S. 1. Z

(iii) *Costs may be ordered to be paid out of property subject to restraint on anticipation.*

" In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just." See Married Women's Property Act, 1893, 56 & 57 Vict. c. 63, S. 2. A

(iv) *Remedies of married woman for protection and security of separate property.*

" Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property , and in any proceeding under this section a husband or

**General—(Continued).**

wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." See Married Women's Property Act, 1892, 45 & 46 Vict. c. 75, S. 12. **B**

**(2) Scope and operation of the section.**

(a) This section does not apply to contracts made before the passing of this Act. 13 B.L.R. 383 **C**

(b) In a suit against a husband and wife and the trustees of the wife's marriage settlement on two joint and several promissory notes given by the husband and wife after their marriage, but before the passing of the Married Women's Property Act (III of 1874), the plaintiff sought to render liable property settled on the marriage upon the wife for her separate use without power of anticipation. The marriage was contracted after the passing of the Indian Succession Act.

*Held*, that S. 4 of that Act did not prevent the operation of the clause in the marriage settlement in restraint of anticipation. 13 B.L.R. 383. **D**

(c) *Held*, further that S. 8 of the Married Women's Property Act, 1874 does not apply to contracts made before the passing of the Act. 13 B.L.R. 383. **E**

(d) If the contract had been made after that Act came into operation, the plaintiff would have had a remedy against wife's separate estate notwithstanding the clause restraining anticipation. 13 B.L.R. 383. (*Per Couch, C.J.*) **F**

**(3) Suit against a married woman—Husband not necessary party.**

(a) In a suit against a woman married before 1865, in respect of her separate property, it is not necessary to make her husband a co-defendant. 10 C.L.R. 536. **G**

(b) The following observations of Wilson, J. may also be noted —

"Section 8 seems to be borrowed from the English Married Women's Property Act. If the section had stood alone, I should have had no doubt that she should be sued alone. The section is not, however, free from ambiguity, owing to the change from the language used in the preceding section. On the whole, however, I am satisfied that its effect is to make the defendant liable to be sued alone." 10 C.L.R. 536 **H**

**(4) Application of section to separate property of married woman subject to restraint upon anticipation.**

**(i) Calcutta**

(a) S. 8 of Act III of 1874 extends to the separate property of a married woman subject to a restraint upon anticipation 12 C. 522. [But see 30 M. 373 = 17 M.L.J. 363 = 2 M.L.T. 322, 11 B. 348, noted *infra*.] **I**

## General—(Continued)

(b) S 10 of the Transfer of Property Act merely excepts from the general rule laid down in that section, the particular case of a married woman, and does not give to a testant upon anticipation any greater force than it had before the passing of the Act, but merely preserves to it the effect it had previously, leaving the Married Women's Property Act of 1874 and the decisions upon it untouched. 12 C 522 J

(c) The following observations of Garth, C J, may be noted —

“ Now we have direct authority in the English Courts, as to the proper meaning of S. 12 of the English “ Married Women's Property Act, 1870, which is very similar in its terms to S 9 of the Indian Act, and I think we may take S 9 as a guide in construing S 8, with which we are now dealing. The authority to which I allude is the case of *Sanger v Sanger*, L R 11 Eq 470, which, so far as I am aware, has never been questioned. In that case Mr Sanger gave his wife by will an annuity of £ 300 for her separate use without power of anticipation, and after his death a fund was set apart, out of his property, to answer this annuit. After the passing of the English Married Women's Property Act, 1870, a creditor brought an action against Mrs Sanger to recover a debt which had been incurred by her after the death of the testator, and on the 19th January 1871 judgment was entered up by the plaintiff in that suit for £ 346. On the same 19th January, but earlier in the day, Mrs Sanger intermarried with William Hutchinson, and the question then arose, how far S 12 of the Married Women's Property Act, 1870, protected the settled property, during the marriage with William Hutchinson, from the judgment-debt thus incurred by Mrs Hutchinson. Now by S 12 her separate property was made liable for debts incurred by her before her marriage, in the same way as it would have been if she had continued unmarried, which provision is substantially the same as that contained in S 9 of the Indian Married Women's Property Act of 1874. An application was then made to the Court to charge Mr Hutchinson's separate property (the fund which had been set apart to answer the annuity) with the payment of the judgment-debt of £ 346, and the Court made an order accordingly. An application was then made to the Master of the Rolls to protect the fund against the charging order, upon the ground that, as it was settled to Mr Hutchinson's separate use without power of anticipation, it could not be taken from her. But the Master of the Rolls was clearly of opinion that the charging order was right, and that, although Mr Hutchinson was married, her property was answerable for the payment of any debts which she had incurred before marriage, precisely as if she had continued unmarried. Now then let us see what is the effect of S 8 of the Indian Act. It says that, if a married woman possesses separate property, and if any person enters into a contract with her on the faith that her obligations arising out of such contract will be satisfied out of such property, then such person shall be entitled to sue her, and to the extent of her separate property, to recover against her whatever he might have recovered in such suit had she been unmarried at the date of the contract and continued unmarried at the date of the execution of the decree. Now it seems to me impossible (for the purposes

**General—(Continued)**

of our present question) to distinguish the terms of that section from those of S 9. S 9 says that, to the extent of her separate property, unmarried woman is liable to satisfy all debts contracted before her marriage, as if she had continued unmarried. Section 8 says that she is liable to satisfy out of her separate property any debt which she has incurred upon the faith of the creditor being paid out of that property. The creditor, under such circumstances, is to be entitled to recover against her *what he might have recovered had she been unmarried at the date of the contract*. 12 C 522 (528, 529, 530). **K**

(d) The Act of 1874 applied to person having an English, as well as to those having an Indian domicile. 12 C 522 (530). **L**

(e) The following observations of Wilton, J., may also be noted:—

“It appears to me clear that the separate property of a married woman means *all* her separate property, and it appears to me clear also that, if a married woman possesses separate property and any person enters into a contract with her with reference to such property, or on the faith that her obligation arising out of such contract will be satisfied out of her separate property, then, in order to ascertain how far her property is liable under the section, we must look at the last words of it, which say that it is liable to the same extent as if she had been unmarried at the date of the contract and continued unmarried at the execution of the decree, so that in each case we must treat the matter as if instead of being a married woman she had become a widow before each of those dates.” 12 C 522 (531). **M**

**(ii) Madras.**

(a) The income of property belonging to a married woman subject to a restraint on anticipation, accruing due after the date of a decree against such married woman's separate property under S 8 of the Married Women's Property Act, is not liable to attachment in execution of such decree under S 206 of the Code of Civil Procedure, 1882, or under Rule 220 of the Rules of the Presidency Court of Small Causes. 30 M 378 = 17 M L J 363 = 2 M L T 322. **N**

(b) S 8 of the Married Women's Property Act does not affect the doctrine of restraint on anticipation. 30 M 378 = 17 M L J 363 = 2 M L T 322 (12 C 522, *Presented from*, 18 M 19, *P.*) **O**

(c) S 10 of the Transfer of Property Act recognises and renders enforceable conditions in restraint of anticipation and is not affected by S 8 of the Married Women's Property Act. 30 M 378 = 17 M L J 363 = 2 M L T 322. **P**

(d) A decree under S 8 of this Act against the separate property of a married woman cannot be considered as passed against property which she is restrained from anticipating. 30 M 378 = 17 M L J 363 = 2 M L T 322. **Q**

(e) S 206 of the Code of Civil Procedure, 1882, is only a rule of procedure, and is not exhaustive. 30 M 378 = 17 M L J 363 = 2 M L T 322. **R**

## General—(Continued)

- (f) It cannot be construed as authorising the attachment of property which, by the rule of substantive law embodied in S 10 of the Transfer of Property Act, is incapable of being transferred or charged by the beneficiary. 30 M 378=17 M L J. 363=2 M L T 322. **S**
- (g) The doctrine of restraint on anticipation established by Courts of Equity for the protection of married women during coverture is one which has always been recognized and enforced by Courts in India. 30 M 378 (379, 380)=17 M L J. 363=2 M L T 322 (13 B L R 383, It) **T**

*Creditor's rights with respect to post-nuptial debts*

- (a) A creditor's right to be satisfied out of the separate property of a married woman is, in the case of post-nuptial debts, restricted to the property as to which there is no restraint on anticipation. 18 M 19. **U**
- (b) S 8 of Act III of 1874 was not intended to give married women the power of evading such restraint. (12 C 522, *Dissented from*.) 14 C 19. **U1**
- (c) The following observations of Shepherd, J., may also be noted:—"My attention, however, was called to the case of *Hypophile v Stuart*, 12 C 522, in which it was held by Sir Garth and Wilson, J., that a creditor in respect of a debt incurred after marriage was entitled to proceed against the separate property of a married woman notwithstanding the restraint on anticipation. The judgment proceeds on the ground that as the provision of S 9 of the Married Women's Property Act (which are to the same effect as those of S 12 of the English Married Women's Property Act of 1870, and which deal with ante-nuptial debts) have been held in England (see *Sanger v Sanger*, L.R. 11 Eq., 470) to extend to such property so S 8 must receive the same construction. The decision has been questioned in Bombay and, as it appears to me, with good reason (see *Cursetji v Rustomji*, 11 B 348). I fully concur in the observations of Farran, J., in that case. To enact that a married woman may contract with reference to her property settled to her separate use without power of anticipation, and bind it by the contract, is tantamount to saying that the restraint on the power of anticipation is inoperative, and that cannot have been intended. Moreover, it is inconsistent with the provision of S 10 of the Transfer of Property Act, which provides that property may be so settled on a married woman as to prevent her from charging it. Full meaning can be given to S. 8 of the Married Women's Property Act, without importing to the Legislature an intention to ignore conditions in restraint of alienation which are distinctly recognized in the later Act. I cannot find in the English case anything to support the view which has been taken in Calcutta. The authority is, as far as I can see, all the other way, unless I except the overruled judgment of Malins, V C., in *Pike v Fitzgibbon*, L.R., 17 Ch. D 154." See *Chapman v Groggs*, L.R., 11 Q B D., 27, and the judgment of Wills, J., in *Bickett v Tasker*, L.R., 19 Q B D., 7, cited in 18 M 19 (20, 21). **Y**

- d) "It is abundantly clear that the creditor's right to be satisfied out of the separate property of a married woman is, in the case of post-nuptial

**General—(Continued)**

debts, restricted to the property as to which there is no restraint on anticipation, and that it was not intended to give married women the power of evading such restraint as can be lawfully imposed on them." 18 M. 19 (21). **W**

**(iii) Bombay**

(a) Under S. 9 of Act III of 1874, a married woman has power to charge property settled upon herself for her separate use without power of anticipation, with the payment of debt incurred by her subsequently to her marriage. 11 B. 318. **X**

(b) And such a charge is valid and binding. 11 B. 318. **Y**

(c) The following observations are worthy of being noted:—

"The question for determination is: whether the above charges, having regard to the fact that Goodbar's interest in the note is settled to her sole and separate use without power of anticipation, and that she was a married woman when she purported to create them, are valid and binding. The answer to it depend upon the proper construction to be put on section 9 of the Married Women's Property Act, III of 1874. The plaintiff relies upon the case of *Peters v. Manuk*, 13, Beng. L. R., 383 and *Hippolite v. Stuart*, 12 C. 122. The latter authority, which is founded upon the earlier one, is in point, and, sitting as a Judge of original jurisdiction, I feel bound to follow it, as I am not prepared to say that it has been incorrectly decided. I must leave it to an Appellate Bench to dissent from it, if they consider the decision one which ought not to be acted upon.

The extreme importance of the question and the wide-reaching consequences of my decision justifying me, I consider in expressing the doubt I entertain as to whether the section has been correctly interpreted. Section 12 of the English Married Women's Property Act of 1870 provides: that a husband shall not be answerable for a wife's ante-nuptial debts; but that the wife shall be liable to be sued, and her separate property shall be liable to satisfy such debt as if she had continued unmarried. In other words, as far as ante-nuptial debts are concerned, the creditor's position shall not be affected by the woman's marriage. Upon this it was decided in *Sanger v. Sanger*, L. R. 11 Eq. 470, that the statute applied as well to property settled upon the woman for her separate use without power of anticipation or alienation, as to her property generally. Manifestly this must be so. Over property so settled an unmarried woman has as absolute control as over her other property, and, as her marriage is to have no effect upon her ante-nuptial engagements, it does not affect the creditor's rights against any of her property, whether settled to her separate use without power of anticipation or not. To the extent of the engagements which she has entered into, she has, in effect, before marriage disposed of her separate property. S. 9 of the Indian Act III of 1874 is to the same effect, and should, no doubt, be similarly construed. That construction, however, does not necessarily involve the construction which the Calcutta High Court has placed upon section 8. According to English law, a testator or

**General—(Concluded).**

donor cannot give property absolutely, and at the same time impose a restriction on the legatee's or donee's power of disposing of it or alienating it, but upon that law, Courts of Equity engrafted an exception for the protection of married women from their husband's influence, which enabled a relation or friend to make an absolutely secure provision for a married woman, or a woman likely to marry, in whom he was interested. That exception gave effect to the expressed intention of a donor to restrain the donee during her marriage from alienating or anticipating the benefits of his bounty. The donee became incapable of alienating or anticipating the income, not because she was a married woman, but because the law gave effect to the intention of the donor while she was such." 11 B. 348 (351, 352) **Z**

- (d) "To enact, or to declare by enactment, that a person can enter into a contract with a married woman, and that she shall be liable upon such contract to the extent of her separate property as if she were unmarried at the date of such contract, does not seem necessarily to give her the power of contracting with reference to property, which, by reason of the condition imposed upon it by the settler, she is unable to deal with, and not by reason of any restraint, which her coverture imposes upon herself. If she were unmarried at the date of the contract, and then possessed property validly settled to her separate use, without power of anticipation, she could not contract with reference to such property; but the law ordains that, in such a case, she cannot *when unmarried*, possess property subject to such a condition. How, it may fairly be asked, can a person contract with a married woman with reference to property over which she has no control, or on the faith that her obligation will be discharged out of such property? The nature of the property itself would seem to forbid it." 11 B. 348 (351, 354) **A**

- (e) "The limited intention expressed in the preamble to the Act seems to support the result to which the above chain of reasoning would lead, and the improbability of the Legislature effecting such an important change in the law, without express words indicative of their intention to do so, points in the same direction. Section 10 of the Transfer of Property Act IV of 1882, which provides that property may be transferred to a woman so that she shall not have power to charge the same or any interest therein during her marriage, is difficult to reconcile with a construction of section 8 of the Married Women's Property Act III of 1874, which, in effect, declares that, with reference to such property, a *feme covert*, can contract as though she were a *feme sole*. For the above reasons, I doubt whether I should not have arrived at a different conclusion to that which a critical examination of the wording of S. 8 of the Act has led the Calcutta High Court. The opinion of Pontifex, J., would have supported me in that conclusion. It is, however, safer to defer to authority, which with reluctance I do in this case. The wording of S. 8 is indisputably susceptible of the meaning which that authority has declared to be the true meaning of the section. Had I thought otherwise, I should not have felt myself bound to follow it." See 11 B. 348 (354). **B**

*V.—Husband's liability for Wife's debts*

9. A husband married after the thirty-first day of December, 1865, shall not by reason only of such marriage be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried

Provided that nothing contained in this section shall invalidate any contract into which a husband may, before the passing of this Act, have entered in consideration of his wife's ante-nuptial debts

**(Notes)**

**General.**

**N B 1** —The words "affect any stat instituted before the passing of this Act, nor" in para (2) of this section were repealed by the Repealing and Amending Act XII of 1891, **C**

**N B 2** —Compare the section with S 12 of the Married Women's Property Act, 1870 (33 & 34 Vic , c 94) **D**

**Corresponding English Law**

(i) *Wife's ante-nuptial debts and liabilities*

"A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributors under and by virtue of the Acts relating to joint stock companies, and she may be sued for any such debt and for any liability in damage or otherwise under any such contract, or in respect of any such wrong, and all sums recovered against her in respect thereof, or for any cost relating thereto, shall be payable out of her separate property, and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Act, hereby repealed or otherwise, if this Act had not passed" See Married Women's Property Act, 45 & 46 Viet , c 75, S 13. **E**

(ii) *Husband to be liable for his wife's debts contracted before marriage to a certain extent*

"A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage,



**General—(Concluded)**

including any liabilities to which she may be so subject under the Acts relating to joint stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs, for or in respect of which his wife was liable before her marriage as aforesaid, but he shall not be liable for the same any further or otherwise, and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property. Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid. See Married Women's Property Act 1882, 45 & 46 Vict., c. 75, S. 11. **F**

**(iii) Suits for ante nuptial liabilities**

"A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them, and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him, and in any such action against husband and wife jointly if it appears that the husband is liable for the debt or damages recovered, or any part thereof the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property and as to the residue, if any, of such debt and damage the judgment shall be a separate judgment against the wife as to her separate property only." See Married Women's Property Act, 1882, 45 and 46 Vict., c. 75, S. 15. **G**

# THE KAZIS' ACT, 1880<sup>1</sup>.

(Act XII of 1880)

[*Passed on the 9th July, 1880*]

An Act for the Appointment of Persons to the Office of Kazi.

WHEREAS by the preamble to Act XI of 1861<sup>2</sup> (*An Act to repeal the law relating to the offices of Hindu and Muhammadan Law Officers and to the offices of Kazi-ul-Kuzaat and of Kazi, and to abolish the former offices*) it was (among other things) declared that it was inexpedient that the appointment of the Kazi-ul-Kuzaat, or of City, Town or Pargana Kazis, should be made by the Government, and by the same Act the enactments relating to the appointment by the Government of the said officers were repealed, and whereas by the usage of the Muhammadan community in some parts of British India the presence of Kazis appointed by the Government is required at the celebration of marriages and the performance of certain other rites and ceremonies, and it is therefore expedient that the Government should again be empowered to appoint persons to the office of Kazi, It is hereby enacted as follows:—

## (Notes)

### I. — *The Kazis' Act, 1880* "

#### (1) Statement of Objects and Reasons

For ———, see Gazette of India, 1880, Pt. V, p. 21

A

#### (2) Report of the Select Committee

For ——— see Gazette of India, 1880, Pt. V, p. 203

B

#### (3) Discussion in Council

For ———, see Gazette of India, 1880, supplement pp. 345, 356 and 1203

C

#### (4) Reasons for the passing of the Act—History of Indian Legislation relating to Kazis.

"Under the Muhammadan Law the Kazi was chiefly a judicial officer. His principal powers and duties are stated at some length in the Hedaya, Book XX. He was appointed by the State, and may be said to have corresponded to our Judge or Magistrate. In addition, however, to his functions under the Muhammadan Law, the Kazi in this country, before the advent of British rule, appears to have performed certain other duties, partly of a secular and partly of a religious nature. The principal of these seem to have been preparing, attesting and registering deeds of transfer of property, celebrating marriages, and performing other rites and ceremonies. It is not apparent that any of these duties were incumbent on the Kazi as such. It is probable that the customary performance of them by him arose rather from his being a

## Act XII of 1880 (THE KAZIS' ACT).

### 1.—“*The Kazis' Act, 1880*”—(Continued).

public functionary and one known by his official position to be acquainted with the law, than from his having, as Kazi, a greater claim to perform them than any one else

Such was the position of the Kazi in this country under native Government. On the introduction of the British rule, Judges and Magistrates took the place of Kazis, and the Kazi in his judicial capacity disappeared, but the British Government, though no longer recognising the judicial functions of the kazi, did not abolish the office. By certain Regulations (*viz.*) Bengal Regulation XXXIX of 1792 for Bengal, Bihar and Orissa, Bengal Regulation XLIX 1795 for Benares, Bengal Regulation XLVI of 1803 for the Ceded Provinces, Madras Regulation III of 1808 for Madras, Bombay Regulation XXVI of 1827 for Bombay, passed from time to time, the appointment of Kazi-ul-Kazaat and Kazis by the State was provided for, and the performance of their non-judicial duties was recognised by law. In the case of Bengal, indeed, certain additional duties were imposed on them. The duties of the Kazi under these Regulations comprised some or all of the following, *viz.* —

- (1) preparing and attesting deeds of transfer and other law-papers,
- (2) celebrating marriages and presiding at divorces,
- (3) performing various rites and ceremonies,
- (4) superintending the sale of distrained property and paying charitable and other pensions and allowances

In the course of subsequent legislation, the first and last of the above duties devolved on officers specially appointed for the purpose, and there remained nothing to be performed by the Kazi but the second and third, which were purely ceremonial. Under these circumstances it appeared no longer necessary that the Government should appoint these officers. Accordingly, in 1864, by Act XI of that year, all the Regulations relating to the appointment of Kazis by Government and the duties to be discharged by them were repealed, but in order that it might be clear that no interference with the ceremonial functions of these officers was intended, a section was added to that Act as follows —“Nothing contained in this Act shall be construed so as to prevent a Kazi-ul-Kazaat or other Kazi from performing, when required to do so, any duties or ceremonies prescribed by the Muhammadan law”. (See section 2 of Act XI of 1864)

Certain of his duties having thus survived the passing of Act XI of 1864, the Kazi is still a functionary of considerable importance in the Muhammadan community. What was originally in some sense an accidental adjunct of his judicial office has become his principal and only duty, and in some parts of the country at least, the presence of a Kazi at certain rites and ceremonies appears now to be considered by Muhammadans essential from their point of view.

Act XI of 1864 has, however, raised a difficulty of a sort which was not anticipated at the time it was passed. As mentioned above, the Kazi was, under Muhammadan law, appointed by the State, and it has been held by the High Courts, both of Bombay and Madras, that the

**1,—“The Kazis' Act, 1880” —(Continued)**

appointment cannot be made except by the State. But as by Act XI of 1861, the State divested itself of the power of appointment, the preamble of that Act declaring that it was inexpedient that such appointment should be made by Government, it would seem that no valid nomination to the office can now be made.

The inconvenience resulting to Muhammadans from this state of things, has been brought to the notice of Government on several occasions by members of that community, and more particularly by the Muhammadans of the Madras Presidency. It is considered that the grant of the relief that is sought, viz. that Government should once more undertake the appointment of Kazis is but a reasonable concession to the wants of the Muhammadan population.

With this object the Kazi Bill had been prepared. It extends in the first instance to Madras only, where the want of duly appointed Kazis appears chiefly to have been felt, but it contains a clause empowering any other Local Government to extend its provisions to the territories administered by it, should the Muhammadans in these territories hereafter request its extension. It confers no legal rights or duties on Kazis. It simply, in order to satisfy the wants of the Muhammadan community, provides for the appointment of Kazis by Government, leaving the position and duties of the Kazi, whatever these may be, as they now are. To prevent any possible misapprehension on this point, a saving clause has been added to the effect that nothing in the Bill confers any judicial or other powers on a Kazi or makes his presence necessary at any marriage or other ceremony at which his presence is not now necessary. See statement of Objects and Reasons. **D**

**(5) Scope and nature of the Act.**

This Act is of a permissive character and it confers no official, administrative or judicial powers upon the Kazi. See Fort St. George Gazette, Supplement, 27th July, 1880, p. 2. **E**

**(6) Who can appoint Kazi under Muhammadan Law**

(a) It is very clear, upon all the Muhammadan authorities, that it is the “Ruler” or “Sultan” alone who has the power of appointing a Kazi, and that it is his duty to appoint one, and also that when there is such a governing power, any election or nomination to that office by Muhammadan inhabitants without the sanction of the “Ruler” is void, and contrary to Muhammadan law. (*Per Sausse, C.J.*) 1 B.H.C. App. xviii (xx). **F**

(b) The appointment of Kazi vested in the Sultan or Chief of the State and can never be rightfully exercised by the body of the Muhammadan community, with the single exception of the case, very rare in Muhammadan countries, in which a city or district is under absolute popular government, with no presiding executive magistrate. 1 B.H.C. App. xviii (xxx). (*Per Arnould, J.*) **G**

(c) “It is incumbent on a Chief to appoint a Kazi in every town and the environs thereof, where there is no Kazi.” (Anwar, p. 322, cited in 1 B.H.C. App. xviii (xxxi)). **H**

(d) “The appointer of the Kazi is the Chief or his deputy.” Tohfah cited in 1 B.H.C. App. xviii (xxxiii). **I**

I.—“ *The Kazis' Act, 1880* ”—(Continued).

- (e) When the Sultan appoints a man to the office of Kazi of a certain town, he does not become the Kazi of the environs unless he has appointed to the office of Kazi of the town and its environs and the same position is laid down in the “Fatawa Khafi Khan”. Fatawa Alamgiri cited in 1 B H C App xviii (xxviii). **G**
- (f) These passages undoubtedly point rather to a personal exercise of patronage by the Ruler or Governor, than to the corporate exercise of patronage by the Ruler or Governor in Council. 1 B H C App xviii (xxviii) (*Per* Arnould, J ) **K**
- (g) Popular election of Kazi could confer no shadow of legal right, it is abundantly clear that the Executive Government, either through its chief in person or in its corporate capacity, can alone lawfully appoint a Kazi such a functionary, where any executive government, either Muhammadan or non-Muhammadan, exists; can in no case be lawfully elected by the body of the Muhammadan community 1 B.H.C App xviii (xi) (*Per* Justice Crose ) **L**
- (h) Where a sanad granted by the Emperor Aurangzeb in A.D. 1693 did not purport to confer a hereditary Kaziship but was a grant of the office of Kazi, personally, to an ancestor of the plaintiff, held that the subsequent recognitions or appointments of members of his family as Kazis by native governments did not prove that the office was or could be made hereditary. 3 B 72 **M**
- (i) Regulation XXVI of 1827 relating to the appointment of Kazis, was repealed by Act XI of 1864 whereby it is recited that it is inexpedient that the appointment of Kazis should be made by Government. The continuance, therefore, by the Collector, of an allowance to the plaintiff in 1867 could not be regarded as a constructive appointment of him to be Kazi. 3 B 72 **N**

(7) **Kazi, Nature of office of**

- (a) The office of Kazi is not a hereditary office unless perhaps by special custom of the locality 18 B 103 **O**
- (b) The following observation of Westropp, C.J. may also be noted —  
 “The Muhammadan Law does not seem to regard the office of Kazi as hereditary. No authority has been cited to us to show that the creation of an hereditary kaziship can be sustained. In the Hedaya, Vol. II, Book XX, Chapter I, it is said “it is incumbent on the Sultan to select for the office of Kazi a person who is capable of discharging the duties of it and passing decrees and who is also in a superlative degree just and virtuous, for the Prophet has said “Whoever appoints a person to the discharge of any office whilst there is another amongst his subjects more qualified for the same than the person so appointed, does surely commit an injury with respect to the rights of God, the Prophet, and the Mussalmans.” This shows that high personal qualifications are to be carefully sought for by the appointing power,—a moral injunction which would be frequently defeated if the office were made hereditary. There is not a hint, in the chapter on Kazis in the Hedaya, that the office can be made hereditary.” 1 B 633 (636). (*Per* Westropp, C.J.) **P**

*I.—“The Kazis' Act, 1880”—(Continued).*

- (c) “It is to be regretted that the Government should, by the repeal of Regulation XXVI of 1827, have abnegated their function of appointing a Kazi, and so quieting the dissensions frequently prevalent amongst Mussalmans as to the validity of the title of persons assuming the office of Kazi—an office which, the Mussalman Law itself ordains, can only be conferred by the State.” 1 B 633 (637, 638) (*Per Westropp, C.J.*) See, also, 1 B 638 Note **Q-Y**
- (d) The office of a Kazi is not a hereditary service *vatan* under Bom Act III of 1874. 19 B. 250 **Z**

**(8) Office of Kazi, ancient nature of**

The office of KAZI is a Muhammadan office so ancient as to be coeval with the founder of Muhammadanism, and granted by competent authority. 1 B H C App xviii (xxii). (*Per Sausse, C.J.*) **A**

**(9) Muhammadan Law—Appointment of Kazi—Qualifications—Reg. XXVI of 1827—Act XI of 1864—Office of Kazi not hereditary**

- (a) The enactment of Bombay Regulation XXVI of 1827 was adverse to any supposition that the office of Kazi could be hereditary. The repeal of that Regulation by Act XI of 1864 left the Muhammadan Law as it stood before the passing of that Regulation, and that law sanctioned no grant of such an office to a man and his heirs. 1 B 633 **B**
- (b) The appointment of Kazi lies exclusively with the sovereign, or other chief executive officer of the State, and ought to be made with the greatest circumspection with regard to the fitness of the individual appointed, and though the sovereign may have full power to make the *vatan* attached to the office of Kazi hereditary, yet he has, under the Muhammadan Law, no power to make the office itself so. 1 B 633 **C**
- (c) In the absence of an established local custom to that effect, the office of Kazi is not hereditary. 1 B 633. **D**
- (d) *Quere*—Whether such a custom would be valid? 1 B 633. **E**

**(10) Powers of Kazi - Muhammadan Law**

- (a) The powers of the Kazi in religious matters were the same as those which appertain to Civil Court of superior jurisdiction. Before an alienation of trust property could be made by a trustee the sanction of the Kazi is essential. See 3 C.W.N. 158. **F**
- (b) The office of Kazi is both judicial and religious. (*Per Sausse, C.J.*) 1 B H C App xviii (xxi). **G**
- (c) Annexed to it is the right and duty of holding a “Court” in which all questions arising upon marriage and divorce, as well as others are entertained. *Ibid* 1 B H C xviii (xxi). **H**
- (d) The sovereign authority can, however, grant the office with the fullest power, or can limit its jurisdiction to particular functions specially designated in the *sanad* of appointment. *Ibid* 1 B H C xviii (xxi). **I**
- (e) The office of Kazi is one of the highest antiquity, and of great dignity and estimation amongst Muhammadans. Muhammad appears by the Hedaya to have been himself appointed Kazi of Mecca and to have subsequently appointed some of his companions to similar offices. 1 B H C App xviii (xxi) (*Per Sausse, C.J.*) **J**

## I—"The Kazis' Act, 1880"—(Continued).

- (f) As far back as living memory can reach, there appears to have existed a usage in Bombay for all Muhammadans, with very few exceptions, to have the operative words of marriage or divorce uttered in presence of the Kazi or that of his appointed deputy. An entry of that fact, with the names and descriptions of the parties and the witnesses, together with the agreement respecting the amount or release of dower, &c., was then immediately made in books kept by the Kazi as records of his Court. Such entries were made as far back as the Kaziship of Nuruddin in the year 1756. 1 B H C App. xviii (xxi) **K**
- (g) It is the practice we believe, of the Muhammadan community amongst themselves to refer to and treat those entries as proof of the several matters contained in them, and it is obviously of great public benefit to that community to possess the means of perpetuating evidence of matters so essential to the peace of families and to the regular transmission of property by descent. 1 B H C App. xviii (xxii) **L**
- (h) For the performance of these services for the public benefit of that community, the Kazi has never received any remuneration from the Government of Bombay. From the evidence before us those services appear to have been solely remunerated by a fixed fee for each. 1 B H C App. xviii (xxiii) **M**

## (11) Functions of Kazi—Bom Reg XXVI of 1827

- (a) The same are very accurately set forth in the preamble to the Bombay Reg. XXVI of 1827 which recites that the office of Kazi exists in several towns subordinate to the Presidency of Bombay, "and is necessary for the purpose of authenticating and recording mortgages, attesting divorces," and assisting in various other religious rites and ceremonies, the same preamble refers to 'the important uses of the office, more especially in furnishing the means of settling questions of inheritance and succession between Muhammadans.' 1 B H C App. xviii (xxiv) (Per Arnold, J.) **N**
- (b) Except in so far as he exercises the powers of a Judge in disposing of matrimonial disputes, the principal functions of the Kazi of Bombay are those of an authorized Registrar of Marriages and Divorces. 1 B H C App. xviii (xxv) **O**
- (c) If the parties wish to perpetuate the evidence of the marriage, the entry thereof in the Kazi's books is the best, the safest, and the most enduring medium of proof. So it is of divorce—a man by mere words, even without the presence of witnesses can, according to Muhammadan law, effectually divorce his wife—but if he wishes the fact of the divorce to be legally attested he must go and get it entered on the records of the Kazi. 1 B H C App. xviii (xxviii) **P**
- (d) 'A divorce by a man's own act is a valid divorce as far as God is concerned, but not as far as man is concerned. How can the Kazi (when asked to re-marry a divorced man or woman) know of a divorce having been granted unless it is entered in his books?' See 1 B H C App. xviii (xxxiii) **Q**
- (e) The appointment to the office had for a considerable number of years, been made in Bombay by a sanad running in the name of the Government of Bombay for the time being. 1 B H C App. xviii (xxviii) **R**

**I —“ The Kazis' Act, 1880 ”—(Continued).**

- (f) The presence of the Kazi is not essential to give validity to either marriage or divorce. It may be, and would appear to be, a desirable practice, if Muhammadans choose to obtain, for their marriage or divorce, the authentication of the Kazi of Bombay: they must go to the Kazi appointed by Government for that purpose. They cannot set up a Kazi of their own: if they do, and the unlawful Kazi accepts the office, and assumes the performance of its duties, he will be liable to an action for a disturbance at the suit of the lawful holder, and if he should receive fees belonging to the office, he will be liable to refund the amount with costs of suit upon action brought by the legitimate Kazi. 1 B H C App. xviii (xxiv). (See *Sausse, C. J.*) **S**

**N B**—This case was decided under the old law. The law under the present Act is different. See 22 M L J. (Notes of cases), p. 1.

**(12) Kazi, remuneration of.—Law before the passing of this Act**

- (a) Fees have been immemorially annexed to the office of Kazi, and the grant of this ancient office, although without mention of fees in the body of the instrument, carried them with it as accessories to the grant. 1 B H C App. xviii (xxiii) (*Per Sausse, C. J.*) **T-U**
- (b) Those fees have been so long established by usage, the Kazi could after performance maintain an action for them against the parties for whom they had been rendered. 1 B H C App. xviii (xxiii). **Y**
- (c) There was no authority to show that remuneration to a Kazi, by fixed and well-known fee, for services performed was at variance with Muhammadan law or usage. But, on the contrary the Kazi of Bombay, devoted solely to the duties of the office, and receiving no support from the State, he was not only authorised, but required by Muhammadan law, to accept a publicly known and recognised remuneration sufficient to sustain the dignity of his office. 1 B H C App. xviii (xxiii) (*Per Sausse, C. J.*) **W**
- (d) If the sums claimed as fees, or as compensation for work done, are certain fixed payments annexed to the discharge of official duties, the action for damages will lie in respect of their privation by a wrongful intruder into the office, if they are mere quantities of uncertain amount and of no legal obligation, their privation is a mere *damnum sine injuria*, for which no action will lie. 1 B H C App. xviii (xxxvii) (*Per Justice Grose*). But see for the present law, 22 M L J. (Notes of cases) p. 1. **X**
- (e) The sums accustomedly taken by the Kazis of Bombay in respect of marriages, divorces, summonses, &c., were fixed and certain payments annexed to the discharge of official duties, and were therefore sums in respect of the privation whereof by a wrongful intruder an action either for money had and received, or for disturbance of the office, will lie. 1 B H C App. xviii (xxxvii) (*Per Justice Grose*). **Y**
- (f) In early times everywhere and at the present day in most Asiatic countries under Muhammadan rulers, the Kazis, it seems, were supported by State funds, or by land grants. 1 B H C App. xviii (xxxviii). **Z**
- (g) In Mecca and Medina, their support has always, it appears, been a charge on the public treasury. 1 B H C App. xviii (xxxviii). **A**



1.—“*The Kazis' Act, 1880*”—(Concluded).

- (h) Under the Peshwas of the Dakhan, nams were assigned to them 1 B.H.C. App. xviii (xxxviii) **B**
- (i) In Kashmir at the present day, they are maintained by jahagirs. 1 B.H.C. App xviii (xxxviii) **C**
- (j) In Bombay no grants of this kind for the maintenance of Kazis appear ever to have existed the Kazis of Bombay have always been maintained exclusively by fees, or at all events by payments in the nature of fees, &c, by certain ascertained sums attached by way of remuneration to the performance of official acts 1 B.H.C. App. xviii (xxxviii) **D**
- (k) These fees were not voluntary payments, “If the Kazi attends, the fee must be paid if one wants the Kazi he sends for him” 1 B.H.C. App. xviii (xxxviii). But see 22 M.L.J. (Notes of cases) p. 4. **E**
- (l) “The Kazi’s fee, is a remuneration for work done in keeping records, making entries, &c” 1 B.H.C. App. xviii (xxxviii) **F**
- (m) As a rule, the customary fees were invariably paid by all Muhammadans who resorted to the Kazi for the purposes of marriage, divorce, settlement of matrimonial disputes, procuring extracts from the registers, &c 1 B.H.C. App. xviii (xxxix). **G**
- (n) The marriage fee was generally paid beforehand persons on behalf of the bride and bridegroom attended at the Kazi’s office, and informed him of the names of the parties and a few other particulars, of which the Kazi or his Naib made an entry the fee was then paid, and the day (generally the next day or the next but one) being fixed for the marriage, the Kazi, if specially invited, or if not his Naib attended and assisted in performing the ceremony 1 B.H.C. App. xviii (xxxix) **H**
- (o) When the Kazi himself was invited, it appears generally to have been the case among the wealthier Muhammadan families, it was almost invariably the custom to make him presents of shawls or piece-goods, these were gratuities, as distinct from fees 1 B.H.C. App. xviii (xxxix). **I**
- (p) The sums received by the Kazi of Bombay in respect of his office of Kazi are not mere gratuities, but are fixed and certain payments annexed to the discharge of official duties, and are, therefore sums in respect of the privation whereof by a wrongful intruder an action, either for money had and received, or for disturbance in the office, will lie. 1 B.H.C. App. xviii But see 22 M.L.J. (Notes of cases) p. 4. **J**

2.—“*Act XI of 1864.*”

**N.B.**—Act XI of 1864 was repealed by the Repealing Act VIII of 1868

Short title, Commencement

1 This Act may be called the Kazis’ Act, 1880, and it shall come into force at once.

Local extent

It extends<sup>1</sup>, in the first instance, only to the territories administered by the Governor of Fort St. George in Council But any other Local Government may, from time to time, by notification in the official Gazette, extend it to the whole or any part of the territories under its administration.

**1.—“ It extends, etc.”**

**N.B.**—The Act has been extended to certain districts, provinces and places in—

- (1) the Bombay Presidency, *see* Bom R and O ,
- (2) the Lower Provinces, *see* Ben R and O , Calcutta Gazette, 1899, Pt 1, p 1225 ,
- (3) the Punjab, *see* Pun R and O ,
- (4) Burma—the Akyah District, *see* Bur R M ,
- (5) Assam, *see* Assam Manual of Local Rules and Orders, Ed 1893, p 160 ,
- (6) the United Provinces, *see* U. P R and O ,
- (7) the Central Provinces—to Jubbulpore *see* C. P R and O

**2. Whenever it appears to the Local Government that any considerable number of the Muhammadans resident**

Power to appoint  
Kazis for any local  
area

**in any local area desire that one or more Kazis should be appointed for such local area, the Local Government may, if it thinks fit, after consulting the principal Muhammadan residents of such local area, select one or more fit persons and appoint him or them to be Kazis for such local area**

If any question arises whether any person has been rightly appointed Kazi under this section, the decision thereof by the Local Government shall be conclusive

The Local Government may, if it thinks fit, suspend or remove any Kazi appointed under this section who is guilty of any misconduct in the execution of his office, or who is for a continuous period of six months absent from the local area for which he is appointed, or leaves such local area for the purpose of residing elsewhere, or is declared an insolvent, or desires to be discharged from the office, or who refuses or becomes in the opinion of the Local Government unfit, or personally incapable, to discharge the duties of the office

**3. Any Kazi appointed under this Act may appoint one or more persons as his naib or naibs to act in his**

Naib Kazis

**place in all or any of the matters appertaining to his office throughout the whole or in any portion of the local area for which he is appointed, and may suspend or remove any naib so appointed.**

When any Kazi is suspended or removed under section 2, his naib or naibs (if any) shall be deemed to be suspended or removed, as the case may be

**4. Nothing herein contained, and no appointment made hereunder, shall be deemed—**

Nothing in Act to  
confer judicial or  
administrative  
powers, or

(a) to confer any judicial or administrative powers on any Kazi or Naib Kazi appointed hereunder ; or



RULES MADE UNDER THE KAZIS' ACT—(Continued).

(i) BENGAL—(Continued)

3 In the selection of Kazis absolute preference shall be given to Muhammadan Registrars licensed under Act I (B.C.) of 1876, if found duly qualified and if exercising jurisdiction as Muhammadan Registrars within the limits specified by the District Registrar under rule 1 as the jurisdiction of a Kazi. In the absence of any Muhammadan Registrar, any duly qualified candidate may be nominated.

4 The limits within which a Kazi shall be appointed to act shall coincide as much as possible with the limits of jurisdiction of Muhammadan Registrars, a police thana or outpost being taken as the unit of jurisdiction, according to local circumstances, as the Lieutenant-Governor may from time to time direct.

5. The Committee shall consider the District Registrar's nomination with the other applications, and shall forward their nominations to Government with their remarks and recommendations.

6 A *sauad* (license) shall be granted to every person appointed as Kazi in the following form —

*Sauad (license) under S. 2, Act XII of 1880*

To

of

Calcutta, the

188

By virtue of the authority conferred upon His Honor the Lieutenant-Governor of Bengal by Act XII of 1880 (the Act for the appointment of persons as Kazis), you are hereby appointed Kazi of thana \_\_\_\_\_ for the celebration of marriages and the performance of other rites and ceremonies, when application is made to you to perform any such functions.

2 It will be your duty carefully to observe the provisions of the abovementioned Act.

3 This *sauad* (license) shall continue in force until it is revoked or suspended by the said Lieutenant-Governor of Bengal.

By order of His Honor the Lieutenant-Governor of  
Bengal,

Secretary to the Government of Bengal.

7 When a Kazi desires to give up his license or to about to leave permanently the local area for which he has been appointed Kazi, he shall report the fact tender his resignation, and forward his license for cancellation and return to Government.

8. Every Kazi shall provide himself at his own expense with a seal bearing the following superscription in the Persian character — "The seal of the Kazi of thana \_\_\_\_\_"

This seal shall remain in the personal custody of the Kazi, and shall be delivered up with his license upon the death, removal or resignation of the Kazi.

9 Every Kazi shall be empowered to appoint any number of Naih Kazis within the local area for which he holds a license. He shall submit the names of the said Naibs for the consideration and approval of the District Registrar, and when approved by the District Registrar, the Kazi shall give each of his Naibs a letter of appointment bearing his signature and seal and countersigned by the District Registrar.

10 When a Kazi suspends or removes any of his Naih Kazis, he shall record a proceeding in his diary or "tozenamchah," specifying the offence for which he suspends or removes the Naih kazi, after allowing the Naih every opportunity of submitting an

## RULES MADE UNDER THE KAZIS' ACT—(Continued).

## (1) BENGAL—(Continued)

explanation and of making due submission. When a Kazi removes his Naib Kazi, he shall recall and revoke the letter of appointment granted to the said Naib.

11. The District Registrar shall keep a register of Kazis and of the Naib Kazis appointed by the Kazis respectively. In the event of any Naib Kazi being removed by his Kazi, as provided for in rule 10, the Kazi shall forward notice of the fact to the District Registrar, who shall make the necessary correction in the register.

12. Every Kazi shall keep a diary (rozenamchah) of his proceedings, the ceremonies he performs, the names of the parties, the dates on which and the places where he attends to perform such ceremonies. Such diary shall be liable to inspection, whenever necessary, by inspecting officers of the Registration Department, or any one specially deputed by the District Registrar for that purpose.

*Notification dated the 31st May, 1884 (published in the Calcutta Gazette of 1884, Part I, p. 660).*

Under the power vested in him by section 1 of Act XII of 1880 (an Act for the appointment of persons to the office of Kazi), the Lieutenant-Governor authorizes the extension of the provisions of that Act to the districts of Jessore, Nadia, Rajshahai, Dinajpur, Rangpur, Pabna, Bogra, Dacca, Faridpur, Backergunge, Mymensing, Chittagong, Noakhali and Tippera.

*Notification dated the 3rd September, 1884 (published in the Calcutta Gazette of 1884, Part I, p. 940).*

In the notification of Government, dated the 31st May, 1884, published at page 660, Part I, of the Calcutta Gazette of the 14th June, 1884, authorizing the extension of the provisions of Act XII of the 1880 (an Act for the appointment of persons to the office of Kazi) to the fourteen districts therein named for the Jessore district read the Kulna district.

*Notification dated the 27th October, 1891 (published in the Calcutta Gazette of 1891, Part I, p. 964).*

It is hereby notified for general information that, under the provisions of section 1, of Act XII of 1880 (an Act for the appointment of persons as Kazis), the Lieutenant-Governor authorizes the extension of the said Act to the town of Calcutta and the districts of the 24 Parganas, Jessore, and Murshidabad, where it shall commence and take effect from the 1st November 1891.

*Notification dated the 15th December, 1891 (published in the Calcutta Gazette of 1891, Part I, p. 1052).*

It is hereby notified for general information that under the provisions of section 1, of Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Muhammadan Marriages and Divorces), and of section 1 of Act XII of 1880 (an Act for the appointment of persons as Kazis), the Lieutenant-Governor authorizes the extension of the said Acts to the district of Lalpagan from the 1st January 1892.

*Notification dated the 31st January, 1893 (published in the Calcutta Gazette of 1893, Part I, p. 81).*

It is hereby notified for general information that under the provisions of section 1, of Act XII of 1880 (an Act for the appointment of persons as Kazis), the Lieutenant-Governor authorizes the extension of the said Act to the district of Khulna.

**RULES MADE UNDER THE KAZIS' ACT—(Continued)**

**(i) BENGAL—(Concluded).**

*Notification No. 2479-J, dated the 1st May, 1894 (published in the Calcutta Gazette of 1894, Part I, p. 550).*

It is hereby notified for general information that under the provisions of section 1, Act XII of 1880 (an Act for the appointment of persons to the office of Kazi), the Lieutenant-Governor authorizes the extension of the said Act to the district of Howrah with effect from the first June, 1894

*Notification No. 718 J D, dated the 4th June, 1891, (published in the Calcutta Gazette of 1891, Part I, p. 650)*

It is hereby notified for general information that under the provisions of section 1, Act XII of 1880 (an act for the appointment of persons to the office of Kazi), the Lieutenant-Governor authorizes the extension of the said Act to the districts of Burdwan, Bankura, Birbhum and Moogly, with effect from the 15th June, 1891

*Notification No. 1126-J., dated the 29th July, 1895 (published in the Calcutta Gazette of 1895, Part I, p. 714).*

It is hereby notified for general information that under the provisions of section 1, Act XII of 1880 (an Act for the appointment of persons to the office of Kazi), the Lieutenant-Governor authorizes the extension of the said Act to the district of Cuttack, with effect from the 15th August, 1895

*Notification No. 692-J D, dated the 26th October, 1896 (published in the Calcutta Gazette of 1896, Part I, p. 1111).*

It is hereby notified for general information that under the provisions of section 1, Act XII of 1880 (an Act for the appointment of persons to the office of Kazi), the Lieutenant Governor authorizes the extension of the said Act to the district of Purnea with effect from the 16th November, 1896

**(ii) BOMBAY**

**Orders extending the Act.**

(i) In exercise of the power conferred by Act XII of 1880 (The Kazis Act, (1880) the Governor of Bombay in Council is pleased to extend the said Act to the Sholapur, Mandrup and Mohal Parganas in the Sholapur District See *Notn. No. 7971, dated 29th November 1880, B G G, 1880 Pt I, p. 1025* **T**

(ii) In exercise of the power conferred by Act XII of 1880 (The Kazis Act, 1880), His Excellency the Governor of Bombay in Council is pleased to extend the said Act to the Barsi and Pangri Parganas in the Barsi Taluka of the Sholapur District *Notn. No. 8322, dated 15th December 1880, B G G, Pt I, p. 1111* **U**

(iii) In exercise of the power conferred by Act XII of 1880 (The Kazis Act 1880), the Governor of Bombay in Council is pleased to extend the said Act to the Native Town and Sadr Bazar of Satara See *Notn. No. 2130, dated 31st March 1881, B G G, 1881, Pt I, p. 151.* **Y**

(iv) In exercise of the power conferred by Act XII of 1880 (The Kazis Act, 1880), His Excellency the Right Honourable the Governor of Bombay in Council is pleased to extend the said Act to the Poona City, Poona Cantonment, Kasbas Karda, Talegaon and Palal in the Poona District See *Notn. No. 3379, dated 30th May 1881, B G G, Pt I, p. 302* **W**

*I —“Act VI of 1886 ”—(Continued).*

had been contemplated, and might involve indefinite expenditure. Under these circumstances, the Select Committee came to the conclusion that they would not be justified in going further than to insert a provision enabling Local Governments to extend the system of voluntary registration cautiously and experimentally to other classes within limited areas. If the result of any such experiment should show that there is a genuine demand for an extension of the system, a strong case would be made out for registration to supply the requisite machinery.

“In the meantime we must be content to work with existing machinery. Doubts have been expressed whether in those towns where a system of registration for statistical purposes already exist it will work in harmony with our new system of registration for evidential purposes, but I feel pretty confident that the difficulties which have been suggested may be overcome by suitable administrative arrangements. Throughout the greater part of the country we shall have to rely mainly on the voluntary agency of those ministers of religion who at present keep registers of baptisms and burials. Many of these gentlemen have supplied us with useful suggestions, but I observe that some of them do not fully understand the grounds on which this legislation has been undertaken. Thus a chaplain writing from Delhi remarks that the existing ecclesiastical registers are carefully kept, that the entries are made under the signature of respectable persons, and the particulars given are obtained from the parties concerned. Why, he asks, should they not be admissible in evidence, and why set up what he describes as the ‘cumbersome and expensive machinery’ expatiated in the Bill? I hope that the machinery proposed will prove to be neither cumbersome nor expensive, but perhaps I did not sufficiently explain in introducing the Bill the nature of the objection which has been taken to the evidence obtainable under the existing system. It is a purely technical objection, and implies no disparagement of the care with which ecclesiastical registers are kept. There is a section in the Evidence Act which gives relevance to entries in public records made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which the record is kept, and it has been questioned by high legal authority whether entries in ordinary ecclesiastical registers fell within the category to which this section refers. This is the doubt which we desire to remove with the least possible disturbance of existing arrangements. If those clergymen who, we hope, will act as voluntary Registrars will compare the revised Bill with the Bill as originally introduced they will see that the Select Committee have endeavoured to meet their wishes in every way, and to avoid imposing on them duties which would be inconsistent with the discharge of their ecclesiastical functions. For instance, the original scheme was to establish Registrars for specified local areas. But it was represented that, whilst a minister might be willing to act as Registrar for his own congregation, he might be disinclined to undertake the duty for the benefit of members of other congregations. The objection seemed reasonable, and accordingly it will be found that,

*I.—“Act VI of 1886”—(Concluded).*

under the revised Bill, Registrars may be appointed not merely for specified areas but also for specified classes. Again, we have modified, in accordance with wishes which have been expressed, the section of the Bill which directs certain clergymen to send entries to the central office through their ecclesiastical superiors. This particular section has had to encounter another objection which I have been unable to remove by amendment, but which I can satisfactorily explain away. It refers to ‘the Churches of England, Rome and Scotland’ in that order, and I am told, in one of the papers from Bombay, that to place the words ‘Church of Rome’ before the words ‘Church of Scotland’ is an error which will give grave offence. Now the truth is that the draughtsman was wholly guiltless of any sinister desire to depreciate the status of the Church of Scotland, and had merely adopted an alphabetical arrangement as being the least invidious. If the Church of Rome appears to take precedence of the Church of Scotland in this section, it is merely because in the English alphabet, as an alphabet which existed long before any of the Christian Churches were dreamt of, the letter R takes precedence of the letter S. As a matter of fact, lower down in the same section, the Church of Scotland is, for reasons not unconnected with draughtsmanship, mentioned before the Church of Rome.

The chapter relating to registration of marriages has, on the advice of a leading member of the Parsi community at Bombay, been extended to certain Parsi marriages which are at present registered much in the same way as marriages under the Christian Marriage Acts.

“The alterations in the chapter relating to the registration of births and deaths have been suggested by the criticisms which we have received, and by a further comparison with the English registration law. In considering the applicability of the latter law the Committee have borne in mind the essential difference between a system of registration which is universal and compulsory and a system which is partial and permissive. Thus the English law imposes on certain persons the obligation of giving notice of a birth or death. The Indian Bill merely requires the Registrar to make an entry on the receipt of notice from any one of certain persons authorised to give the notice and we have found it possible to extend this latter class so as to make it include all persons who are likely to be in a position to give satisfactory evidence of the event. But we have not seen our way to a provision authorising notices, of births and deaths to be sent by post. The whole value of the measure depends on the register book being kept, and the entries in it being authenticated in such a manner as to minimize the risk of a fraud or error, and it is obvious that a book made up of loose fly-leaves would be open to serious objection on that score. If this were a compulsory measure, arguments based on the difficulty and inconvenience of personal attendance would be entitled to great weight. But it is only a permissive measure, and those who wish to take advantage of its provisions must be prepared in some cases to face a certain amount of trouble and expense. See Fort St. George Gazette, Suppl., March 3rd 1886, 1.



**CHAPTER I****PRELIMINARY.**

**Short title and commencement.** 1 (1) This Act may be called the Births, Deaths and Marriages Registration Act, 1886; and

(2) It shall come into force on such day<sup>1</sup> as the Governor General in Council, by notification in the Gazette of India, directs

**(Notes)****General**

**N.B.**—Sub-Sec (3) of S 1 was repealed by the Repealing and Amending Act XII of 1891. It ran as follows —

“Any power conferred by the Act to make rules or to issue orders may be exercised at any time after the passing of this Act, but a rule or order so made or issued shall not take effect until the Act comes into force.”

*1.*—“*It shall come into force on such day.*”

**N.B.**—This Act came into force on the 1st October 1888. See Gazette of India 1888, Pt I, p 336.

**Local extent.** 2. This Act extends to the whole of British India<sup>1</sup> and applies also, within the dominions of Princes and States in India in alliance with Her Majesty, to British subjects in those dominions

**(Notes).**

*1*—“*British India.*” ,

**(1) Act where declared in force**

This Act has been declared in force in —

- (a) Santhal Parganas, see S 3, Santhal Parganas Settlement Reg. III of 1872, as amended by the Santhal Parganas Justice and Laws Reg. III of 1899.
- (b) British Baluchistan, see British Baluchistan Laws Reg. I of 1880, S. 3 and Schedule.
- (c) Upper Burma except the Shan States, see Burma Laws Act XIII of 1898, S. 4 and 1st Sch **F**

**N B.**—It has been previously extended there by notification under S 5, Scheduled Districts Act XIV of 1874, see Gazette of India, 1888, Pt. I, p 528.

**(2) Definition of British India**

“British India” shall mean all territories and places within Her Majesty’s dominions which are for the time being governed by Her Majesty through the Governor-General of India or through any Governor or other officer subordinate to the Governor General of India.” See Act X of 1897, S. 3, sub-S. 7. **G**

Definitions

3. In this Act, unless there is something repugnant in the subject or context,—

“sign” includes mark, when the person making the mark is unable to write his name.

“prescribed” means prescribed by a rule made by the Governor General in Council under this Act: and

“Registrar of Births and Deaths” means a Registrar of Births and Deaths appointed under this Act

4. Nothing in this Act, or in any rule made under this Act,

Saving of local laws. shall affect any law heretofore or hereafter passed providing for the registration of births and deaths within particular local areas.

Powers exercisable from time to time

5 All powers conferred by this Act may be exercised from time to time as occasion requires.

## CHAPTER II

### GENERAL REGISTRY OFFICES OF BIRTHS, DEATHS AND MARRIAGES

Establishment of general registry offices and appointment of Registrars General

6 (1) Each local Government—

- (a) shall establish a general registry office<sup>1</sup> for keeping such certified copies of registers of births and deaths registered under this Act, or marriages registered under Act III of 1872 (*to provide a form of marriage in certain cases*)<sup>2</sup> or the Indian Christian Marriage Act, 1872, or, beyond XV of 1872, the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Bombay, under the Parsi Marriage and Divorce Act, 1865<sup>3</sup>, as may be XV of 1865, sent to it under this Act, or under any of the three last-mentioned Acts, as amended by this Act, and
- (b) may appoint to the charge of that office an officer, to be called the Registrar General of Births, Deaths and Marriages, for the territories under its administration<sup>2</sup>:

(2) Provided that the Governor of Bombay in Council may, with the previous sanction of the Governor General in Council, establish two general registry offices and appoint two Registrars General of Births, Deaths and Marriages for the territories under

his administration : one of such general registry offices and of such Registrars (General being established and appointed for Sindh and the other for the other territories under the administration of the Governor of Bombay in Council

**(Notes).**

**1.—“General registry office.”**

**N.B.**—For General Registry Offices appointed for—

- (a) Ajmer-Merwara, *see* Aj R and O ,
- (b) Assam, *see* Assam Gazette, 1888, Notification No 118-J, dated 10th October ,
- (c) Bombay, *see* Bom , R. and O ,
- (d) Burma, *see* Bur., R M.,
- (e) Coorg, *see* Coorg , R and O ,
- (f) Madras, *see* M.L.J , R and O ,
- (g) North-West Frontier Province, *see* Gazette of India, 1901, Pt II, p. 1301 ,
- (h) Punjab, *see* Punj , R. and O.,
- (i) United Provinces of Agra and Oudh, *see* U P , R. and O.

**2.—“Registrar General of Births, Deaths and Marriages, for the territories under its administration ”**

**N B.**—For Registrars General appointed for—

- (a) Ajmer-Merwara, *see* Aj , R and O ,
- (b) Assam, *see* Assam Gazette, 1888, Notification No 118-J dated 10th October ,
- (c) Bombay, *see* Bom , R and O.,
- (d) British Baluchistan, *see* Gazette of India, 1903, Pt II, p 1165 ,
- (e) Burma, *see* Burma Gazette, 1886 Pt I p. 459 Bur. R. M ,
- (f) Central Provinces, *see* C P , R. and O ,
- (g) Coorg, *see* Coorg, R and O ,
- (h) Madras, *see* Madras List of Local Rules and Orders, Vol. I. Ed. 1898, p. 208 ,
- (i) North-West Frontier Province, *see* Gazette of India, 1901, Pt. II, p 1304.
- (j) Punjab, *see* Punj , R and O ,
- (k) United Provinces of Agra and Oudh, *see* U P , R and O

**3.—“Beyond the local limits . Parsi Marriage and Divorce Act, 1865.”**  
**Extension of the Act to Parsis.**

“The Select Committee have, on the advice of a leading member of the Parsi community at Bombay, extended to the scattered Parsi Communities resident beyond the local limits of the ordinary original civil jurisdiction of the High Court at Bombay the same provisions for the more effectual registration of marriages as were proposed by the Bill to be conferred on the classes to whom Act III of 1872 and the Indian Christian Marriage Act, 1872, apply.” *See Report of the Select committee.*

7. Each Registrar General of Births, Deaths and Marriages shall cause indexes of all the certified copies of registers sent to his office under this Act, or under Act III of 1872, the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, as amended by this Act, to be made and kept in his office in the prescribed form. XV of 1872  
XV of 1865.

8. Subject to the payment of the prescribed fees, the indexes so made shall be at all reasonable times open to inspection by any person applying to inspect them, and copies of entries in the certified copies of the registers to which the indexes relate shall be given to all persons applying for them.

(Note).  
General.

**N.B.**—For Officer authorized to certify copies of entries given under S. 8 in—

- (a) Assam, see p 263 of the Assam Manual of Local Rules and Orders, 10d., 1893,
- (b) Bombay, see Bom R and O
- (c) Madras, see Mad R and O

9. A copy of an entry given under the last foregoing section shall be certified by the Registrar General of Births, Deaths and Marriages, or by an officer authorized in this behalf by the Local Government, and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates

10. Each Registrar General of Births, Deaths and Marriages shall exercise a general superintendence over the Registrars of Births and Deaths in the territories for which he is appointed

Superintendence  
of Registrars by  
Registrar General.

## CHAPTER III

### REGISTRATION OF BIRTHS AND DEATHS

#### A.—Application of this Chapter

11. (1) The persons whose births and deaths shall, in the first instance, be registrable under this Chapter are the following, namely.—

Persons whose  
births and deaths are  
registrable

- (a) in British India, the members of every race, sect or tribe to which the Indian Succession Act, 1865, applies, and in respect of which an order under section 332 of that Act is not for the time being in force, and all persons professing the Christian religion ; x of 1865.

(b) in the dominions of Princes and States in India in alliance with Her Majesty, British subjects being members of a like race, sect or tribe, or professing the Christian religion ;

(2) But the Local Government, by notification in the official Gazette, may, with the previous approval of the Governor (General in Council, extend the operation of this Chapter to any other class of persons either generally or in any local area<sup>1</sup>.

(Note).

1—" Clause (2). "

**Scope and effect of clause (2) of the section.**

" By section 11, sub-Section (2), the Select Committee have enabled Local Governments, with the previous sanction of the Governor-General in Council, to extend the operation of the chapter respecting the registration of births and deaths to any classes of the community which may be desirous of taking advantage of the provisions of that Chapter " See Report of Select Committee.

*B.—Registration Establishment*

**12** The Local Government may appoint, either by name or by virtue of their office, so many persons as it thinks necessary to be Registrars of Births and Deaths for such local areas within the territories under its administration as it may define and, if it sees fit, for any class of persons within any part of those territories

Power for local Government to appoint Registrars for its territories

(Notes).

**General.**

**N.B**—As to Registrars appointed under this section for—

- (a) Ajmer-Merwara, *see* Aj., R. O. ,
- (b) Assam, *see* Assam List of Local Rules and Orders, Ed , 1893, p. 273 ,
- (c) Bombay, *see* Bom , R. and O. ,
- (d) British Baluchistan, *see* Gazette of India, 1903, Pt. II, p 1165 ,
- (e) Burma, *see* Bur. R. M. Burma Gazette 1906, Pt I, p. 795 , *ibid.*, 1903, Pt. I, p. 693 ,
- (f) Central Provinces, *see* Central Provinces List of Local Rules and Orders, Ed , 1896, p 246.
- (g) Coorg, *see* Coorg, R. and O. ,
- (h) Madras, *see* Mad., R. and O. ,
- (i) Punjab, *see* Punj., R. and O. ,
- (j) United Provinces of Agra and Oudh, *see* U P., R. and O. ,

**Scope and effect of Ss. 12 and 13**

" By sections 12 and 13, the Select Committee have enabled Local Governments in British India and the Governor-General in Council in States in India in alliance with Her Majesty to appoint Registrars of Births

**General—(Concluded)**

and Deaths for classes of persons as well as for local areas. It will thus be practicable to appoint ministers of religion to be Registrars of Births and Deaths for their own congregations only without imposing on them duties for which they might have neither leisure nor inclination." See Report of Select Committee I

**13.** The Governor General in Council may, by notification in the Gazette of India, appoint, either by name or by virtue of their office, so many persons as he thinks necessary to be Registrars of Births and Deaths for such local areas within the dominions of any Prince or State in India in alliance with Her Majesty as he may define and, if he sees fit, for any class of persons within any part of those dominions

**(Note)**

**"1.—Power of Governor General in Council to appoint Registrars for Native States."**

**N.B.**—For Registrars of Births and Deaths appointed under this section for—

- (1) Native States in the Bombay Presidency, see Brit. Enact., N.S. (W.I.),
- (2) States of Puddu Kottai, Ranganapalle, and Sandur, see Gazette of India, 1880, Pt. I, p. 52,
- (3) State of Mysore, see Gazette of India, 1889, Pt. I, p. 54, and *ibid*, 1893, Pt. I, p. 381,
- (4) Hyderabad State, see Gazette of India, 1889 and 1890, Pt. I, pp. 621 and 468, respectively,
- (5) Rampur and Tehri States, see Gazette of India, 1891, p. 421,
- (6) Kashmir and Jammu, see Brit. Enact., N.S. (N.I.),
- (7) Nepal, see Brit. Enact., N.S. (N.I.),
- (8) Central Provinces Feudatory States, see Brit. Enact., N.S. (C.I.), and Gazette of India, 1885, Pt. I, p. 401,
- (9) States in the Central India Agency, see Brit. Enact., N.S. (C.I.),
- (10) States in the Rajputana Agency, see Brit. Enact., N.S. (Raj.) and Gazette of India 1893, Pt. I, p. 158,
- (11) The territory of the Raja of Nahan (Sirmur), see Gazette of India, 1899, Pt. I, p. 277,
- (12) Certain states in Rajputana, see Gazette of India, 1899, Pt. I, p. 421,
- (13) Baluchistan Agency Territories, see Gazette of India, 1903 Pt. I, p. 916

Registrar to be deemed a public servant.

**14.** Every Registrar of Births and Deaths shall be deemed to be a public servant within the meaning of the Indian Penal Code

**XLV of 1860.**

**15.** (1) The Local Government or the Governor General in Council, as the case may be, may suspend, remove or dismiss any Registrar of Births and Deaths.

Power to remove Registrars.

(2) A Registrar of Births and Deaths may resign by notifying in writing to the Local Government or to the Governor General in Council, as the case may be, his intention to do so, and, on his resignation being accepted by the Local Government or the Governor General in Council, he shall be deemed to have vacated his office.

• **16.** (1) Every Registrar of Births and Deaths shall have an Office and attend- office in the local area, or within the part of the  
ance of Registrar. territories or dominions, for which he is appointed

(2) Every Registrar of Births and Deaths to whom the Local Government may direct this sub-section to apply shall attend at his office for the purpose of registering births and deaths on such days and at such hours as the Registrar-General of Births, Deaths and Marriages may direct, and shall cause to be placed in some conspicuous place on or near the outer door of his office his name, with the addition of Registrar of Births and Deaths for the local area or class for which he is appointed, and the days and hours of his attendance.

**17.** (1) When any Registrar of Births and Deaths to whom the Local Government may direct this section to  
Absence of Registrar or vacancy in his office. apply<sup>1</sup>, not being a Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay, is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, or such other officer as the Local Government appoints in this behalf, shall be the Registrar of Births and Deaths during such absence or until the Local Government fills the vacancy

(2) When any such Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay is absent, or when his office is temporarily vacant, any person whom the Registrar General of Births, Deaths and Marriages appoints in this behalf shall be the Registrar of Births and Deaths during such absence or until the Local Government fills the vacancy.

(3) The Registrar-General of Births, Deaths and Marriages shall report to the Local Government all appointments made by him under this section.

**(Note).**

*I — "The Local Government .. to apply."*

**N.B.**—This section has been declared by the Government of Madras to apply to all the Registrars appointed by that Government, under the notification issued under the S. 12 See Madras Rules and Orders.

**18.** The Local Government shall supply every Registrar of Births and Deaths with a sufficient number of register books of births and of register books of deaths, and shall make suitable provision for the preservation\* of the records connected with the registration of births and deaths

Register books to be supplied and preservation of records to be provided for

*C.—Mode of Registration*

**19.** Every Registrar of Births and Deaths, on receipt of notice of a birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book,

Duty of Registrar to register births and deaths of which notice is given

Provided that—

- (a) if he has reason to believe the notice to be in any respect false, he may refuse to register the birth or death until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made 1; and
- (b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

**(Note)**

*I — "Clause(a)."*

**Scope of the section**

"By S. 19 the Select Committee have provided that, if a Registrar of Births and Deaths has reason to believe any notice given to him to be in any respect false, he may refuse to register the birth or death until he receives an order from the District Court directing him to make the entry and prescribing the manner in which the entry is to be made.

In the same section and in S. 22, Sub-S. 3, they have reproduced the provisions of S 7 of the Statute 37 and 33 Vic. cap 88." See Report of Select Committee

**J**

Persons authorized to give notice of birth.

**20** Any of the following persons may give notice of a birth, namely:—



- (a) the father or mother of the child ,
- (b) any person present at the birth ,
- (c) any person occupying, at the time of the birth, any part of the house wherein the child was born and having knowledge of the child having been born in the house ;
- (d) any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred ;
- (e) any person having charge of the child

Persons autho-  
rized to give notice  
of death

**21** Any of the following persons may give notice of a death, namely —

- (a) any relative of the deceased having knowledge of any of the particulars required to be registered concerning the death ,
- (b) any person present at the death ,
- (c) any person occupying, at the time of the death, any part of the house wherein the death occurred and having knowledge of the deceased having died in the house ,
- (d) any person in attendance during the last illness of the deceased ,
- (e) any person who has seen the body of the deceased after death.

Entry of birth or  
death to be signed  
by person giving  
notice.

**22.** (1) When an entry of a birth or death has been made by the Registrar of Births and Deaths under section 19, the person giving notice of the birth or death must sign the entry in the register in the presence of the Registrar :

“Provided <sup>1</sup> that it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register if he has given such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the Local Government in this behalf ”

(2) Until the entry has been so signed or the conditions specified in the proviso to sub-section (1) have been complied with <sup>2</sup>, the birth or death shall not be deemed to be registered under this Act.

(3) When the birth of an illegitimate child is registered, and the mother and the person acknowledging himself to be the father of the child jointly request that that person may be registered as the father, the mother and that person must both sign the entry in the register in the presence of the Registrar

(Notes).

*1 — "Provided, etc "*

**N B.**—This proviso to Sub-S. 1, has been added by S. 2 of Act IX of 1911.\*

*2 — "Or the conditions complied with "*

**N B.**—These words were inserted by S. 2 of Act IX of 1911

**23** The Registrar of Births and Deaths shall, on application made at the time of registering any birth or death by the person giving notice of the birth or death and on payment by him of the prescribed fee 1, give to the applicant a certificate in the prescribed form, signed by the Registrar, of having registered the birth or death

Grant of certificate of registration of birth or death

(Note).

*1. — "Prescribed fee "*

**Stamps in which such fees are to be paid**

As to —, see Gazette of India, 1899 Pt. I p. 82, Para 14 (c) of Notification No. 786 S R **K**

**24.** (1) Every Registrar of Births and Deaths in British India shall send to the Registrar General of Births, Deaths and Marriages for the territories within which the local area or class for which he is appointed is situate or resides, at the prescribed intervals, a true copy certified by him, in the prescribed form, of all the entries of births and deaths in the register book kept by him since the last of those intervals

Duty of Registrars as to sending certified copies of entries in register books to Registrar General

Provided that in the case of Registrars of Births and Deaths who are clergymen of the Churches of England, Rome and Scotland, the Registrar may, if so directed by his ecclesiastical superior, send the certified copies in the first instance to that superior, who shall send them to the proper Registrar General of Births, Deaths and Marriages.

In this sub-section "Church of England" and "Church of Scotland" mean the Church of England and the Church of Scotland as by law established respectively; and "Church of Rome" means the Church which regards the Pope of Rome as its spiritual head

(2) The provisions of sub-section (1) shall apply to every Registrar of Births and Deaths in the dominions of any Prince or State in India in alliance with Her Majesty, with this modification that the certified copies referred to in that sub-section shall be sent to such one of the Registrars General of Births, Deaths and Marriages as the Governor General in Council, by notification <sup>1</sup> in the Gazette of India appoints in this behalf

(Note).

*I.—“Notification.”*

**An instance of such notification.**

For —, see Gazette of India, 1899, Pt. I, p. 424

L

**25** (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same.

Searches and copies of entries in register books.

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or death to which the entry relates

**26.** Notwithstanding anything in section 19, the Local Government may make rules <sup>1</sup> authorizing Registrars of Births and Deaths, on conditions and in circumstances to be specified in the rules, to register births and deaths occurring outside the local areas or classes for which they are appointed.

Exceptional provision for registration of certain births and deaths.

(Notes).

General.

**Scope of Section.**

“By S. 26, the Select Committee have proposed to empower the Governor-General in Council (now the Local Government) to make rules authorizing Registrars of Births and Deaths, on conditions and in circumstances to be specified in the rules, to register births and deaths occurring outside the local areas or classes for which they have been appointed. Events occurring in the course of journeys, or in places for which Registrars of Births and Deaths have not been appointed, may by those rules be made registrable.” See Report of Select Committee.

M

*I.—“May make rules.”*

**Rules made under S. 26 jointly with Ss. 28 and 36.**

For ———, see Gazette of India 1888, Pt. I, p. 336; *ibid.*, 1894, Pt. I, p. 436. N

**2—"Local Government."**

**N.B.**—These words were substituted for the words "Governor General in Council" by S. 3 of Act IX of 1911.

**D—Penalty for False Information.**

**27.** If any person wilfully makes, or causes to be made for the purpose of being inserted in any register of births or deaths, any false statement in connection with any notice of a birth or death under this Act, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both

Penalty for wilfully giving false information.

**E.—Correction of Errors**

**28** (1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such rules as may be made by the Local Government<sup>1</sup> with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction

Correction of entry in register of births or deaths

(2) If a certified copy of the entry has already been sent to the Registrar General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.

**(Notes).**

**1—"Local Government."**

**N.B.**—These words were substituted for the words "Governor General in Council" by S. 3 of Act IX of 1911

**CHAPTER IV**

**AMENDMENT OF MARRIAGE ACTS.**

Addition of new section after section 13, Act III of 1872

**29.** After section 13 of Act III of 1872 (*to provide a form of marriage in certain cases*) the following section shall be inserted, namely.—

"13-A. The Registrar shall send to the Registrar General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as the Governor General in Council from time to time, directs, a true copy certified by him, in such form as the Governor General in Council from time to time, prescribes, of all entries made

Transmission of certified copies of entries in marriage-certificate book to the Registrar General of Births, Deaths and Marriages.

by him in the said marriage-certificate book since the last of such intervals."

Amendment of the  
Indian Christian  
Marriage Act, 1872.

**30** In the Indian Christian Marriage Act, 1872 (Act XV of 1872), the following amendments shall be made, namely —

(a) at the end of section 3, the words "Registrar General of Births, Deaths and Marriages" means a Registrar General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886," shall be added.

VI of 1886.

(b) for the words "Secretary to the Local Government", wherever they occur, and for the words "Secretary to a Local Government" in section 79, the words "Registrar General of Births, Deaths and Marriages" shall be substituted,

1(c) \* \* \* \*

(d) in section 81, after the words "Registrar General of Births, Deaths and Marriages" the words "in England" shall be added

**(Note)**

**I — "Clause (c)"**

**N.B.**—Clause (c) in this section, which amended S. 62 of Act XV of 1872, was repealed by the Christian Marriage Act, 1872, Amendment Act II of 1891, S. 4.

Addition of new  
section after section  
8 of the Parsi Mar-  
riage and Divorce  
Act, 1865.

**31** After section 8 of the Parsi Marriage and Divorce Act, 1865 (XV of 1865), the following section shall be inserted, namely —

"8-A. Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at such intervals as the Governor General in Council from time to time directs, send to the Registrar General of Births, Deaths and Marriages for the territories administered by the Local Government by which he was appointed a

Transmission of  
certified copies of  
certificates in mar-  
riage register to Re-  
gistrar General of  
Births, Deaths and  
Marriages

true copy certified by him, in such form as the Governor General, from time to time prescribes, of all certificates entered by him in the said register of marriages since the last of such intervals."

## CHAPTER V.

### SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS

**32** If any person in British India, or in the dominions of any Prince or State in India in alliance with Her Majesty, has for the time being the custody of any register or record of birth, baptism, naming, dedication, death or burial of any persons of the classes referred to in Section 11, sub-S (1), or of any register or record of marriage of any persons of the classes to which Act III of 1872 or the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, applies, and if such register or record has been made otherwise than in performance of a duty specially enjoined by the law of the country in which the register or record was kept, he may, at any time before the first day of April, 1891<sup>1</sup> send the register or record to the office of the Registrar General of Births, Deaths and Marriages for the territories within which he resides, or, if he resides within the dominions of any such Prince or State as aforesaid, to such one of the Registrars General as aforesaid as the Governor General in Council, by notification<sup>2</sup> in the Gazette of India, directs, in this behalf

XV of 1872.  
XV of 1865.

(Notes).

*1 — "At any time 1891"*

**N B** —The words "at any time before the 1st day of April, 1891" in the middle of S. 32, were substituted for the words "within one year from the date on which this Act comes into force" by the Act XVI of 1890, S. 1.

*2 — "Notification."*

#### **Instance of such Notification.**

For an ———, see Gazette of India, 1890, Pt. I, p. 424

**0**

**33.** (1) The Governor General in Council may appoint so many persons as he thinks fit to be Commissioners for examining the registers or records sent to the Registrar General of Births, Deaths and Marriages under the last foregoing section

Appointment of Commissioners to examine registers

(2) The Commissioners so appointed shall hold office for such period as the Governor General in Council, by the order of appointment, or any subsequent order, directs

**34.** (1) The Commissioners appointed under the last foregoing section shall enquire into the state, custody and authenticity of every such register or record as may be sent to the Registrar General of Births, Deaths and Marriages under section 32,

Duties of Commissioners.

and shall deliver to the Registrar General a descriptive list or descriptive lists of all such registers or records, or portions of registers or records, as they find to be accurate and faithful.

(2) The list or lists shall contain the prescribed particulars and refer to the registers or records, or to the portions of the registers or records, in the prescribed manner

(3) The Commissioners shall also certify in writing, upon some part of every separate book or volume containing any such register or record, or portion of a register or record, as is referred to in any list or lists made by the Commissioners, that it is one of the registers or records, or portions of registers or records, referred to in the said list or lists.

**35.** (1) Subject to the payment of the prescribed fees, the descriptive list or lists of registers or records, or portions of registers or records, delivered by the Commissioners to the Registrar General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them

(2) A copy of an entry given under this section shall be certified by the Registrar General of Births, Deaths and Marriages, or by an officer or person authorized in this behalf by the Local Government, and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death, burial or marriage to which the entry relates

(Note).

**General**

**N.B.**—For officers appointed under S. 35 (2) in,—

- (1) Bengal, *see* Ben, R. and O.,
- (2) Bombay, *see* Bom, R. and O.,
- (3) Burma, *see* Bur, R.M.,
- (4) Madras, *see* Mad, R. and O.,
- (5) Punjab, *see* Punj, R. and O.,
- (6) United Provinces, *see* U P., R. and O.

**35-A.** (1) The Governor General in Council, if he thinks fit, may, by notification in the Gazette of India, appoint more commissions<sup>1</sup>, than one for the purposes of this Chapter, each such commission consisting of so many and such members as he may by a like notification, nominate thereto by name or by office, and having its functions restricted to the disposal, under this Act

Constitution of additional commissions for purposes of this Chapter

**SS. 36-A & 36] Act VI of 1886 (BIRTHS, DEATHS & MARRIAGES REG.). 717**

and the rules thereunder, of the registers or records sent under S. 32 to such Registrar General or Registrars General as the Governor General in Council may, by a like notification, specify in this behalf.

(2) If more commissions than one are appointed in exercise of the power conferred by sub-S (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a commission so appointed

**(Notes)**

## General

**N B**—This section was added by S. 2, Act XVI of 1890

### 1.—“Commissions.”

**N B.**—For Commissioner appointed under this section in —

- (1) The Bombay Presidency, see Bom , R and O ,  
(2) Burma, see Bur , R.M ,  
(3) Madras, see Mad., R and O

## CHAPTER VI

## RULES

**Rules**                 “ **36** (1) The Local Government may make rules to carry out the purposes of this Act”

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) fix the fees payable under this Act ,
- (b) prescribe the forms required for the purposes of this Act ;
- (c) prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice ,
- (d) prescribe the evidence of identity to be furnished to a Registrar of Births and Deaths by persons giving notice of a birth or death in cases where personal attendance before such Registrar is dispensed with ,
- (e) prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them ;



- (f) prescribe the conditions and circumstances on and in which Registrars of Births and Deaths may correct entries of births and deaths in registers kept by them ;
- (g) prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate ; and
- (h) prescribe the custody in which those registers or records are to be kept

(3) Every power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication.

(4) All rules made under this Act shall be published in the local official Gazette, and on such publication shall have effect as if enacted in this Act "

**(Notes)**

**General.**

**N.B.**—This section was substituted for the old S. 36 by S. 4 of Act IX of 1911. The old S. 36 stood thus —

Power for Governor General in Council to make rules.

In addition to any other power to make rules impliedly or expressly conferred by this Act, the Governor General in Council may make rules—

- (a) to fix the fees payable under this Act ,
- (b) to prescribe the forms required for the purposes of this Act ,
- (c) to prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice ,
- (d) to prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them ,
- (e) to prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate ,
- (f) to prescribe the custody in which those registers or records are to be kept ; and,
- (g) generally, to carry out the purposes of this Act.

**(1) Continuation of rules heretofore made by Governor General in Council.**

" All rules heretofore made under Act VI of 1886 by the Governor General in Council shall, after the commencement of this Act (IX of 1911), be deemed to have been made by the Local Government." See S. 6 of Act IX of 1911.

**General—(Concluded).**

**(2) Rules made under this section**

For———, conjointly with Ss. 28 and 36, *see* Gazette of India, 1893, Pt. I, p. 336, and *ibid*, 1894, Pt. I, p. 136 **P**

**(3) Fees prescribed for attendance at private residences.**

**N.B.**—For fees prescribed for attendance at private residences in—

(1) Burma, *see* Burma Rules Manual

(2) Madras, *see* Madras Rules and Orders **Q**

**(4) Rules framed by the Government of India as to fees**

For ———, *see* Gazette of India, 1894, Pt. I, p. 580 **R**

**(5) Rules for the guidance of Commissioners appointed under Ch. V**

For———, *see* Gazette of India, 1890, Pt. I, p. 745 **S**

**(6) Rules for the guidance of Commissioners appointed under Ch. V**

For———, framed with regard to the powers conferred by this section, *see* Gazette of India, 1890 and 1892, Pt. I, pp. 745 and 123, respectively **T**

**37** [Repealed by S. 5 of Act IX of 1911]

**(Notes)**

**N.B.**—The old S. 37 stood thus —

“(1) The Governor General in Council shall, before making rules under this Act, publish a draft of the proposed rules in such manner as may, in his opinion, be sufficient for the information of persons likely to be affected thereby.

(2) There shall be published with the draft a notice specifying a date at or after which the draft will be taken into consideration.

(3) The Governor General in Council shall receive and consider any objection or suggestion which may be made by any person with respect to the draft before the date so specified.

(4) Every rule made under this Act shall be published in the Gazette of India, and the publication in the Gazette of India of a rule purporting to be made under this Act shall be conclusive evidence that it has been duly made.”

**RULES AND ORDERS MADE UNDER ACT VI OF 1886**

**1.—GENERAL**

**Date of operation of Births, Deaths and Marriages Registration Act, 1886 (VI of 1886).**

*No. 1161, dated the 19th July 1888.*—The Governor General in Council is pleased to direct under S. 1, subsection (2) of the Births, Deaths, and Marriages Registration Act, No. VI of 1886, that that Act shall come into force on the first day of October, 1888.

[*See* Gazette of India, 1888, Pt. I, p. 336]

**Rules under the Births, Deaths and Marriages Registration Act, 1886 (VI of 1886).**

*No. 1173, dated the 19th July 1888.*—The Governor General in Council is pleased to publish the following rules made under Ss. 26, 24, and 36 of the Births, Deaths, and Marriages Registration Act, No. VI of 1886

1. In these rules unless there is something repugnant in the subject or context,—

## I.—GENERAL—(Continued)

- (1) "the Act" means the Births, Deaths and Marriages Registration Act, 1886
- (2) "schedule" means a schedule to these rules
- (3) "Registrar-General" and "Registrar" mean respectively a Registrar-General of Births, Deaths and Marriages and a Registrar of Births and Deaths appointed under the Act and
- (4) "sign" used with reference to a person who is unable to write his name includes mark.

2. Notices of births and deaths shall be in the forms set forth in Schedule A and Schedule B, respectively.

3. Every such notice shall be signed by the person giving it and shall specify the capacity in which the person claims to be authorized to give it

4. Every such notice shall ordinarily be presented to the Registrar for the local area in which the birth or death occurred within three months of the date of the birth or death to which it refers, as the case may be

Provided that the Registrar may, of his own authority for any reason which he considers sufficient, accept notice of a birth or death at any time within six months from the date of its occurrence and with the special sanction in writing of the Registrar-General after that time.

5. An appeal against an order of a Registrar refusing to register a birth or death on any other ground than that referred to in proviso (a) to S. 19 of the Act shall lie to the Registrar-General who may in his discretion either confirm the order of the Registrar or direct him to register the birth or death.

6. Registers of births and deaths shall be kept in the forms set forth in Schs. C and D, respectively

7. When a birth or death has occurred during a journey, or when a person giving notice of a birth or death was compelled by duty, or urgent necessity, or unavoidable accident, to leave the local area in which such birth or death occurred so soon after its occurrence that he was unable to give the prescribed notice to the Registrar for that local area,

any Registrar may receive notice of such birth or death and register the same as if it were a birth or death which had occurred within the local area for which he has been appointed

8. The provisions of Rule 1, as to the time within which notice of a birth or death must be given, shall apply to every notice of a birth or death given under the circumstances described in the last foregoing rule

9. In every case of a birth or death admitted to registration under Rule 7 the Registrar to whom the notice of the birth or death is given shall record in his register the reason why the notice was not given to the Registrar of the local area within which the birth or death occurred, and shall within one week from the date of the registration of the birth or death forward to the Registrar-General, and to the Registrar of the local area within which the birth or death occurred, a copy of the entry in the register relating to the birth or death.

Every Registrar shall paste into a book kept by him for the purpose all copies of entries received by him under this rule, and the book containing the copies shall be at all reasonable times open to inspection by any person desiring to inspect it,

**I.—GENERAL—(Continued).**

10. The Registrar for any local area including a port may register any birth or death which has occurred on the high seas on board any ship arriving at such port —

Provided that notice of the birth or death is given to such Registrar within sixty days after the arrival of the ship.

In the notice of such birth or death and in the entry thereof in the register there shall be specified in lieu of the name of the place at which the name of the ship on which the event occurred and the name of the Commander of the ship and the approximate latitude and longitude of the ship's position at the time of the birth or death.

11. Every certificate of registration of a birth or death given by a Registrar under section 23 of the Act shall be in the form set forth in Schedule E.

12. At the foot of every copy of an entry given under S. 9 or S. 25 of the Act there shall be written a certificate dated and subscribed by the Registrar-General or officer authorized under S. 9 or by the Registrar as the case may be that the copy is a true copy of the entry.

13. Every Registrar shall keep in the form set forth in Sch. F a register of all certificates of registration and copies of entries given by him.

Every Registrar-General shall keep a register in a similar form of all copies given by him of entries in the certified copies of the Registers sent to his office

14. The copies of entries, births and deaths with Registrars are required by S. 24 of the Act to send to the Registrar-General shall be certified in the form set forth in Schedule G, and shall be sent at intervals of three months on or as nearly as possible after the 1st January, April, July and October in each year

Should no entries be made in a register during the preceding three months, a certificate to this effect shall be sent to the Registrar-General

15. The indexes which are required by S. 7 of the Act to be made of the certified copies of the registers of births, deaths and marriages sent to the office of the Registrar-General shall be in the forms set forth in Sch. H, Sch. I and Sch. J, respectively.

Every entry in an index shall be made alphabetically with reference to the initial letter of the name of the person indicated by the entry.

In the index of certified copies of entries of marriages, the name of both the husband and the wife must be indexed.

In the case of the person of European descent the initial letter will be the first letter of the surname, and in the case of any other person the first letter of his name and not that of his rank, title or class.

16. A Registrar may, of his own motion, correct in manner prescribed in S. 28 of the Act any error in form made in an entry of a birth or death in a register of births or register of deaths kept by him under the Act.

In every case in which an entry is corrected under this rule intimation thereof shall (if practicable) be communicated within one week from the date of the correction being made to the person who gave the notice of the birth or death

17. When an error in substance in any entry of a birth or death in a register of births or register of deaths is asserted to have been made the Registrar may correct the error in manner prescribed in S. 28 of the Act on application made in writing and signed in the presence of two witnesses attesting the signature by any person

**I.—GENERAL—(Concluded).**

authorized under S. 20 or 21 as the case may be to give notice of the birth or death to which the entry relates —

Provided that the Registrar is satisfied that the application is well founded.

An appeal against an order of a Registrar under this rule refusing to correct an asserted error in an entry in a register shall lie to the Registrar-General who may in his discretion either confirm the order of the Registrar or direct him to correct the error.

18. Without the special sanction in writing of the Registrar-General an application for the correction of an entry in a register of births or register of deaths shall not be entertained after the expiration of one year from the date on which the notice of the birth or death was given.

19. The sums specified in Sch K shall be the fees payable under the sections of the Act there referred to —

Provided that soldiers and non-commissioned officers of Her Majesty's Regular Forces and all seamen shall be exempted from the payment of any fees.

20. Every Registrar-General and every Registrar, who is a Government servant and not a minister of religion, shall keep a register in the form set forth in Schedule L of all fees realized under these rules, and shall forward such fees at the end of each month to the nearest treasury to be credited to Government. The Treasury Officer shall give each Registrar a certificate of the amount so credited, and the Registrar shall send a copy of the certificate to the Registrar-General. Registrars who are not Government servants or who are ministers of religion may retain for their own use any fees which they may realize under these rules.

**SCHEDULES.****SCHEDULE A***Notice of a Birth*

(Rule 2).

To the Registrar of Births and Deaths for (*local area or class*).

I, A.B. (*name, description and residence*) being (*here state the capacity in which the person claims to be authorised to give notice*), hereby give notice for the purposes of S. 19, Act VI of 1886, that on (*date*) at (*place*) I, A. B. or my wife, C. D. or C. D. (*name and description*) was delivered of a      , and I request that the said birth may be registered.

----- - *Signature.*

**SCHEDULE B.***Notice of a Death.*

(Rule 2).

To the Registrar of Births and Deaths for (*local area or class*).

I, A.B. (*name, description and residence*) being (*here state the capacity in which the person claims to be authorised to give the notice*) hereby give notice for the purposes of S. 19, Act VI of 1886, that on (*date*) at (*place*) my (*state relationship*) C D. (*name and description*), or C D *name and description*, died of      , and request that the said death may be registered.

----- *Signature.*

## SCHEDULE C.

*Register of Births.*

(Rule 6).

1. Serial number
2. Date of birth.
3. Place of birth.
4. Name, if any.
5. Sex.
6. Name, race, religion, and occupation of father
7. Name, race and religion of mother
8. Signature, description and residence of person giving notice.
9. Signature, description and residence of mother and person acknowledging himself to be father (*column only to be used in the case referred to in S. 19, proviso (b), and S. 22, sub-S. 3*)
10. Reason why notice was not given to Registrar within whose local area birth occurred (*column only to be used in the case of a birth registered under Rule 7*).
11. Date of registration
12. Signature of Registrar
13. Rectification of error in entry

## SCHEDULE D.

*Register of Deaths*

(Rule 6)

1. Serial number.
2. Date of death.
3. Place of death.
4. Name, sex, religion and occupation of deceased
5. Name, race, religion and occupation of parents of deceased.
6. When deceased was a married woman or a widow, name, race, religion and occupation of her husband or late husband
7. Age of deceased.
8. Cause of death.
9. Signature, description and residence of person giving notice.
10. Reason why notice was not given to Registrar within whose local area death occurred (*column only to be used in the case of a death registered under Rule 7*).
11. Date of registration.
12. Signature of Registrar.
13. Rectification of error in entry

## SCHEDULE E

*Certificate of Registration of Birth or Death*

(Rule 11.)

Certified that I have this day registered the birth (or death) to which the entry in the Register of Births (or deaths), of which a true copy is above written, relates.

Dated the                      of

A.B.,

Registrar of Births and Deaths  
for (local area or class).

## SCHEDULE F.

*Register of Certificates of Registration or Copies of entries granted.*

(Rule 13).

1. Serial number
2. Name and residence of person applying for certificate or copy.
3. Date of application.
4. Nature of certificate or copy granted.
5. Date of grant of certificate or copy.
6. Fee paid.
7. Initials of Registrar
8. Remarks.

## SCHEDULE G.

*Certificate of truth of copies of entries sent to the Registrar General.*

(Rule 14)

Certified that the above, which contains entries from No.            regarding            to No.            regarding           , is a true copy of all the entries in the Register of Births (or Register of Deaths, as the case may be) kept by me for the three months ending            the day of            18   .

Dated            of           .

- - - - - Signature.

Registrar of Births and Deaths

for (local area or class).

## SCHEDULE H.

*Index of certified copies of Registers of Births.*

(Rule 15).

Name and sex.

Father's name.

Date.

Place.

Reference to certified copy of register

## SCHEDULE I

*Index of certified copies of Registers of Deaths.*

(Rule 15)

Name and sex.

Father's name.

Date.

Place.

Reference to certified copy of register.

## SCHEDULE J.

*Index of certified copies of entries of marriages.*

(Rule 15).

Name of (husband) (wife).

Date.

Place.

Reference to certified copy of entry.

**SCHEDULE K.**

*Fees leviable under Ss. 8, 23 and 25 of the Act.*

(Rule 19).

**Rs. A. P.**

(i) Under section 8 for inspection of indexes in the Office of a Registrar-General—	
(a) For the first year	1 0 0
(b) For every additional year, four annas up to a maximum for one inspection of	5 0 0
(ii) Under section 8 for each copy of an entry in a certified copy of a register in the office of a Registrar-General.	1 0 0
(iii) Under section 23 for a certificate of registration of birth or death.	1 0 0
(iv) Under section 25 for search in a register of births or deaths—	
(a) for the first year	1 0 0
(b) for every additional year, four annas up to a maximum for one search of	5 0 0
(v) Under section 25 for each copy of an entry given by a Registrar	1 0 0

**SCHEDULE L.**

*Register of Fees*

(Rule 20)

1. Serial number
2. Date of receipt
3. From whom received
4. On what account received
5. Section of Act under which chargeable.
6. Amount of fee
7. Signature of Registrar-General or officer authorised under section 9 of the Act  
(or Registrar as the case may be)
8. Signature of Treasury officer, and date of receipt in treasury
9. Remarks

(See Gazette of India, 1888, Pt I, p. 336).

**Commissioners for the purposes of the Act.**

*No. 1523, dated the 17th October, 1890*—In exercise of the power conferred by section 35-A (1) of the Births, Deaths, and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers of records which have already been or may hereafter be sent under section 32 of the Act to the Registrar-General of Births, Deaths and Marriages for the Madras Presidency —

The Registrar-General of Births, Deaths and Marriages for the Madras Presidency.

The Registrar of the Madras Diocese.

The Reverend E. H. Desiva

The Reverend J. C. Peattie

(See Gazette of India, 1890, Pt I, p. 744).

*No. 1525, dated the 17th October, 1890.*—In exercise of the power conferred by S. 35-A (1) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the



undermentioned persons to be Commissioners for the purpose of examining and verifying the registers of records which have already been or may hereafter be sent under S 32 of the Act to the Registrar-General of Births, Deaths and Marriages for Bengal —

The Registrar-General of Births, Deaths and Marriages for Bengal.

The Remembrancer of Legal Affairs, Bengal.

The Registrar of the Calcutta Diocese

(See Gazette of India, 1890, Pt. I, p. 744).

*No. 1527, dated the 17th October, 1890.*—In exercise of the power conferred by S 35-A (1) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers or records which have already been or may hereafter be sent under S 32 of the Act to the Registrar-General of Births, Deaths and Marriages for the North-Western Provinces and Oudh —

The Registrar-General of Births, Deaths and Marriages for the North-Western Provinces and Oudh.

The Legal Remembrancer to the Government of the North-Western Provinces and Oudh

The Secretary to the Board of Revenue, North-Western Provinces

(See Gazette of India, 1890, Pt. I, p. 744).

*No. 1529, dated the 17th October, 1890.*—In exercise of the power conferred by S 35-A (2) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers or records which have already been or may hereafter be sent under S 32 of the Act to the Registrar-General of Births, Deaths and Marriages for the Central Provinces

The Registrar-General of Births, Deaths and Marriages for the Central Provinces.

The Registrar of the Court of the Judicial Commissioner of the Central Provinces

(See Gazette of India, 1890, Pt. I, p. 744)

*No. 1531, dated the 17th October, 1890*—In exercise of the power conferred by S. 35-A (1) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers or records which have already been or may hereafter be sent under S 32 of the Act to the Registrar-General of Births, Deaths and Marriages for Burma —

The Registrar-General of Births, Deaths and Marriages for Burma.

The Registrar of the Court of the Recorder of Rangoon.

The Registrar of the Rangoon Diocese

(See Gazette of India, 1890, Pt. I, p. 745)

*No. 1533, dated the 17th October, 1890*—In exercise of the power conferred by S 35-A (1) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers or records which have already been or may hereafter be sent under S. 32 of the Act to the Registrar-General of Births, Deaths and Marriages for Assam —

The Registrar-General of Births, Deaths and Marriages for Assam.

The Deputy Commissioner of the Khasi and Jaintia Hills.

(See Gazette of India, 1890, Pt. I, p. 745).

**Rules for Commissioners appointed under section 35-A (1) of the Act.**

*No 1535, date the 17th October, 1890.*—In exercise of the powers conferred by S 36 (e) and (f) of the Births, Deaths and Marriages Registration Act, VI of 1886, the Governor General in Council is pleased to frame the following rules for the guidance of Commissioners to be appointed under S 35-A (1) of the above Act as amended by Act XVI of 1890 —

1 The descriptive lists to be prepared by the Commissioners appointed under Chapter V of the Act shall show, in three separate classes, the registers or records, or portions of registers or records—

- (a) relating to births, baptisms, namings, or dedications ,
- (b) relating to marriages ,
- (c) relating to deaths or burials.

2. Each list shall show in each class in alphabetical order the places at which the registers or records, or portions of registers or records therein referred to, have been kept.

3. The volumes of the registers or records, or portions of registers or records, kept at each place shall be shown in the list according to the chronological sequence of the entries therein , and the number so assigned to each volume in the list shall be written or impressed on the outside of such volume

4. The pages of each register or record, or portion of a register or record, examined shall be numbered in consecutive order , and the total number of the pages in each register or record, or portion of a register or record, shall be entered in the descriptive list.

5. The entries in each year in every register or record, or portion of a register or record, examined shall be numbered in consecutive order, where this has not already been done , and the total number of entries for each year in each register or record or portion of a register or record shall be shown in the descriptive list, together with the dates of the first and last entries

6. Every blank space, blank page, interlineation, and erasure found in each register or record, or portion of a register or record, when examined by the Commissioners, shall be indicated therein by a stamp impressed, and the descriptive list shall show in appropriate columns on what pages in each register or record, or portion of a register or record, such impressions have been made.

7. Entries in registers or records, or portions of registers or records, which purport to be true copies only shall be indicated therein by a stamp impressed, and the descriptive list shall show on what pages in each register or record, or portion of a register or record, such impressions have been made

8. Every descriptive list shall further show in appropriate columns the following particulars —

- (1) the name and description of the person from whom each register or record, or portion of a register or record, to which it relates was received ,
- (2) the names and descriptions of the persons by whom such register or record, or portion of a register or record, was kept ,
- (3) the class or classes of persons to whom the entries in such register or record, or portion of a register or record, relate ,
- (4) the condition of each register or record, or portion of a register or record, or any other remarks relating thereto as the Commissioners may think fit to record.

9. The descriptive list shall be in the following form :—

DESCRIPTIVE LIST.

*Descriptive List prepared by the Commissioners appointed under Chapter V of the Births, Deaths and Marriages DESCRIPTIVE LIST.*

*Registration Act, VI of 1856.*  
Class A — Births and Baptisms

**X B**—The entries are imaginary and for the sake of illustrating the form only

10. Any registers or records dealt with by Commissioners under Chapter V of the Births, Deaths and Marriages Registration Act, 1886, may be deposited in the office of the Registrar-General of Births, Deaths and Marriages with the consent of the custodians of them. In the absence of such consent the registers or records shall be returned to their custodians.

(See Gazette of India, 1890, Pt I, p. 745).

### **Fees payable under section 35 of the Act.**

*No. 296, dated the 26th October, 1891* --In continuation of the Notification of the Government of India in the Home Department, No 1173, dated the 19th July, 1889, the Governor General in Council is pleased to publish the following rules under section 36 (a) of the Births, Deaths and Marriages Registration Act, VI of 1886.

1. The following fees shall be payable under section 35 of the said Act, namely —

Fees,  
Rs. A P

For inspection of the descriptive list of registers or records delivered to the Registrar-General by Commissioners appointed under Chapter V of the said Act	1 0 0
--	-------

For each copy of an entry in any register or record described in the above-mentioned descriptive lists	1 0 0
--	-------

Provided that soldiers and non-commissioned officers of Her Majesty's Regular Forces and all seamen shall be exempted from the payment of the foregoing fees, when the same are payable to a Registrar-General or a Government servant who is not a minister of religion.

2. When fees payable under the foregoing rule are received by a Registrar-General or any person being a Government servant and not a minister of religion having the custody of any such registers or records as aforesaid, they shall be entered in a register and otherwise treated, as if they were fees realised under the rules published under the Notification No. 1173, dated 19th July, 1888, above referred to. When such fees are received by any other person, they may be retained by such person.

(See Gazette of India, 1894, Pt I, p. 580)

### **Fees for the attendance of a Registrar at a private residence.**

*No. 1-36-48, dated the 17th January, 1889* —Resolution —With its letter dated the 15th September last cited in the preamble to the Resolution the Government of Madras forwards a copy of a general order of that Government in paragraph 11 of which it is suggested that in cases in which a person is unable to attend at the office of the District Registrar and requires his presence at his private residence for the purposes of section 22 of the Births, Deaths and Marriages Registration Act, VI of 1886, the same fees should be charged for such attendance as are levied under section 78 of the Indian Registration Act, 1877. The Governor General in Council observes that for the purpose of registering births and deaths, Act VI of 1886 contemplates the attendance of parties at a Registrar's office. If, however, he is requested to attend at a private residence, His Excellency in Council sees no objection to his doing so if he thinks that course necessary, on payment of a fee for such attendance and of such travelling allowances as may be prescribed under S. 78 of the Indian Registration Act, 1877, for similar attendances under that Act.

His Excellency in Council is accordingly pleased to direct that a fee of Rs. 10 shall be charged for every attendance at a private residence. In rule 20 of the rules promulgated by Home Department Notification No. 1173, dated the 19th July, 1888, it is provided that a register (in the prescribed form) is to be kept of all fees realised under those rules, and that the fees should be credited to Government. The fees referred to in this Resolution should be treated in the same way, but the travelling allowances may be appropriated by the Registrar, who will receive no travelling allowance from Government.

(See Gazette of India, 1889, Pt. I, p. 115).

**Rules for guidance of Commissioners, appointed under section 35-A (1) of the Act, as amended by Act XVI of 1890.**

*No. 306, dated the 4th March, 1892* —In exercise of the power conferred by section 36 (g) of the Births, Deaths and Marriages Registration Act (VI of 1886), the Governor General in Council is pleased to frame the following rule for the guidance of the Commissioners appointed under section 35-A (1) of the above Act as amended by Act XVI of 1890 —

The certificates in writing required by S. 34 (3) of the said Act shall be signed by not less than two Commissioners.

(See Gazette of India, 1892, Pt. I, p. 123).

See Statutory Rules and Orders, 1907, Vol. II, pp. 1081 to 1100

**II.—BENGAL.**

*Notifications Nos. 118, 119 and 120, dated the 8th January, 1901 (published in the Calcutta Gazette of 1901, Part I, pp. 31—40).*

*No. 118* —In exercise of the power conferred by section 85 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant-Governor is pleased to declare that, in every place in Bengal to which the said Act applies and for which a District Judge has been appointed under the Bengal, North-Western Provinces, and Assam Civil Courts Act, XII of 1887, such Judge shall be deemed to be the District Judge for the purposes of the first mentioned Act.

*No. 119* —In exercise of the powers conferred by section 62 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant Governor is pleased to direct—

(1) that the register-book referred to in that section shall be kept in the first form prescribed in Schedule IV to the said Act, and

(2) that the extracts referred to in that section shall be made in the form prescribed in Appendix I to this notification, and shall be deposited in the office of the Registrar-General of Births, Deaths and Marriages on the 31st December of each year.

**II.—Rules.**

*No. 120* —In exercise of the powers conferred by sections 82 and 83 of the Indian Christian Marriage Act, XV of 1872, the Lieutenant-Governor is pleased to fix the following fees and to make the following rules for the disposal of such fees, the supply of register-books, and the preparation and submission of returns of marriages solemnised under the said Act.

I.—Fees shall be levied and disposed of in the manner prescribed in the following table —

For what purpose levied.	To be levied.			How fees to be disposed of
	By Marriage Registrars	By Licensed Ministers	Under Sections 37, 61, 63 or 64	
	1	2	3	
	Rs. A P	Rs. A P	Rs. A P	
(1) For receiving each notice of marriage . . .	1 0 0	1 0 0		Fees levied by Marriage Registrars must be paid into the Government Treasury. Fees levied by other persons may be retained by them. Marriage Registrars are authorized to remit any portion, not exceeding three-fourths, of the fees in cases where they may consider the parties unable to pay.
(2) For publishing each notice of marriage . . .	2 0 0	2 0 0		
(3) For the issuing of each certificate by a Marriage Registrar . . .	5 0 0		0 1 0	
(4) For registering each marriage by a Marriage Registrar . . .	3 0 0			
(5) For every protest against, or prohibition of, the issue of a marriage certificate by a Marriage Registrar . . .	10 0 0			
(6) For allowing a search to be made in the marriage register-book, or for searching certificates, duplicates, or copies for a period of not more than one year or (in cases under sections 37, 61, 63 or 64) two years . . .	1 0 0	1 0 0	0 8 0	
(7) Ditto for every additional year . . .	0 1 0	0 1 0	0 2 0	
(8) For giving copies or duplicates of certificates . . .	1 0 0	1 0 0	0 4 0	

2 (1) Registers and forms shall whenever required be supplied to Marriage Registrars by the Superintendent of Stationery free of charge.

(2) One full set of registers and forms shall be supplied by the Superintendent of Stationery free of charge to licensed ministers and to persons authorised to grant certificates of marriages between Native Christians.

3. (1) Registers and forms required by any person referred to in sub-rule (2) of rule 2 after one full set has been furnished under that sub-rule may be supplied by the Superintendent of Stationery on payment being made for the same out of the fees received by such persons under rule 1.

(2) When the Superintendent of Stationery receives an indent under sub-rule (1), he shall intimate to the indenting officer the cost of the registers and forms required.

(3) The indenting officer must send the amount of such cost to the nearest civil treasury, with a chalan, in duplicate, stating the date of the Superintendent's intimation.

(4) One copy of such chalan shall be retained in the treasury, and the other shall be returned, duly receipted, to the remitter for transmission to the Superintendent of Stationery.

(5) On receipt of the receipted chalan, the Superintendent shall comply with the indent.

Indents when to be submitted to the Superintendent of Stationery direct and when through another officer

4. (1) Indents for registers and forms required by the Registrar of the Archdeaconry, the Senior Chaplain of the Church of Scotland, the most Reverend Archbishop Dr. Paul Goothals, S. J., or the Vicar-General of the Portuguese Missions in Bengal, shall be submitted by them direct to the Superintendent of Stationery.

(2) Indents for registers and forms required by other officers shall be submitted by or through the Commissioner of the Division, or the Senior Marriage Registrar, Calcutta, to the Superintendent of Stationery

Forms of indent

5. The forms prescribed in Appendices VIII (a) to VIII (d) shall be used for indents.

Certificate on returns of solemnisation of marriages

6. (1) Every return submitted under sections 29, 30 or 31 of the Indian Christian Marriage Act, 1872, shall have endorsed on it a certificate of truth in the form prescribed in Appendix IV

(2) Such certificate must be written or printed on the face of the form on which the returns are made, and the number of entries recorded must be mentioned in the certificate

7. If during any quarter no marriages have been recorded, a certificate of no occurrence in the form prescribed in Appendix V shall be forwarded

Certificate of no occurrence      both by the officers who are required to furnish returns of marriages and by those who are required by sections 34, 55 and 56 of the said Act to submit certificates of marriages in original

Separate returns for each quarter

8. Returns of marriages for each quarter shall be kept distinct.

9. The officers to whom returns of marriages are submitted and who are, by

Time from sending returns to Registrar-General

sections 29, 30 and 31 of the said Act, entrusted with the duty of forwarding a copy of such returns to the Registrar-General, shall perform that duty within two months of the end of the quarter to which the returns relate

### III—Orders of Government

#### Marriage returns

No returns other than those prescribed by the Indian Marriage Act are required.

The procedure to be observed in the submission of the original certificates of marriages, by ministers of religions other than those who are empowered to submit returns and by marriage Registrars is laid down in the Indian Marriage Act and shall be observed.

#### Baptism Returns.

1. Every minister, of whatever denomination who baptizes European Christians, i.e., all Christians of European birth or descent, or of mixed European and native descent, and Armenian Christians shall record such baptisms in the register to be kept by him for the purpose.

Returns of baptisms

To facilitate the filling in of the quarterly returns (forms specified in Appendix II) it will be found convenient to adopt for the register the form given in Appendix VI.

2 As the Government desire to possess a record of all baptisms of European, Eurasian and Armenian Christians solemnized by the laity, and Baptisms by lay- not only of those solemnized by the clergy, all magisterial men officers are required to report every baptism by laymen, within their several jurisdictions to the Registrar-General through the Divisional Commissioners. The Magistrate will enter such baptisms in a register in the form given in Appendix VI to be kept by him for the purpose.

*Exception* —When a layman solemnises a baptism in a church and the rules of that church require that an entry of such baptism shall be made in the church register, it will suffice to make such entry, and a report thereof need not be made by the District Magistrate.

3 (1) A quarterly return showing all baptisms of European and Armenian Christians, solemnised in whatever church or other place, shall Quarterly returns of baptisms be submitted by every clergyman of the Churches of England, Rome, Scotland and Armenia to the authority to whom he submits his quarterly return of marriages under Act XV of 1872.

(2) A quarterly return of all baptisms of European and Armenian Christians solemnised by him shall be submitted by ministers of every denomination other than those mentioned in clause (1) above to the District Magistrate, within two months of the end of the quarters to which they relate.

1 (1) Every quarterly return prescribed under clauses (1) Certificate of correctness and (2) of section 3 shall have endorsed on it the "certificate of truth" in the form prescribed in Appendix IV.

(2) Such certificate must be written or printed on the face of the form on which the returns are made, the number of entries recorded being mentioned in words as well as figures in such certificate.

5 Returns of baptisms for each quarter shall be kept distinct, and shall not contain entries which belong to other quarters. If necessary supplementary returns can be submitted. Returns to be kept distinct and supplementary returns

6 These returns shall not include entries in respect of Native Christians. Native Christians

7 If during any quarter no baptisms have been recorded, a "certificate of no occurrence" in the form prescribed in Appendix V shall be forwarded. No occurrence certificate

8 The officers to whom the returns under rule 3 (1) and (2) are submitted shall forward to the Registrar-General, within two months of the end of the quarter to which they relate, a consolidated return embodying all the baptisms so reported, and the District Magistrate shall in addition to the above also submit at the same time to the Registrar-General direct a quarterly return embodying all the entries relating to that quarter in the register kept by him under rule 2.

### Burials

1. For every Government cemetery there shall be kept a register of burials of European Christians (i.e., of all Christians of European birth or descent, or of fixed European and Native descent), and of Armenian Christians in the form prescribed in



**Appendix VII** This register shall be in charge of the officer to whom under rule I of the rules for the care and use of Government cemeteries the charge of the cemetery belongs.

2. On receipt of the notice of the burial under rule VII (1) of the rules for the care and use of Government cemeteries, the person in charge of the register prescribed in rule 1 above shall cause this register to be produced at the cemetery at the time of the ceremony.

3. The person solemnising the burial shall immediately after the burial make an entry of the same therein.

4. Every person solemnising a burial of a European or Armenian Christian in a place other than a cemetery should submit a report thereof to the District Magistrate, who will record such burial in a register to be kept by him for the purpose in the form prescribed in Appendix VII.

5. As the Government desire to possess a record of all deaths of European, Eurasian and Armenian Christians buried by the laity, and not only of those buried by the clergy, all magisterial officers are required to report every burial by laymen within their several jurisdictions to the Registrar-General through the Divisional Commissioners. The Magistrate will enter such burials in a register in the form given in Appendix VII to be kept by him for the purpose.

Quarterly returns of burials of European Christians and of Armenian Christians should in the case of burials solemnised at Government cemeteries be forwarded by the officers in charge of the register to the Registrar-General of Births, Deaths and Marriages in the form specified in Appendix III within two months of the end of the quarter to which they belong.

In the case of burials solemnised in a place other than a cemetery, the Magistrate should, within the same period, submit to the Registrar-General a copy of all the entries in his register No. VII relating to the same quarter.

7. In the case of a cemetery other than a Government cemetery, the managing body should make similar arrangements for the submission to the Registrar-General of Births, Deaths and Marriages, within two months of the quarter to which they relate, of similar quarterly returns of the burials of all European and Armenian Christians buried in such cemetery.

8. (1) Every return submitted to the Registrar-General of Births, Deaths and Marriages should have endorsed on it the 'certificate of truth' in the form prescribed in Appendix IV.

(2) Such certificate must be written or printed on the face of the form on which the returns are made, the number of entries recorded being mentioned in such certificate.

Returns to be kept distinct, and supplementary returns      9. Returns of burials for each quarter shall be kept distinct, and shall not contain entries which belong to other quarters. If necessary, supplementary returns can be submitted.

Native Christians      10. These returns are not to include entries in respect of Native Christians.

No occurrence certificate.      11. If in any cemetery during any quarter no burials have been recorded a 'Certificate of no occurrence' in the form prescribed in Appendix V shall be forwarded to the Registrar-General.

## APPENDIX I.

### Marriages solemnised at

When married			Names of parties.			Condition	Rank or profession	Residence at the time of marriage	Father's name and surname	Place where or before of notice	Signature of the parties	Signature of two or more witnesses present.	Name and designation of person by whom the ceremony was performed.
Year	Month	Day	Christian	Surname	Age								
1	2	3	4	5	6	7	8	9	10	11	12	13	14

## APPENDIX II.

Baptisms solemnized at

[illegible]



## APPENDIX VI.

### Register of Baptisms kept at

When Baptised.			Said to be born.			Child's Christian name.	Sex.	Parent's name		Abode of parents.	Trade or profession of father.	Name of person by whom the ceremony was performed.	Baptisms solemnised at.	Rites according to which solemnised.
Year	Month.	Day.	Year	Month.	Day.			Christian.	Sur-name.					
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15

## APPENDIX VII

## Register of Burials kept at

When died.			Christian name.	Sur-name.	Age	Trade or profession, &c., &c.	When buried			Cause of death	Name and designation of person by whom the ceremony was performed	Burial's solemnised at	Rites according to which solemnised.
Year.	Month	Day.					Year	Month	Day.				
1	2	3	4	5	6	7	8	9	10	11	12	13	14

## APPENDIX VIII (a).

Indent for Ecclesiastical Forms under Part III of Act XV of 1872 from the 1st 19 to 31st 19 .

This form to be carefully filled up by the indenting officer, specifying the route and mode of carriage by which the forms are to be sent. To the o. at care of To be forwarded by

Serial number of forms as authorised by the Government of Bengal	Description of forms	Balance in hand on 1st last year	Number received during the year	Consumption of last twelve months	Number in hand this day.	Quantity now indented for	Quantity allowed.	Quantity supplied.	Remarks.
1	2	3	4	5	6	7	8	9	10
4.	Form of indent for marriage forms.								
1	Notice of marriage in English, S 12								
1-a	Notice of marriage in Bengali or other vernacular, S 23.								
2.	Minister's certificate in English, Ss. 17 and 24 and schedule 2.								
2-a.	Minister's certificate in Bengali or other vernacular, S 23.								
3.	Marriage register book and certificate of marriage in English, S. 32, schedule 4.								
4.	Marriage register book for native marriages, S 37								
5.	True extract from the register-book of marriages under S 37. (see S. 64)								
6.	Quarterly returns of marriages								

\*Indent should be forwarded in triplicate to the Superintendent of Stationery, observing the period as prescribed in Rule VI of the Stationery Rules.

**Register No.**

**A**

To the  
of  
at  
cause of  
To be forwarded by

## APPENDIX.

## APPENDIX VIII (b)—(Concluded).

Serial number of forms as authorised by the Government of Bengal.		Description of forms							Remarks
1	2	3	4	5	6	7	8	9	
4-s	Deposing party minor, other of full age, different district, consent obtained								
4-k	Deposing party minor, other of full age, different districts, consent unobtainable								
4-l	Both minor, same district, consent obtained								
4-m	Both minor, same district, consent unobtainable								
4-n	Both minor, different district, consent obtained								
4-o	Both minor, different district, consent unobtainable								
5	Registrar's certificate, Ss 41 and 50, sch 2								
5-a	Registrar's certificate, Bengal, S 57								
6	Copy of certificate of marriage in English, S 79								
7	Marriage register-book and certificate of marriage in English, S. 54, schedule 4.								
z	Marriage register-book for Native Christians under S. 59 (S 37)								
y	Copy of entry in the marriage register-book under Ss 59 and 79								
A*	Register-book for entering copies of certificates by <i>ex-officio</i> Marriage Registrars under S. 35								
	Form of indent for marriage forms under part V.								

\* Indents should be forwarded in triplicate to the Superintendent of Stationery, observing the period as prescribed in Rule VI of Stationery Rules.

Signature of Indenting Officer.

# APPENDIX VIII (c).

## Register No.

A

Indent for Ecclesiastical Forms authorised by the Government of Bengal, for of

from 1st 19 to 31st 19 .

This form to be carefully filled up by the indenting officer, specifying the route and mode of carriage by of at To the  
which the forms are to be sent care of To be forwarded by

Serial number of form	Description of forms	Balance in hand on 1st last year	Number received during the year	Consumption of last twelve months	Number in hand this day	Quantity now indented for	Quantity allowed.	Quantity supplied	Remarks.
1	2	3	4	5	6	7	8	9	10
A	Form of indent *								
1	Do of return of baptism								
2	Do of return of medical to suit the case of Baptists								
3	Do of return of marriage,								
4	Do of return of burial.								
5	Certificate of the correctness of the returns furnished								
6	Certificate of "No occurrence "								

\* Indent should be forwarded in triplicate to the Superintendent of Stationary, observing the period as prescribed in Rule VI of the Stationary Rules.

The

19 .

Signature of Indenting Officer.



**APPENDIX VIII (d).**  
**Register No.**

Indent for Ecclesiastical Forms under Part VI of Act XV of 1872, from 1st 19 to 31st 19  
for of A.

This form to be carefully filled up by the indenting officer, specifying the route and mode of carriage by which the forms are to be sent.

To the  
of  
at  
care of  
To be forwarded by

Serial number of forms as authorised by the Government of Bengal.		Description of Forms					Balance in hand on 1st last year.					Number received during the year.					Consumption of last twelve months.					Number in hand this day.					Quantity now indented for.					Quantity allowed					Quantity supplied.					Remarks.									
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30																						
1.	Register book of marriages between Native Christians in vernacular under section 62.																																																		
2	True extract from the register book of marriages under section 62.																																																		

\* Indents should be forwarded in triplicate to the Superintendent of Stationery observing the period as prescribed in Rule VI of the Stationery Rules.

*Signature of Indenting Officer*

# APPENDIX VIII (c).

## *Births and Deaths Registration.*

Register No.

Indent for Forms under Act VI of 1886.

From 1st

190

to 31st

190

This form to be carefully filled up by the indenting officer, specifying the route and mode of carriage (To the of at To be forwarded by

Serial number of forms as  
authorized by the Gov  
ernment of Bengal.

Description of Forms.

Balance in hand on 1st  
last year.

Number received during  
the year.

Consumption of last  
twelve months.

Number in hand this day

Quantity now indented  
for.

Quantity allowed.

Quantity supplied

Remarks.

2

3

5

6

7

8

9

10

1 Register of Birth

2 Do of Death

3 Certified copy of Register of Birth

4 Certified copy of Register of Death

5 Register of Certificate of Registration

6 Copy of entry in Register of Birth

7 Copy of entry in Register of Death

8 Register of Fees

9 Notice of Birth

10 Do of Death

11 Certificate of registration

12 Certificate of no entry

13 Index of certified copies of Registers of Births

14 Index of certified copies of Registers of Deaths.

15 Index of certified copies of Registers of Marriages.

Form of indent for forms under Act VI of 1886. This indent should be submitted in triplicate.  
The 190 .

Signature of the Indenting Officer.

*Notification No 4182, dated the 11th December, 1894 (published in the Calcutta Gazette of 1894, Pt. I, p. 1234).*

In exercise of the powers conferred upon him by section 35 (2) of the Births, Deaths and Marriages Registration Act, VI of 1886, as amended by Act XVI of 1890, the Lieutenant-Governor authorises the persons specified in the list below to whose custody the registers submitted to the Registrar-General of Births, Deaths and Marriages under section 32 of the Act, and examined and certified by the Commissioners appointed for that purpose, have been returned, to certify copies of entries from the registers given by them under section 35 (1) of that Act

2. When the person to whom the registers have been returned is the custodian of such registers by virtue of any office to which he has been appointed by the Government of India or by the Local Government the authority conferred by this notification shall be exercised by his successor in office duly appointed

3. When the person to whom the registers have been returned is a clergyman of the Church of Rome or minister of religion attached to any other denomination or sect other than a clergyman of the Church of England or Scotland, as defined in section 24 (1), clause 3 of Act VI of 1886, then the authority conferred by this notification shall be exercised by the successor of such clergyman or minister whose appointment has been duly notified to the Local Government by his ecclesiastical superior, or, in the case of a minister of religion, by the religious body or authority empowered to appoint, or who customarily exercises the function of appointing, such minister

**List of persons whose registers were examined by the Commissioners appointed under Chapter V of Act VI of 1886, as amended by Act XVI of 1890**

Number	Name of the persons who are the custodians of the registers	Official title of the persons who, on behalf of each sect, have the custody of registers	The name of the sects whose registers were examined
1	2	3	4
1	Registrar-General of Births, Deaths and Marriages (Kumar G. K. Dev)	Registrar-General of Births, Deaths and Marriages, Bengal	All sects.
2	Rev. G. H. Hook	Minister, Lall Bazar Baptist Chapel	Baptist
3	Rev. B. Evans.	Minister of Baptist Mission, Monghyr	Do.
4	Magistrate of Monghyr (H. A. D. Phillips, Esq.)	Magistrate of Monghyr	Do
5	Rev. James A. Dyer	Superintendent of the Pachamba station of the Sonthal Mission of the Free Church of Scotland	Presbyterian
6	Rev. P. C. Nath	Superintendent of the Taltala Circuit	Wesleyan Methodist Church
7	Rev. A. Turnbull, M.A.	Acting Chaplain of the Church of Scotland, Darjeeling	Church of Scotland.
8	Rev. James Levitt	Missionary of the London Missionary Society, Hastings	All sects of English Christians
9	Rev. T. K. Chatterjee	Missionary of the London Missionary Society, Bhowanipur	Bhowanipur Congregationalists
10	Rev. W. A. Thomas	Independent Methodist Missionary, Monghyr.	Methodist

**List of persons whose registers were examined by the Commissioners appointed under Chapter V of Act VI of 1886, as amended by Act XVI of 1890—Concluded**

Number	Name of the persons who are the custodians of the registers	Official title of the persons who, on behalf of each sect, have the custody of registers	The Name of the sects whose registers were examined
1	2	3	4
11	Rev A Campbell	Minister and Missionary of the Free Church of Scotland, Sonthal Mission	Free Church of Scotland
12	Rev Frank Litheridge	Clerk in Holy Orders, 6, Pathria, Sonthal Parganas	Established Church of England
13	Rev Froom Chand	Missionary, Baptist Mission Society, Gaya	Baptist
14	Mr A McDougall	Honorary Treasurer, St Andrew's Church, 6, Commercial Buildings	Church of Scotland.
15	Rev. E T Butler	Minister of St John's Church, Krishnagar	Church of England.
16	Magistrate of Bhagalpur (H F T. Maguire, Esq)	Magistrate of Bhagalpur	Do
17	Rev Alf A Cooper.	Ordained Pastor in charge of the Mission Church of the Presbyterian Church of England Rampur Bhoita	Presbyterian Church of England.
18	Principal of the Serampore College	Principal of the Serampore College	Baptist
19	Mr H T Shircom	Warden of the Armenian Holy Church of Nazareth, Calcutta	Armenian Christians
20	Rev R Wright Hay	Missionary Baptist Mission, Dacca	Baptist and other Non-Conformists.
21	Rev Mathura Nath Bose	Ordained Missionary, Pandpur.	Presbyterian.
22	Magistrate of Faridpur (J L Herald, Esq)	Magistrate of Faridpur	Unsectarian

See Bengal Local Statutory Rules and Orders, 1903, Vol II, pp. 593 to 606.

### III—BOMBAY

#### **Establishing a General Registry Office in Bombay and appointing Registrars of Births and Deaths.**

*Notn. No 624, dated 13th February 1889, B.G.G., 1889.*

Vide Government Notification No 3344, dated 25th September 1888, printed at page 771 of the Bombay Government Gazette of the 27th idem, Part I (1)

*Pt I, P 124*—Under section 6 of the Births, Deaths, and Marriages Registration Act 1886, His Excellency the Governor in Council is pleased to establish in the City of Bombay a General Registry office for the purposes specified in the said section under the charge of the Registrar General of Births, Deaths and Marriages appointed for the territories under the administration of the Government of Bombay.

His Excellency the Governor in Council is further pleased, under Section 12 of the said Act, to make the following appointments—

(a) by virtue of their office, all persons appointed Registrars of Districts under the Indian Registration Act, 1877 to be Registrars of Births and Deaths for the local areas within their respective Districts,

(b) by virtue of their office, all persons appointed under the said Registration Act as Sub-Registrars of the Sub-Districts mentioned in List A to be Registrars of Births and Deaths for the local areas respectively defined by the corresponding entries in the third column of the said list,

(c) by name, the Ministers of Religion mentioned in List B to be Registrars of Births and Deaths for the territories under the administration of the Government of Bombay.

#### A.—By virtue of Office.

District.	Persons.	Local Area.
Ahmedabad	The Sub-Registrar of Ahmedabad	Ahmedabad District
Broach	Do Broach	Broach do.
Kaira	Do Kaira	Kaira do
Panch Mahals	Do Godhra	Panch Mahals do
Surat	Do Surat	Surat do
Kolaba	Do Alibag	Kolaba do
Ratnagiri	Do Ratnagiri	Ratnagiri do.
Thana	Do Silsette	Thana do
Ahmednagar	Do Ahmednagar	Ahmednagar do
Khandesh	Do Dhulia	Khandesh do
Nasik	Do Nasik	Nasik do
Poona	Do Haveli	Poona do.
Satara	Do Satara	Satara do
Sholapur	Do Sholapur	Sholapur do
Belgaum	Do Belgaum	Belgaum do
Dharwar	Do Dhulewar	Dharwar do
Bijapur	Do Bijapur	Bijapur do
Kanara	Do Karwar	Kanara do
Aden	Do Aden	Settlement of Aden.
Deesa	Do Deesa	Cantonment of Deesa.
Karachi	Do Karachi	Karachi District.
Hyderabad	Do Hyderabad	Hyderabad do.
Shikarpur	Do Shikarpur	Shikarpur do.
Upper Sind Frontier	Do Jacobabad	Upper Sind Frontier District
Thar and Parkar	Do Umarmkot	Thar and Parkar District.

#### B — By Name.

##### Appointing Registrar General of Births, Deaths and Marriages.

*Notn., No. 3348, dated 25th September 1885, B G G, 1885, Pt. I, p 771.*—In exercise of the power conferred by Section 6, clause 1 (b), of Act VI of 1886, His Excellency the Governor in Council is pleased to appoint the Inspector-General of Registration and Stamps, Bombay, to be Registrar General of Births, Deaths and Marriages for the territories under the administration of the Government of Bombay.

##### Authorizing the Sub-Registrars of Bombay under Act III of 1877 to certify copies of entries

*Notn., No 1876, dated 10th May 1895, B G G, 1895, Pt I, p 579.*—In exercise of the powers conferred by Section 9 of the Births, Deaths and Marriages Registration Act, 1886, His Excellency the Governor in Council is pleased to authorize the Sub-Registrar of Bombay under Act III of 1877 to certify, in the absence from the City of Bombay of the Registrar General of Births, Deaths and Marriages, copies of entries required by Section 8 of the said Act to be given to persons applying for them.

**Appointment of Registrars of Births and Deaths.**

*Notn., No. 4421, dated 23rd October 1889, B G G., 1889, Pt I, p. 692* — Under Section 12 of Act VI of 1886 His Excellency the Right Honourable the Governor in Council is pleased to direct that the following be added to List A of Registrars of Births and Deaths appointed by virtue of their office, published at page 124 of the Bombay Gazette of 14th February 1889 —

District.	Person.	Area of jurisdiction.
Bombay ..	Sub-Registrar of Bombay	Bombay Presidency ..

*Notn., No. 4422, dated 5th November 1890, B G G., Pt I, p. 1114* — Under Section 12 of the Births, Deaths and Marriages Act, 1886, His Excellency the Governor in Council is pleased to appoint the following persons, by virtue of offices, as Registrars of Births and Deaths for the areas marked against their names —

Station.	Designation.	Area of jurisdiction
<i>Church of England</i>		
Aden (Steamer Point)	Chaplain	Settlement of Aden.
Aden (Camp)	Do	Do
Ahmedabad	Do Christ's Church	Bombay Presidency.
Ahmednagar	Chaplain	Do.
Do	The Missionary in charge Mission Church	Do.
Bandra	The Church Trustee, St. Stephen's Church	Do
Baroda	The Clergyman or Officer in charge, St James' Church	The Baroda State including the British Cantonment of Baroda
Belgaum	The Chaplain of Belgaum, Fort and Camp	Bombay Presidency
Bijapur	The Clergyman or Officer in charge of Church Establishment.	Do
Bhuj	The Clergyman or Officer in charge, St Andrew's Church	The Cutch States.
Bhavnagar	The Clergyman or Officer in charge, Church Establishment	The Bhavnagar State.
Bhusaval	The Railway Chaplain in charge, Church Establishment	Bombay Presidency
Bombay (St Thomas Cathedral)	The Senior Chaplain	Do.
Broach	The Clergyman or Officer in charge St Mathias' Church	Do
Bombay (Byculla)	Chaplain, Christ Church	Do
Bombay (Colaba)	Chaplain of the Church of St John the Evangelist	Do.
Dapoli	The Clergyman or Officer in charge, St. John's Church	Do.
Deesa	Chaplain	The Cantonment of Deesa.
Devlali	Do	Bombay Presidency.
Dharwar	Do	Do
Bombay (Girgaon)	The Clergyman in charge, Mission Church	Do.
Ghorepuri	Chaplain	Do.

Station.	Designation.	Area of jurisdiction.
<i>Church of England—(Concluded)</i>		
Igatpuri	The Railway Chaplain, St Mathias' Church	Bombay Presidency.
Junnar	The Clergyman or Officer in charge Church Establishment	
Bombay (Kamathi-pura)	Do St. Paul's Church	Do.
Karagav	The Clergyman or Officer in charge, Church Establishment	Do
Karwar	Do do	Do.
Kaira	Do do	Do
Kirkee	Chaplain	Do
Kolhapur	The Clergyman or Officer in charge, Church Establishment	The Kolhapur State Bombay Presidency.
Khadambe	Do do	
Khandala	Do Christ Church	Do
Lonavli	The Railway Chaplain in charge of Church Establishment	Do
Mahabaleshvar	The Clergyman or Officer in charge, Christ Church	Do.
Malegaon	The Clergyman or Officer in charge, Church Establishment	Do
Bombay (Malabar Hill)	The Archdeacon in charge All Saints' Church	Do.
Matheran	The Clergyman or Superintendent in charge St Paul's Church	Do
Bombay (Mazgaon)	The Clergyman or Officer in charge St Peter's Church	Do
Nasik	Do Church Establishment	Do
Panchgani	Do do	Do
Poona (Panch Howds)	Do in charge, of the Church of the Holy Name	Do
Bombay (Parel)	Do St Mary's Church	Do
Poona	The Chaplain St Mary's Church	Do
Do.	Do St. Paul's Church	Do
Do	The Clergyman in charge of Church Mission Society	Do
Bombay (Prince's Dock)	The Harbour Chaplain, St Nicholas' Church	Do
Purandhar	The Chaplain of St Mary's Church, Poona, in charge of Purandhar Church	Do.
Rajkot	The Clergyman or Officer in charge, Christ Church	Rajkot Cantonment
Ratnagiri	The Clergyman or Officer in charge, Church Establishment	
Satara	The Chaplain, St Thomas' Church	Bombay Presidency.
Sholapur	The Railway Chaplain, Christ Church	
Surat	The Clergyman or Officer in charge, Christ Church	Do.
Thana	The Church Trustee in charge, St James' Church	Do.
<i>Church of Scotland</i>		
Bombay	Minister for the time being in charge of any Baptismal or Burial Registers belonging to the Station	Do.
Karachi	Do do	Do.
Poona	Do do	Do.
Kirkee	Do do	Do.

Station	Designation	Area of jurisdiction
<i>Roman Catholic Vicars and Chaplains under the Archdiocese of Bombay</i>		
Bombay (Kalbadevi)	The Vicar of the Cathedral of our Lady of Hope	Bombay Presidency
Bombay (Mazgaon)	Do of N.S. de Rozario	Do
Bombay (Mazgaon)	Do of St. Anne's	Do
Bombay (T p p e r Mahim)	Do of N.S. de Victoria's	Do
Bandra	Do of St. Peter's Church	Do
Salsette (Juvem)	Do of St. Joseph's Church	Do
Trombay (Manc)	Do of St. Anthony's Church	Do
Salsette (Candoli)	Do of N.S. de Assumption	Do
Salsette (Culveni)	Do of the Cathedral of Sacred Heart Church	Do
Bombay (Colaba)	The Roman Catholic Chaplain	Do
Bombay	Do of Mount Carmel (Fort Chapel)	Do
Bombay (Grant Road)	The Roman Catholic Chaplain	Do
Baroda	Do	Baroda State, including British Cantonment at Baroda.
Bhavnagar	Do.	The Bhavnagar State
Ahmedabad	Do	Bombay Presidency
Sukkur	Do	Do
Hyderabad (Sind)	Do.	Do
Karachi	Do	Do
Deesa	Do	Cantonment of Deesa
Bombay (Siwri)	The Municipal Registrar of Deaths	Bombay Presidency

#### Appointing Registrars of Births and Deaths in certain Native States

*Government of India Notn. No. 1227-I, dated 11st October 1889, republished in Govt. Notn. No. 1374, dated 6th November 1889 B.G.G. 1889 Pt. I, p. 920*—In modification of Foreign Department Notification No. 310 I dated the 25th January 1889, the Governor General in Council is pleased to issue the following:

1.—In exercise of the powers conferred by Section 13 of the Births, Deaths and Marriages Registration Act VI of 1886 the Governor General in Council is pleased to appoint the persons for the time being holding the office designated in the first column of the following schedule to be Registrars of Births and Deaths in respect of the classes of persons indicated in Section 11, sub-section (b), clause (b), of the said Act, for the local areas mentioned opposite their designations in the second column of that schedule, respectively.

#### Offices

#### Local Areas

#### 1.—Kathwana

- |  |                              |
|--|------------------------------|
| 1. The Assistant Political Agent in charge of the Sorath District.   | The States within his charge |
| 2. The Assistant Political Agent in charge of the Jhalavad District. | The States within his charge |
| 3. The Deputy Assistant Political Agent Halar Prant, at Rayhol.      | The District of Halar        |
| 4. The Deputy Assistant Political Agent at Songad                    | The District of Gohelwad     |

\* As substituted by Notification No. 565-1, dated 15th February 1890.



Offices	Local Areas.
<i>II.—Rewa Kantha.</i>	
The Political Agent	The States within the Agency.
<i>III —Mahn Kantha.</i>	
The Assistant Political Agent	The States within the Agency.
<i>IV —Palanpur</i>	
1 The Cantonment Magistrate of Deesa	The Cantonment of Deesa
2 The Assistant Political Superintendent	The States within the Superintendency
<i>V —Cutch</i>	
The Political Agent.	The Cutch States
<i>VI —Kolhapur and Southern Maratha Country</i>	
1. The Second in Command, Kolhapur Infantry and <i>ex-officio</i> Assistant to the Political Agent, Kolhapur and Southern Maratha Country	The State of Kolhapur
2 The Assistant Political Agent in subordinate charge of Southern Maratha Country	The States of Sangli, Mnaj, Senior and Junior Kurundvad, Senior and Junior, Jamkhandi, Mudhol and Ramdurg
<i>VII —Savantvadi</i>	
The Political Superintendent	The State of Savantvadi.

It is for the purpose of Section 21 sub-section (2), and Section 32 of the said Act, the Governor General in Council is further pleased to appoint the Registrar General of Births, Deaths and Marriages for the Presidency of Bombay for the time being, to be the Registrar General for the local areas mentioned in the schedule above.

*Government of India Notn. No. 565-I, dated 15th February 1890 (republished in Govt. Notn. No. 1300, dated 25th February 1890, B. G. G., 1890, Pt. I, p. 159.* The Governor General in Council is pleased to amend Foreign Department Notification No. 4227-1, dated the 31st October 1889, as follows:—For "The Station Magistrate of Rajkot," in the first column of the Schedule, substitute "The Deputy Assistant Political Agent, Halar Prant, at Rajkot."

#### **Authorizing certain officers and persons to certify copies in registers and records**

*Notn. No. 1939, dated 23rd May 1894, B. G. G., 1894, Pt. I, p. 465.*—In exercise of the powers conferred by sub-section (2) of Section 35 of the Births, Deaths and Marriages Registration Act, 1886, the Governor in Council is pleased to authorize the respective officers and persons in whose custody the registers and records referred to in sub-section (1) of the said section are kept, in accordance with rules for the time being in force under clause (f) of Section 36 of the said Act, to certify such copies of entries in those registers or records as are required by sub-section (1) of Section 35 of the Said Act to be given to persons applying for them.

*Notn. No. 1878-A, dated 10th May 1895, B. G. G., 1895, Pt. I, p. 579.*—In exercise of the powers conferred by sub-section (2) of Section 35 of the Births, Deaths and Marriages Registration Act, 1886, His Excellency the Governor in Council is pleased to

authorize the Sub-Registrar of Bombay under Act III of 1877 to certify, in the absence from the City of Bombay of the Registrar General of Births, Deaths and Marriages, all such copies of entries in registers and records referred to in sub-section (1) of the said section as are by the said section required to be given to persons applying for them.

### Appointing Commissioners

*Government of India Note No. 1557, dated 20th October 1890, republished in Govt. Note No. 4312 dated 29th October 1890, B. G. G., 1890, Pt. I, p. 1085* -- In exercise of the power conferred by Section 35-A (1) of the Births, Deaths and Marriages Registration Act VI of 1886, as amended by Act XVI of 1890, the Governor General in Council is pleased to appoint the undermentioned persons to be Commissioners for the purpose of examining and verifying the registers or records which have already been, or may hereafter be, sent under Section 32 to the Registrar General of Births, Deaths and Marriages for the Bombay Presidency:—

The Registrar General of Births, Deaths and Marriages for the Bombay Presidency.

The Remembrancer of Legal Affairs, Bombay.

The Registrar of the Bombay Diocese.

See Bombay Local Rules and Orders, 1896, Vol. I, pp. 165 to 171.

IV.—PUNJAB.  
List of Local Rules and Orders in force in the Punjab.

Acts of the Governor-General in Council			Rules and Orders.			
Year	Number.	Subject.	Section	Subject	Number and date of notification	Where Published.
1	2	3	4	5	6	7
1886	VI	Births, Deaths and Marriages Registration.	1 (2)	Bringing the Act into force on the 1st of October 1888	No. 1161, 10th July 1888	1888, Part I, p. 396 (Gazette of India)
"	"	Do.	6 (1)	Establishing at Lahore a General Registry Office and appointing the Inspector General of Registration Punjab <i>ex officio</i> Registrar-General, of Births, Deaths and Marriages for the Punjab	No. 568, 28th September 1888	1888, Part I, p. 607
"	"	Do.	9 and 35 (2)	Authorizing the Superintendent of the Office of Inspector General of Registration to certify copies of entries when the Registrar General is absent, from Lahore	No. 1730, 17th December 1888	1888, Part I, p. 788
"	"	Do.	12	Appointing the following persons to be Registrars of Births and Deaths —		
"	"	Do.	12	1. All Deputy Commissioners in the Punjab.	No. 570 S., 28th September 1888	1888, Part I, p. 607
				2. All Ministers of Religion for the area of the district in which the ordinarily reside.	No. 571 S., 24th September 1888	Do
				3. The officer in charge of the District Treasury during the absence of the Deputy Commissioner.	No. 1731 and 1732, 17th December 1888.	1888, Part I, p. 788.
				4. The Officer in charge of Sarsa sub-division of Hissar district.	No. 1768, 4th December 1889.	1889, Part I, p. 603.

Do	5.	Chaplains of the Church of England No 425, 22nd April 1891. 1891, Part I, p 166 and Church of Scotland in the Punjab.
"	6	Clerk of the Church Session of the No 438 B., 24th April, 1894, Part I, p. 229 Presbyterian Church of Ludhiana, 1894
"	7	The Presidency Surgeon in Kashmir
12	8	The Chaplain of Simnagar and Session No 2935 15th July 1891, Part I, p 424 (Gaz- ette of India)
"	13*	Member of the Church Missionary Society.
Do	9	Custom officer serving in British India No 152 L, 26th January 1892, Part I, p 70 (Gaz- ette of India)
Do	26, 28 & 36	Rules for registration of births and No 1173 10th July 1888 1888, Part I, p 336 (Gaz- ette of India)
"	"	Deaths for correction of entries in the
"	"	Registers of Births and Deaths, No
Do	35 (2)	Revised July 20 No 185, 27th July 1894, 1894, Part I, p 436 (Gaz- ette of India)
"	"	Authenticating the entries in the registers No 417, 13th May, 1895, Part I, p 222 custody of a registration or record dealt with under section 410, conf. copies of registers in the registers in record given by the
Do	36 (a)	Rules regarding the punishment for persons who published 1894 under section 35 of the Act passed in continuation of No 1173 dated 19th July 1888
Do	36 (a) & (b)	Rules for the regulation of companies No 1535 17th October 1890, Part I, p 745 (Gaz- ette of India)
"	"	appointed under section 35 A (1) of 1890 the Act
Do	26, 28 & 36	Prescriptions for the Rules 10 for every Rule No 126-48, 17th March 1889, Part I, p 115 (Gaz- ette of India)
"	"	attendance at a public meeting by the District Registrar for the purpose of the Act
Do	36 (a)	Rules for the appointment of Commissioners No 396, 14th March 1892 1892, Part I, p 123 (Gaz- ette of India)
"	"	appointed under section 35-A (1) of the Act to the effect that the certifi- cates required by section 34 (3) shall be signed by not less than two Com- missioners

See Punjab Local Rules and Orders, 1902, pp. 146 to 148.

V.—MADRAS  
List of Rules and Orders made under Enactments applying to the Madras Presidency.

General Acts of the Governor-General in Council			Rules and Orders		Where published
Year.	Number.	Subject.	Section.	Subject	
1	2	3	4	5	6
1886	VI	Births, Deaths and Marriages Registration	1 (2)	Bringing the Act into force on the 1st October 1888	Government of India, Home Department Notification, No. 1161, 19th July 1888.
"	"	Do.	6 and 12	Appointing the Inspector General of Registration Madras, all Marriage Registrars, and all District Registrars under the Indian Registration Act, to be the Registrar General of Births, &c., and Registrars of Births, &c.	Public Notification, No. 356, 15th September 1888.
"	"	Do.	9	Authorizing the Registrar of Assurances to certify copies of entries in registers under the Registrar-General's absence from Madras	Public Notification No. 290 1st July 1892.
"	"	Do.	17	Applying this section to all Registrars of Births, Deaths and Marriages appointed under clause 3 of Notification dated 15th September 1888	Public Notification, 1891, Part I, p. 403.
"	"	Do.	26, 28 and 36	Rules for registration of Births and Deaths, for correction of entries in the registers of Births and Deaths, &c.	Government of India, Home Department Notification, No. 1173, 19th July 1888
"	"	Do.		New rule substituted for Rule 20 of the above rules regarding the maintenance of registers of fees realized under those rules	Government of India, Home Department Notification, No. 185, 27th July 1894.

"	"	Rules regarding the payment of fees under section 95 of the Act published in continuation of Home Department Notification, No. 1173, 19th July 1888.	Government of India, 1894, Part I, p. 1325.
"	Do.	Prescribing a fee of Rs. 10 for every attendance at a private residence by the District Registrars for the purposes of Act.	Home Department Notification, No. 141, 11th Feb. 1889.
"	Do.	Appointing Commissioners for examining and verifying the registers or records sent under S. 32 of the Act to the Registrar General for the Madras Presidency.	Government of India 1890, Part I, p. 859.
"	35-A (1)	Appointing Commissioner for examining and verifying the registers or records sent to the Registrar General of Births, Deaths and Marriages for the Hyderabad State.	Home Department Notification, No. 1523, 17th October, 1890.
"	35 (2)	Authorizing the representative of Cumbha of the London Missionary Society to certify copies of entries relating to British subjects in the five registers belonging to that society which were examined at Madras and certified by the Commissioner appointed by the Government of India under Chapter V of the Act.	Government of India 1891, Part I, p. 151.
"	Do.	Authorizing the representative of Cumbha of the London Missionary Society to certify copies of entries relating to British subjects in certain verified registers for the guidance of Commissioners appointed under S. 35-A (1).	Public Notification, 1892, Part I, p. 1191. No. 329, 10th September, 1892.
"	36 (e) and (f)	Rules for the guidance of Commissioners appointed under S. 35-A (1).	Public Notification, 1892, Part I, p. 1521. No. 434, 3rd Dec 1892.
"	Do.	Framing a rule for the guidance of Commissioners appointed under S. 35-A (1) of the Act as amended by Act XVI of 1940 to the effect that the certificates required by S. 34 (3) of the Act shall be signed by not less than two Commissioners.	Government of India 1890, Part I, p. 859. Home Department Notification, No. 1535, 17th Oct 1890.
"	36 (d)	Framing a rule for the guidance of Commissioners appointed under S. 35-A (1) of the Act as amended by Act XVI of 1940 to the effect that the certificates required by S. 34 (3) of the Act shall be signed by not less than two Commissioners.	Government of India, 1892, Part I, p. 312. Home Department Notification, No. 306 4th Mar 1892.

See Madras Local Rules and Orders, 1897, Vol. I, pp. 217 to 220

## VI—UNITED PROVINCES OF AGRA AND OUDH.

**Establishment of general registry office and appointment of Registrar General**

Under section 6, clause (1) (a), of Act VI of 1886 (the Births, Deaths and Marriages Registration Act), the office of the Inspector-General of Registration, United Provinces, is the general registry office for keeping certified copies as specified in the clause hereinbefore cited

Under clause (1) (b) of the same section the Inspector-General of Registration, United Provinces, is appointed to be the Registrar-General of Births, Deaths and Marriages, and to be in charge of the general registry office created by the above notification See G O No 658 and No 659 VII—138-B, dated 22nd August 1888

**Registrars of Births and Deaths**

Under section 12, the Births, Deaths and Marriages Registration Act, the following are appointed as Registrars of Births and Deaths in the United Provinces —

- (1) all District Magistrates for the areas of their districts,
- (2) all Ministers of religion licensed under Act XV of 1872 for the areas of the districts in which they reside
- (3) all Registrars of the Registration Department for the areas of their jurisdictions

(4) all Ministers of religion authorized by sub sections (1) and (2) of section 5 of the Indian Christian Marriage Act XX of 1872, to solemnize marriages within the areas of the districts in which they reside See G O No 660 VII—138-B, dated 22nd August 1888, G O Nos 851 and 880 VII—138-B, dated 16th and 23rd November 1888.

It will be optional with the person wishing to register the occurrence to which of the above authorities he will resort

Provided that in the case of Ministers of religion, the class of persons for whom they shall be empowered to act as Registrars of Births and Deaths shall be those at whose baptisms or funeral they have themselves officiated G.O No 530 VII—138-B, dated 29th July 1889

**Appointment of Registrars for the Rampur and Tehri States**

Under section 13 of the Births, Deaths, and Marriages Registration Act (VI of 1886), the persons for the time being holding the offices of Magistrate of Bareilly and Deputy Commissioner of British Garhwal are appointed to be Registrars of Births and Deaths in respect of the classes of persons indicated in Section 11, Sub-Section (1), clause (b) of the said Act for the Rampur and Tehri States, respectively.

For the purposes of section 21 Sub-Section (2) of the said Act, the Registrar-General of Births, Deaths, and Marriages for the United Provinces for the time being is appointed to be the Registrar General for the Rampur and Tehri States See G.G.O (For No. 29311, dated 15th July, 1891)

See Manual of Orders of Government United Provinces of Agra and Oudh. 1902, Vol I, Dept VII, p 3

**Registration of Births and Deaths in a Cantonment.**

Under section 221 (1) of the Cantonment Code, 1899, forms have been prescribed for the registration of all Births and Deaths occurring in a Cantonment Every birth or

death occurring in the whole population of a cantonment, whether military or non military, and whether Native or European or Eurasian, will be recorded in the daily register (A) and abstracted in the monthly summary (B). The monthly summary should be forwarded to the Civil Surgeon of the district as early as possible after the close of the month to which it refers. Submission of the summary to the Sanitary Commissioner has been discontinued. Forms A and B are obtainable from the Government Press.

In Column I of Form B, the figures of the population of the last preceding census should invariably be entered. But any appreciable difference in the population during an intercensal period may be indicated by supplementary figures in this column with a note of explanation. See G O Nos 1945-1948 XII-505-E, dated 7th September 1901, and No. 2666 XII-505-E, dated the 5th December 1901, printed in the *Manual of Orders of Government, United Provinces of Agra and Oudh, 1902, Vol II, Dept. XII, p. 25.*





# THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (1886) AMENDMENT ACT, 1890.

(ACT XVI OF 1890<sup>1</sup>.)

[*Passed on the 11th September, 1890*]

An Act to amend the Births, Deaths and Marriages Registration Act, 1886

Amendment of section 32, Act VI, 1886 WHEREAS it is expedient to amend the Births, Deaths and Marriages Registration Act, 1886, It is hereby enacted as follows —

1 In S 32 of the said Act, for the words " within one year from the date on which this Act comes into force," the words " at any time before the first day of April, 1891," shall be substituted

(Notes)

1.—"Act XVI of 1890."

## (1) Statement of Objects and Reasons

For———, see Gazette of India, 1890, Pt V, p 127

A

## (2) Proceedings in Council.

For———, see Gazette of India, 1890, Pt VI, pp 126, 129

B

## (3) Where this Act is in force

This Act is in force in Upper Burma (except the Shan States) as being a part of the Principal Act of 1886, see Burma Laws Act, XIII of 1898

C

## (4) Act, where declared in force

This Act has been declared in force in Santhal Parganas, see Santhal Parganas Settlement Reg III of 1872, S 3, as amended by the Santhal Parganas Justice and Laws Reg III of 1899

D

2 The following section shall be added to Chapter V of the said Act, namely .—

\* \* \* \*

35-A<sup>1</sup>. (1) The Governor-General in Council, if he thinks fit, may, by notification in the Gazette of India, appoint more commissions than one for the purposes of this Chapter, each such commission consisting of so many and such members as he may by a like notification, nominate thereto by name or by office, and having its functions restricted to the disposal, under this Act and

Constitution of additional commissions for purposes of this chapter

the rules thereunder, of the registers or records sent under S. 32 to such Registrar-General or Registrars General as the Governor-General in Council may, be a like notification, specify in this behalf.

(2) If more commissions than one are appointed in exercise of the power conferred by sub-S (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a commission so appointed.

**(Note)**

**1.—“S. 35-A.”**

**N. B.**—This section has been incorporated as S. 35-A of Act VI of 1886.

# THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION (AMENDMENT) ACT, 1911.

(ACT IX OF 1911.)

*(Received the Assent of the Governor General on the  
16th March, 1911)*

An Act further to amend the Births, Deaths and Marriages  
Registration Act, 1886

WHEREAS it is expedient further to amend the Births, Deaths  
and Marriages Registration Act, 1886, It is hereby enacted as  
follows —

Short title                      1    This Act may be called the Births,  
Deaths and Marriages Registration (Amendment)  
Act, 1911

Amendment of sec-  
tion 22 of Act VI of  
1886.

2    In section 22 of the Births, Deaths and  
Marriages Registration Act, 1886, the following  
amendments shall be made, namely —

(1) To sub-section (1) of the said section the following proviso  
shall be added, namely —

“ Provided that it shall not be necessary for the person giving  
notice to attend before the Registrar or to sign the entry in the  
register if he has given such notice in writing and has furnished to  
the satisfaction of the Registrar such evidence of his identity as  
may be required by any rules made by the Local Government in  
this behalf ” •

(2) In sub-section (2) of the said section, after the word “signed”  
the words “or the conditions specified in the proviso to sub-  
section (1) have been complied with” shall be inserted

3    In section 26 and in section 28 of the said Act, for the  
words “Governor General in Council” the words  
“Local Government” shall be substituted

Amendment of sec-  
tions 26 and 28.

Substitution of  
new section 36

4    For section 36 of the said Act the fol-  
lowing section shall be substituted, namely —

Rules.                      “ 36 (1) The Local Government may make  
rules to carry out the purposes of this Act

(2) In particular and without prejudice to the generality of  
the foregoing power, such rules may—

- (a) fix the fees payable under this Act ;
- (b) prescribe the forms required for the purposes of this Act ;
- (c) prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice ,
- (d) prescribe the evidence of identity to be furnished to a Registrar of Births and Deaths by persons giving notice of a birth or death in cases where personal attendance before such Registrar is dispensed with ,
- (e) prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them ,
- (f) prescribe the conditions and circumstances on and in which Registrars of Births and Deaths may correct entries of births and deaths in registers kept by them ;
- (g) prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate , and
- (h) prescribe the custody in which those registers or records are to be kept.

(3) Every power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication.

(4) All rules made under this Act shall be published in the local official Gazette, and on such publication shall have effect as if enacted in this Act "

**Repeal of section 37**      **5** Section 37 of the said Act is hereby repealed

**Continuation of rules heretofore made by Governor General in Council.**      **6** All rules heretofore made under the said Act by the Governor General in Council shall, after the commencement of this Act, be deemed to have been made by the Local Government.

# THE FOREIGN MARRIAGE ACT, 1903.

(ACT XIV OF 1903<sup>1</sup>.)

(Passed on the 23rd October, 1903.)

An Act to give effect to the Foreign Marriages Order in Council,  
1903

WHEREAS it is expedient to give effect to the Foreign Marriages Order in Council, 1903, It is hereby enacted as follows —

Short title, extent  
and application.

1. (1) This Act may be called the Indian Foreign Marriage Act, 1903.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas, the Shan States and the Pargana of Spiti, and

(3) It applies also to all British subjects and to all servants of the King, whether British subjects or not, in the territories of any Native Prince or State in India

(Notes).

I — “Act XIV of 1903”

## (1) Statement of Objects and Reasons

For———, see Gazette of India, 1903, Pt. V, p. 466

A

## (2) Proceedings in Council

For———, see Gazette of India, 1903, Pt. VI, pp. 157, 165.

B

## (3) Reasons for the passing of the Act

(a) The Foreign Marriages order in Council, 1903, directed that, if a marriage officer proceeding under the Foreign Marriage Act, 1892, (55 & 56 Vic., C. 23), was satisfied that such notice of an intended marriage had been given by a party dwelling in India as may be required by any law of the Governor-General in Council giving effect to that order, such notice shall be sufficient for the purposes of the Statute, and it was further explained that a law of the Indian Legislature should be deemed to give effect to the order if it provided

“(1) that notice of a marriage intended to be solemnized under the Statute referred to may be given by one of the parties intending such marriage, who has had his or her usual place of abode for three consecutive weeks immediately preceding in some place in India to such marriage registrar or other officer as may be designated by the law in this behalf,

(2) that such notice shall be published either by proclamation of banns or in such other manner as the law may provide, and

## 1.—“Act XIV of 1903”—(Continued).

- (3) that such marriage registrar or other officer, unless he is aware of any impediment or objection which should obstruct the solemnization of the marriage, shall on payment of such fee, if any, as the law may fix, give a certificate that the said notice has been so given and published as aforesaid.”

This Act is intended to give effect to this order in Council.

See Statement of Objects and Reasons

C

- (b) The following remarks of the Hon'ble Mr. Arundel in moving for leave to introduce the Bill to give effect to the Foreign Marriages Order in Council, 1903, may also be noted—“On several occasions difficulties have arisen in connection with the intended marriage of British subjects under the provisions of the Foreign Marriage Act and Foreign Marriages Order in Council, 1892, in cases where one of the parties has been resident in India

“The Foreign Marriages Order in Council requires that in cases where one of the parties has not been resident within the district of the Marriage Officer, who is to celebrate the marriage, that party shall produce a certificate from the Marriage Officer of the place in which he or she has been resident, that proper notice has been given of the marriage, but these requirements of the Order in Council relate only to foreign countries and to the United Kingdom, while no instructions are given concerning notice of marriage by persons resident in India.

After some correspondence between the Secretary of State and the Government of India, an Order in Council was issued on the 12th March, 1903, to the following effect

- 1 The following further modifications of the requirements of the Foreign Marriage Act, 1892, as to residence and notice which appear to His Majesty to be consistent with the observance of due precautions against the solemnization of clandestine marriages, shall have effect in cases where one only of the parties has dwelt within the district of the Marriage Officer and the other of such parties has dwelt in a Colony or in India that is to say
  - (i) if the Marriage Officer is satisfied that such notice has been given by the party dwelling in such Colony or in India as may be provided by any law in that Colony or of the Governor General of India in Council (as the case may be), giving effect to this Order,
  - (ii) in any such case the oath, affirmation or declaration required by section 7 of the Foreign Marriage Act shall be made subject to the modifications thereof to which effect is given by article 6 of the Foreign Marriages Order in Council, 1892
- 2 A law enacted by the Legislature of a Colony or by the Governor General of India in Council shall be deemed to give effect to this Order if it makes provision (in whatever terms expressed) as follows
  - (i) That a notice of a marriage intended to be solemnized under the Foreign Marriage Act may be given by one of the parties intending such marriage who has had his or her usual place of abode for three consecutive weeks immediately preceding in some place in that Colony or in India (as the case may be) to such Marriage Registrar or other officer as may be designated by the law in this behalf.

1.—“Act XIV of 1903” — (Concluded).

- (ii) that such notice shall be published either by proclamation of banns or in such other manner as the law may provide; and
- (iii) that such Marriage Registrar or other officer, unless he is aware of any impediment or objection which should obstruct the solemnization of the marriage, shall, on payment of such fee, if any, as the law may provide, give a certificate that the said notice has been so given and published as aforesaid.

“The Bill which I beg for leave to introduce is intended to give effect to this Order in Council. It extends to the whole of British India; and applies to all British subjects and to all servants of the King, whether British subjects or not, in the territories of any Native Prince or State in India.

“The Bill is purely permissive and nothing in it affects a valid marriage solemnized outside its provisions.”

See Proceedings of the Council of the Governor General of India dated 28th August, 1903. D

Notice of marriage intended to be solemnized under 55 & 56 Vict., c. 28.

2. (1) Notice in writing of a marriage which it is intended to solemnize under the Foreign Marriage Act, 1892, may be given by one of the parties intending such marriage, to— 55 & 56 Vict. c. 28

- (a) a Marriage Registrar appointed under the Indian Christian Marriage Act, 1872, where either of such parties is a person professing the Christian religion;
- (b) a District Magistrate, Chief Presidency Magistrate or Political Agent where neither of such parties is a person professing the Christian religion.

Provided that the party giving such notice as aforesaid shall have had his usual place of abode for not less than three consecutive weeks immediately preceding the giving of notice within the local limits of the area for which the Marriage Registrar, Magistrate or Political Agent to whom the notice is given, is appointed.

(2) Every notice given under this section shall state—

- (a) the name, surname, age, profession or condition of each of the parties intending marriage;
- (b) the residence of each of them;
- (c) the time during which each of them has dwelt there; and
- (d) the place in which the intended marriage is to be solemnized;



and it shall contain a declaration by the party giving the notice to the effect that he believes that there is not impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage.

(3) A copy of every notice given under this section shall be published by being affixed in some conspicuous place in the office of the officer to whom the notice is given.

(4) On the expiration of four clear days after such notice as aforesaid has been published in the manner prescribed by sub-section (3), the officer to whom the notice is given unless he is aware of any impediment of kindred or affinity or other lawful hindrance to the solemnization of the said intended marriage shall, on payment of such fee (if any) as the Governor General in Council may fix in this behalf, furnish the party by whom the notice was given, with a certificate, under his hand and seal, to the effect that the notice has been so given and published.

## RULES MADE UNDER ACT XIV OF 1903.

### Fee for certificate of publication of notice

No 341, dated the 11th August, 1904. —In exercise of the power conferred by sub-S. 4 of S. 2 of the Indian Foreign Marriage Act, 1903 (XIV of 1903), the Governor General in Council is pleased to prescribe a fee of Rs. 5 for every certificate to the effect that notice under the Act has been given and published in accordance with the said section.

A Marriage Registrar, District Magistrate, Chief Presidency Magistrate or Political Agent may, in his discretion, remit a part not exceeding three-fourths of the fee to any person who appears to him to be in indigent circumstances.

Where the fee is received by any person, who is a Government servant and not a minister of religion, it shall be paid into a Government Treasury; and where it is received by any other person it may be retained by him. See Gazette of India, 1904, Pt I, p. 592. See General Statutory Rules and Orders, 1907, Vol III, p. 1828.

# ANAND MARRIAGE ACT.

(ACT VII OF 1909.)

*(Received the Assent of the Governor General on the  
22nd October, 1909)*

An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand.

WHEREAS it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand; It is hereby enacted as follows —

Short title and extent                      1    (1) This Act may be called the Anand Marriage Act, 1909, and

(2) It extends to the whole of British India.

(Notes).

General.

## Object of the Act.

- The object of this Act is to set at rest doubts as to the validity of the marriage rite of the Sikhs called "Anand "

This form of marriage has long been practised among the Sikhs, but it was apprehended that there were good reasons to believe that, in the absence of a validating enactment, doubts might be thrown upon it, and Sikhs might have had to face great difficulties in the future, and incur heavy expenses on suits instituted in the Civil Courts. It was also apprehended that, in the absence of such a law, some judicial officers might be uncertain as to the validity of this orthodox Sikh custom.

- It was therefore thought desirable that all doubts should be set at rest for the future, by passing this enactment, which merely validates an existing rite and involves no new principles See Statement of Objects and Reasons.

2. All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been, with effect from the date of the

Validity of Anand marriages.

solemnization of each respectively, good and valid in law.

Exemption of certain marriages from Act.

3. Nothing in this Act shall apply to—

- (a) any marriage between persons not professing the Sikh religion, or
- (b) any marriage which has been judicially declared to be null and void.

Saving of marriages solemnized according to other ceremonies.

4. Nothing in this Act shall effect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.

Non-validation of marriages within prohibited degrees.

5. Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would according to the customary law of the Sikhs render a marriage between them illegal.

# THE BENGAL MUHAMMADAN MARRIAGES AND DIVORCES REGISTRATION ACT, 1876.

(BENGAL ACT I OF 1876.)

## CONTENTS.

### PREAMBLE.

### SECTIONS.

1. Local extent.
2. Interpretation
3. Lieutenant-Governor may grant licenses to register
4. Muhammadan Registrars to use seals.
5. Government to provide seal and books
6. Muhammadan Registrar to keep registers
7. Entries to be numbered.
8. Application by whom to be made
9. Duties of Muhammadan Registrar on application
10. Muhammadan Registrar may receive gratuity.
11. Entries by whom to be signed
12. Copies of entry to be given to parties.
13. Index to be kept
14. Particulars to be shown in index
15. Index may be inspected and copies of entries in registers taken.
16. Fees for searches and copies
17. Muhammadan Registrars to be subject to control of District Registrar.
18. Inspector-General of Registration to exercise general superintendence.
19. Rules to be approved by Lieutenant-Governor and published in Gazette
20. Refusal to register to be recorded.
21. Appeal against refusal to register.
22. Copies of entries to be sent monthly to Registrar of district.
23. Registers to be given up
24. Lieutenant-Governor may prescribe rules.
25. Muhammadan Registrar a public officer.
26. Saving clause.

Schedule.—Form A. Book I  
" Form B. Book II.  
" Form C. Book III.



# THE BENGAL MUHAMMADAN MARRIAGES AND DIVORCES REGISTRATION ACT, 1876.

(BENGAL ACT I OF 1876<sup>1</sup>.)

19th January, 1876.

An Act to provide for the voluntary registration of Muhammadan  
Marriages and Divorces

WHEREAS it is expedient to provide for the voluntary registration  
of marriages and divorces among Muhamnadans ;  
Preamble It is enacted as follows.—

(Notes)

General.

## 1.—“*Bengal Act I of 1876.*”

### (1) Statement of Objects and Reasons.

For—see Calcutta Gazette, 1873, Part IV, p. 1526. A

### (2) Proceedings in Council.

For — see (*Ibid*) Suppl. p. 1586, *Ibid.*, 1875, Suppl. pp. 1, 55, 119, 175,  
407, 437 and 1358. B

### (3) Local extent.

This Act Extends—

(1) to districts in Eastern Bengal notified under S. 1, and

(2) to districts in Assam notified under the Scheduled Districts Act, 1874  
(XIV of 1874).

For a list of districts in Eastern Bengal to which the Act has been extended  
by notification, see the Bengal Local Statutory Rules and Orders,  
• 1903, Vol. I, p. 100.

The Act (with the exception of S. 1) has been extended by notification under  
the Scheduled Districts Act, 1874 (XIV of 1874), S. 5 to the following  
districts in Assam, namely —

Cachar, Darrang, Goalpara, Kamrup, Lakimpur, Nowgong, Sibsagar and  
Sylhet.

The application of the Act is barred in the Chittagong Hill tracts by the  
Chittagong Hill tracts Regulation, 1900 (I of 1900), S. 4 (2). C

### (4) Rules made under this Act.

For rules made under this Act—

(i) for Eastern Bengal, see the Bengal Local Statutory Rules and Orders,  
1903, Vol. II, pp. 608 and 611 to 619; D

(ii) for Assam, see the Assam Local Statutory Rules and Orders, 1893,  
• pp. 98 to 107 (reprinted in the Assam Regulation Manual, 1894,  
pp. 127 to 134); and E

(iii) for Eastern Bengal and Assam (revised rules 44, 45 and 45-A), see  
Notification No. 4986, dated 3rd June, 1907, in E. B. and A. Gazette,  
1907, Pt. II, p. 887. F

1. This Act shall commence and take effect in those districts in the Provinces subject to the Lieutenant-Governor of Bengal to which the said Lieutenant-Governor shall extend it by an order published in the Calcutta Gazette; and thereupon this Act shall commence and take in the districts named in such order, on the day which shall be in such order provided for the commencement thereof.

Local extent.

Interpretation

2. In this Act, unless there be something repugnant in the subject or context,—

"Muhammadian Registrar"

"Muhammadian Registrar" means any person who is duly authorised under this Act to register marriages and divorces.

VIII of 1871.

"Inspector-General of Registration," "Registrar".

"Inspector-General of Registration" and "Registrar" respectively mean the officers so designated and appointed under the Indian Registration Act, 1871, or other law for the time being in force for the registration of documents.

"District."

"district" means a district formed under the provisions of the Indian Registration Act, 1871:

"parda-nishin" means a woman who, according to the custom of the country, might reasonably object to appear in a public office.

"Parda-nishin."

Lieutenant-Governor may grant licenses to register.

3. It shall be lawful for the Lieutenant-Governor to grant a license to any person, being a Muhammadian, authorizing him to register Muhammadian marriages and divorces which have been effected within certain specified limits, on application being made to him for such registration; and in like manner it shall be lawful for the said Lieutenant-Governor to revoke or suspend such license

Provided that no more than two persons shall be licensed to exercise the said functions within the same limits: and provided further that, when two persons are so licensed to act within the same limits, the one shall be a member of the Sunni, and the other of the Shia sect.

Muhammadian Registrars to use seals.

4. Every Muhammadian Registrar shall use a seal bearing the following inscription in the Persian character and language: "The seal of the Muhammadian Registrar of——."

5. The Lieutenant-Governor shall supply for the office of every Muhammadan Registrar the seal and the books necessary for the purposes of this Act.

The pages of such books shall be consecutively numbered in print, and the number of pages in each book shall be certified on the title-page by the officer by whom such books are issued.

6. Every Muhammadan Registrar shall keep up the following register books :—

*Book I.*—Register of marriages, in the Form A contained in the schedule to this Act.

*Book II.*—Register of divorces other than those of the kind known as *Khula*, in the Form B contained in the schedule to this Act.

*Book III.*—Register of divorces of the kind known as *Khula*, in the Form C contained in the schedule to this Act.

(Note).

General.

**Registration of Muhammadan marriages—Copy of entry in Register—Evidence.**

"A special condition" (that a Muhammadan wife might divorce her husband under certain circumstances) is a matter which, under Bengal Act, I of 1876, it is the duty of the Mahomedan Registrar (of marriages under the Act) to enter in the Register and, therefore, a copy of the entry therein would be evidence of its contents, in a suit by the husband for restitution of conjugal rights, on a divorce by his wife on the occurrence of such circumstances. 10 C. 607. F

7. All entries in each register prescribed by the last preceding section shall be numbered in a consecutive series, which shall commence and terminate with the year, a fresh series being commenced at the beginning of each year.

8. Every application for registration under this Act shall be made to the Muhammadan Registrar orally as follows :—

*If the application be for the registration of a marriage—*

by the parties to the marriage jointly : provided that if the man, or the woman, or both, be minors, application shall be made on their behalf by their respective lawful guardians and provided further, that if the woman be a *pardanishin*, such application may be made on her behalf by her duly authorised *vakil* ;



*if the application be for the registration of a divorce other than of the kind known as 'Khula'—*

by the man who has effected the divorce ;

*if the application be for the registration of a divorce of the kind known as 'Khula'—*

by the parties to the divorce jointly : provided that, if the woman be a pardanishin, such application may be made on her behalf by her duly authorised vakil.

9. On application being made to a Muhammadan Registrar for registration under this Act of a marriage or divorce within one month of the marriage or divorce being effected, and not otherwise, and on payment to him of a fee of one rupee, the Muhammadan Registrar shall—

Duties of Muhammadan Registrar on application.

- (a) satisfy himself whether or not such marriage or divorce was effected by the person or persons by whom it is represented to have been effected ;
- (b) satisfy himself as to the identity of the persons appearing before him and alleging that the marriage or divorce has been effected ;
- (c) in the case of any person appearing as representative of the man or woman (whether he appears as guardian or vakil), satisfy himself of the right of such person to appear.

If the Muhammadan Registrar be satisfied on the above points and not otherwise, he shall make an entry of the marriage or divorce in the proper Register .

Provided that no such entry shall be made otherwise than in the presence of every person who, by section 11 of this Act, is required to sign such entry.

10. Nothing in the preceding section shall be held to prohibit a Muhammadan Registrar from receiving a gratuity in excess of the prescribed fee of one rupee, when such gratuity is voluntarily tendered.

Muhammadan Registrar may receive gratuity.

Entries by whom to be signed.

11. Every entry in a register kept under this Act shall be signed as follows :—

*If the entry be of a marriage in a register in the form A contained in the schedule to this Act,—*

- (1) by the parties to the marriage, or, if either or both of them be minors, by their lawful guardians respectively :

- provided that, if the woman be a *parda nishin*, the entry may be signed on her behalf by her duly authorized *vakil* ;
- (2) by two witnesses who were present at the marriage-ceremony ;
- (3) in cases in which the woman is represented by a *vakil*—by two witnesses to the fact of the *vakil* having been duly authorized to represent her ;
- (4) by the Muhammadan Registrar ;

*if the entry be of a divorce other than the kind known as Khula in a register in the form be contained in the schedule to this Act,—*

- (1) by the man who has effected the divorce ,
- (2) by the witness who identifies the man who has effected the divorce ;
- (3) if the man be of the Shia sect—by two witnesses to the divorce being effected ;
- (4) by the Muhammadan Registrar ,

*if the entry be of a divorce of the kind known as Khula in a register in the form C contained in the schedule to this Act,—*

- (1) by the parties to the *Khula* provided that, if the woman be a *parda-nishin*, the entry may be signed on her behalf by her duly authorized *vakil* ;
- (2) by the person who identifies the man ;
- (3) by the person who identifies the woman ;
- (4) if the application for registration has been made by a *vakil* on behalf of the woman—by two witnesses to the fact of the *vakil* having been duly authorized to represent her ;
- (5) if the man be of the Shia sect—by two witnesses to the divorce being effected ,
- (6) by the Muhammadan Registrar

12. On completion of the registration of any marriage or divorce, the Muhammadan Registrar shall deliver

Copies of entry to  
be given to parties.

to each of the applicants for registration an attested copy of the entry, and for such copy no charge shall be made.

13. In every office in which any register hereinbefore mentioned is kept, there shall be prepared a  
current index of the contents of such register ;

Index to be kept

and every entry in such index shall be made, so far as practicable, immediately after the Muhammadan Registrar has made an entry in any such register.

14. The index mentioned in the last preceding section shall contain the name, place of residence and father's name of each party to every marriage or divorce and the date of registration.

Particulars to be shown in index.

It shall also contain such other particulars, and shall be prepared in such form, as the Lieutenant-Governor may direct.

15. Subject to the previous payment of the fees prescribed, the index, whether it be in the office of the Muhammadan Registrar or of the Registrar of the district, and the copies of entries in such index, which are filed in the office of the Registrar of the district under the provisions of section 22 of this Act, shall be at all times open to inspection by any person applying to inspect the same; and copies of entries in any of the registers, and of the certified copies of such entries, which are filed in the office of the Registrar of the district under section 22 of this Act, shall be given to all persons applying for such copies.

Index may be inspected and copies of entries in registers taken.

Such copies shall be signed and sealed by the Registrar of the district or by the Muhammadan Registrar, as the case may be.

16. Every Registrar of a district and every Muhammadan Registrar shall, for the purpose of this Act, be entitled to levy the following fees:—

Fees for searches and copies.

for every search or permission to search in any index or register under his charge—four annas

for every certified copy of any entry in a register other than the first copy referred to in section 12 of this Act—one rupee.

17. Every Muhammadan Registrar shall perform the duties of his office under the superintendence and control of the Registrar in whose district the office of such Muhammadan Registrar is situate.

Muhammadan Registrars to be subject to control of District Registrar.

*[In the town of Calcutta every Muhammadan Registrar shall perform the duties of his office under the superintendence and control of the Inspector-General of Registration.]*

Every Registrar *[and in the town of Calcutta the Inspector-General of Registration]* shall have authority to issue (whether on

complaint or otherwise) any order consistent with this Act which he considers necessary in respect of any act or omission of any Muhammadan Registrar subordinate to him.

**18.** The Inspector-General of Registration shall exercise a general superintendence over offices of all Muhammadans Registrars, and shall have power from time to time to frame rules, consistent with this Act, for the guidance of the said Muhammadan Registrars and the regulation of their offices generally.

Inspector-General of Registration to exercise general superintendence.

**19.** All rules framed in accordance with the last preceding section shall be submitted to the Lieutenant-Governor for approval, and after they have been approved they shall be published in the Official Gazette, and shall then have the same force as if they were inserted in this Act.

Rules to be approved by Lieutenant-Governor and published in Gazette.

**20.** Every Muhammadan Registrar refusing to register a marriage or divorce shall make an order of refusal, and record his reasons for such order in a book to be kept for that purpose.

Refusal to register to be recorded

**21.** An appeal shall lie against an order of a Muhammadan Registrar refusing to register a marriage or divorce, to the registrar to whom such Muhammadan Registrar is subordinate, if presented to such Registrar within twenty days from the date of the order, and the Registrar may reverse or alter such order, and the order passed by the Registrar on appeal shall be final.

Appeal against refusal to register

**22.** Every Muhammadan Registrar shall, at the expiration of every month, send certified copies of all entries made by him during the month in the registers mentioned in section 6 of this Act, and also of the entries which have been made in the index referred to in sections 13 and 14 of this Act, to the Registrar of the district within which such Muhammadan Registrar has been authorized to act, and the Registrar, on receiving such copies, shall file them in his office.

Copies of entries to be sent monthly to Registrar of district

**23.** Every Muhammadan Registrar shall keep safely each register until the same shall be filled, and shall then, or earlier if he shall leave the district or cease to hold a license, make over the same to the

Registers to be given up.

Registrar of the district for safe custody, or to such other person as the Registrar may direct.

**24.** The Lieutenant-Governor may from time to time prescribe such rules as he thinks fit, provided that such rules be not inconsistent with any provision of this Act,—

Lieutenant-Governor may prescribe rules

- (a) for determining the qualifications to be required from persons to whom licenses under section 3 of this Act may be granted ;
- (b) for regulating the attendance of Muhammadan Registrars at the celebration of marriages, and their remuneration for such attendance ;
- (c) for regulating the grant of copies by Registrars and Muhammadan Registrars ;
- (d) for regulating the payment by the Muhammadans Registrars of the cost of the seals, forms of registers, stationery and any other articles which may be supplied to them by the Government ;
- (e) for regulating the application of the fees levied by Registrars of district and Muhammadan Registrars under Act ; and
- (f) for regulating such other matters as appear to the Lieutenant-Governor necessary to effect the purposes of this Act.

The Lieutenant-Governor may from time to time cancel or alter any such rules.

**25.** Every Muhammadan Registrar shall be, and be deemed to be, a public officer, and his duties under this Act shall be deemed to be public duties.

Muham m a d a n Registrar a public officer.

**26.** Nothing in this Act contained shall be construed to—

Saving clause.

- (a) render invalid, merely by reason of its not having been registered, any muhammadan marriage or divorce which would otherwise be valid ;
- (b) render valid, by reason of its having been registered, any muhammadan marriage or divorce which would otherwise be invalid ;

- (c) authorize the attendance of any Muhammadan Registrar at the celebration of a marriage, except at the request of all the parties concerned ;
- (d) affect the religion or religious rites and usages of any of Her Majesty's subjects in India ;
- (e) prevent any person, who is unable to write, from putting his mark instead of the signature required by this Act.

## SCHEDULE.

(SEE SECTIONS 6 AND 11)

• Form A. Book I.

*Register of Marriages (as prescribed by section 6 of the Act for the voluntary registration of Muhammadan Marriages and Divorces).*

1. Consecutive number.
2. Name of the bridegroom and that of his father, with their respective residences.
3. Name of the bride and that of her father, with their respective residences.
4. Whether the bride is a spinster, a widow or divorced by a former husband, and whether she is adult or otherwise.
5. Name of the guardian of the bridegroom (if the bridegroom be a minor) and that of the guardian's father, with specification of the guardian's residence, and of the relationship in which he stands to the bridegroom.
6. Name of the guardian of the bride (if she be a minor) and that of his father, with specification of his residence, and the relationship in which he stands to the bride.
7. Name of the bride's vakil, and of his father, and their residences, with specification of the relationship in which the vakil stands to the bride.
8. Names of the witnesses to the due authorization of the bride's vakil with names of their fathers and residences, and specification of the relationship in which they stand to the bride.
9. Date on which the marriage was contracted,—to be given according to the English style and according to the *era* current in the district.

10. Amount of dower. .
11. How much of the dower is mu'ajjal (prompt) and how much mu'wajjal (deferred).
12. Whether any portion of the dower was paid at the moment. If so, how much.
13. Whether any property was given in lieu of the whole or any portion of the dower, with specification of the same.
14. Special conditions, if any.
15. Names of village or town, police jurisdiction and district. in which the marriage took place.
16. Name of the person in whose house the marriage-ceremony took place and that of his father.
17. Date of registration,—to be given according to the English style.

*Form B. Book II.*

*Register of divorces other than those of the kind known as Khula prescribed by section 6 of the Act for the voluntary registration of Muhammadan Marriages and Divorces.*

1. Consecutive number.
2. Names of the husband and of his father, and their residences.
3. Names of the wife and of her father, and their residences.
4. Date of divorce—according to the English style and according to the *era* current in the district.
5. Description of divorce.
6. Manner in which the divorce was effected.
7. Names of the village or town, police-jurisdiction and district in which the divorce took place.
8. Name of the party in whose house the divorce took place, and of his father.
9. Names of witnesses to the divorce, if any, the names of their fathers and their respective residences.
10. Name of party identifying the husband before the Muhammadan Registrar and that of his father, and their residences.
11. Date of registration,—to be given according to the English style.

*Form C Book III.*

*Register of Divorces of the kind known as Khula (prescribed by section 6 of the Act for the voluntary registration of Muhammadan Marriages and Divorces).*

1. Consecutive number.
2. Name of the husband and that of his father, and their residences.
3. Name of the wife and that of her father, and their residences
4. Date of Khula—according to the English style and according to the *era* current in the district
5. Amount of dower
6. Whether Khula was acknowledged by the wife in person before the Muhammadan Registrar
7. If so, name of the party identifying her before the Muhammadan Registrar, and that of his father, and their residences, with specification of the relationship which he bears to her, if any.
8. If the Khula be acknowledged before the Muhammadan Registrar by the wife's wakil, his name and that of his father and their residences, with specification of the relationship which the wakil bears to the wife, if any
9. Names of the two witnesses to the due authorization of the wife's wakil and those of their fathers, with their residences.
10. Name of village or town, police-jurisdiction and district where the Khula took place
11. Name of the person in whose house the Khula took place, and that of his father
12. Names of the witnesses, if any, to the divorce being effected, the names of their fathers and their residences
13. Name of the person identifying the husband, and that of his father and their residences
14. Date of registration,—to be given in the English style

**RULES MADE UNDER BENGAL ACT I OF 1876.**

- (*Published in the supplement to the Calcutta Gazette of 1884, pp. 936-37.*)

**Rules for the guidance of the permanent Committee for the supervision of Muhammadan Registrars appointed under Act I (B.C.) of 1876, and of kazis appointed under Act XII of 1880.**

1. The Committee shall consist of five or more members appointed by the Local Government, the appointments being notified in the Calcutta Gazette. The Inspector-General of Registration for the time being shall be *ex officio* President of the Committee.



Three members to form a *quorum*. In case of the death, resignation or inability (from any cause) to act of any member, the President shall submit a fresh nomination for the consideration of Government.

2. The Committee shall meet at the office of the Inspector-General of Registration on the first Tuesday in every alternate month, commencing from January, provided there is business to necessitate its assembling so often. Due notice of the matters to be laid before the Committee shall be circulated beforehand. In case of any urgent business or upon the requisition of three members, the President shall call a special meeting of the Committee for the consideration of such business.

3. The Committee shall have power to deal with the following matters —

(1) The consideration of all nominations to the post of Muhammadan Registrars made by District Registrars under Rule 2 of the rules framed under the Muhammadan Marriage Registration Act, for recommendation to Government

Ben. I of 1876. (2) The temporary suspension or removal of Muhammadan Registrars, subject to the submission of a report for the final orders of Government.

(3) The consideration of all nominations to the post of Kazis, made by the District Registrars, for recommendation to Government

(4) The temporary suspension or removal of Kazis, subject to the submission of a report for the final orders of Government

4. Subject to the approval of Government, the Committee shall be empowered to arrange for the examination from time to time of all Muhammadan Registrars —

(1) In the Muhammadan law of marriage and divorce.

(2) Act I (B. C.) of 1876 and its rules

*(Notification dated the 24th January, 1876 (published in the Calcutta Gazette of 1876 Part 1, p. 89).*

Under the provisions of section I of Act I (B.C.) of 1876 (an act to provide for the voluntary registration of Muhammadan marriages and divorces), the Lieutenant-Governor is pleased to notify for general information, that the said Act shall commence and take effect in the following districts, from the 15th February next, viz.—

Dacca

Rangpur.

Mymensingh

Bogra.

Backergunge

Chittagong.

*Notification, dated the 5th June, 1876 (published in the Calcutta Gazette of 1876, Part I, p. 650).*

Under the provisions of section 1 of Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Muhammadan marriages and divorces), the Lieutenant-Governor is pleased to notify for general information, that the said Act shall commence and take effect in the district of Noakhali from the 1st July next.

*Notification dated the 14th October, 1876 (published in the Calcutta Gazette of 1876, Pt. I, p. 1311).*

Under the provisions of section 1, Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), the Lieutenant-Governor is pleased to notify for general information that the said Act shall commence to take effect in the District of Tippera from the first November next.

*Notification dated 21st November, 1876 (published in the Calcutta Gazette of 1876, Pt. I, p. 1398)*

It is hereby notified for general information that, under the provision of section 1, Act I (B.O.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), the Lieutenant-Governor is pleased to extend the said Act to the sub-divisions of Khulna and Bagirhat in the District of Jessore, where it shall commence and take effect from the 1st December next.

*Notification dated 8th December, 1876 (published in the Calcutta Gazette of 1876, Pt. I, p. 1492).*

It is hereby notified for general information that, under the provisions of section 1, Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), the Lieutenant-Governor is pleased to extend the said Act to the following districts and sub-divisions where it shall commence and take effect at once, *viz.* —

Faridpur, Pabna, Kooshtea, sub-division of Nadia Sadar, sub-division of the Dinajpur district and the Nator sub-division of the Rajshahi district.

*Notification dated the 13th April, 1882 (published in the Calcutta Gazette of 1882, Pt. I, p. 384)*

It is hereby notified for general information that, under the provisions of section 1, Act I (B. C.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), the Lieutenant-Governor sanctions the extension of the said Act to the Sadar sub-division of the district of Rajshahi, where it shall take effect from this date

*Notification dated the 1st September, 1890 (published in the Calcutta Gazette of 1890, Pt. I, p. 876).*

It is hereby notified for general information that, under the provisions of section 1, Act I (B. C.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), the Lieutenant-Governor authorizes the extension of the said Act to the Districts of Calcutta, 24-Parganas, Jessore and Murshidabad, where it shall commence and take effect from the 1st November, 1890.

*Notification dated the 15th December, 1891 (published in the Calcutta Gazette of 1895, Pt. I, p. 1082).*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B. C.) of 1876 (an Act to provide for the voluntary registration of Mahomedan marriages and divorces), and of section 1 of Act XII of 1880 (an Act for the appointment of persons as Kazis), the Lieutenant Governor authorizes the extension of the said Acts to the District of Jalpaiguri from the 1st January, 1892

*Notification dated 10th March, 1893 (published in the Calcutta Gazette of 1893, Pt. I, p. 211)*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B. C.) of 1876 (an Act to provide for the voluntary registration of Marriages and divorces) the Lieutenant-Governor authorizes the extension of the said Act to the District of Midnapur, with effect from the 1st April, 1893.

*Notification No. 2480-J., dated 1st May 1894 (published in the Calcutta Gazette of 1894, Pt. I, p. 550).*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Muhamman-dan marriages and divorces), the Lieutenant-Governor authorizes the extension of the said Act to the District of Howrah, with effect from the 1st June, 1894,

*Notification No. 717 J.D., dated the 4th June, 1894 (published in the Calcutta Gazette of 1894, Pt. I, p. 650).*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B.C.) of 1876 (an Act for the voluntary registration of marriages and divorces) the Lieutenant-Governor authorizes the extension of the said Act to the districts of Burdwan, Bankura, Birbhum and Hooghly, with effect from the 15th June, 1894.

*Notification No. 4125 J., dated the 29th July, 1895 (published in the Calcutta Gazette of 1895, Pt. I, p. 714).*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Muhammadan marriages and divorces), the Lieutenant-Governor authorizes the extension of the said Act to the district of Cuttack, with effect from the 15th August, 1895.

*Notification No. 691 J.D., dated the 26th October, 1896 (published in the Calcutta Gazette of 1896, Pt. I, p. 1111).*

It is hereby notified for general information that, under the provisions of section 1 of Act I (B.C.) of 1876 (an Act to provide for the voluntary registration of Muhammadan marriages and divorces), the Lieutenant-Governor authorizes the extension of the said Act to the district of Purnea, with effect from the 16th November, 1896.

*Notification dated the 31st May, 1884 (published in the Supplement to the Calcutta Gazette of 1884, p. 937)*

Revised rules under sections 18 and 24 of Act I (B.C.) of 1876 an act to provide for the voluntary registration of Muhammadan Marriages and Divorces, approved by the Lieutenant-Governor of Bengal

1. As soon as the Act has been extended to any district under section 1, the District Registrar shall nominate a sufficient number of persons possessing the qualifications specified in rule 3 to be licensed as Muhammadan Registrars under section 3. The District Registrar shall also specify the limits within which each of the persons so nominated shall exercise the functions of Muhammadan Registrar.

2. The District Registrar's nomination shall be submitted to the Permanent Committee in Calcutta and shall be accompanied by the original application of the candidate in the form appended, together with a certificate of good moral character, and (unless the applicant holds a certificate of qualification from any Madrassa) every candidate shall be required to furnish a certificate of his possessing sufficient acquaintance with the Arabic language and the Muhammadan law of marriage and divorce signed by three Muhammadan gentlemen of respectability and position, and countersigned by the District Magistrate or District Judge.

**Application for a Muhammadan Registrarship under Act I (B.C.) of 1876 (an Act to provide for the Voluntary Registration of Muhammadan Marriages and Divorces)**  
**at Thana , District of**

1	2	3	4	5	6	7	8	9	10	11	12	13
Name and usual signature of candidate. Date of Application and Address in full	Age	Profession or pre-ent employment of candidate with present salary or pension	Father's name and profession	Present family residence of candidate	Distance of residence from proposed Registry Office and Sudder station	Whether candidate has a masonry house for Office	If previously employed under Government, details of past service, if ever dismissed from any post, particulars of the fact	Name and addresses of persons recommending the candidate	Whether candidate is acquainted with Arabic, Persian, Urdu, Bengali, or English	Whether candidate is acquainted with Muhammadan law, and holds any certificate from any Government or private Madrasa (taking its name)	Remarks of the District Registrar	Remarks.

3. Candidates selected for the post of Muhammadan Registrars should be possessed of sufficient acquaintance with the Arabic language and Muhammadan Law of Marriage and Divorce, and be of good moral character. Preference shall ordinarily be given to ex-kazis and Government pensioners, being Muhammadans, Moulvies, Khundkars and Mullahs, who reside, or are willing to reside, at a convenient place within the limits of the proposed jurisdiction provided they are possessed of the above qualifications, but no person shall be nominated merely by reason of some supposed hereditary right.

4. The limits within which a Muhammadan Registrar shall be licensed to act shall coincide with the limits of a sub-district under the Indian Registration Act, or within the jurisdiction of one or more police-stations or parts thereof as the Lieutenant-Governor may from time to time direct. The head-quarters shall be at some convenient place within these limits.

5. The District Registrar's nomination, with the accompanying applications and certificates, shall be forwarded to Government by the Permanent Committee with their remarks and recommendations. Should the nomination of the District Registrar be disapproved, the District Registrar may be requested to submit a fresh nomination, or the Permanent Committee may select any other candidate. For this purpose a list of candidates willing to serve as Muhammadan Registrars in any district to which they may be appointed shall be kept in the office of the Inspector General of Registration.

6 Should such a course appear expedient hereafter, all Muhammadan Registrars who may have been appointed under these rules, and all future applicants for licenses, shall be liable to examination in the following subjects.—

- (1) Arabic and vernacular of the district;
- (2) Muhammadan law of marriage and divorce.
- (3) Act I of 1876 (B.C.) and the rules.

And if any person, who has been appointed a Muhammadan Registrar, fail to pass such examination, his license will be liable to be cancelled. Such examination may be held at such times and places and by such examiners as the Lieutenant-Governor may from time to time appoint.

7. Licenses to qualified persons who have been approved of as Muhammadan Registrars will be granted in the following form.—

**License under section 3, Act I (B.C.) of 1876.**

To

of

Calcutta, the 190 .

1 By virtue of the authority conferred upon His Honor the Lieutenant-Governor of Bengal by Act I (B.C.) of 1876, you are hereby authorized to register, in the manner prescribed by the above Act, all Muhammadan marriages and divorces which shall be effected within on application being made to you for such registration.

2. It will be your duty carefully to observe the provisions of the above mentioned Act, and such rules as may from time to time be prescribed by His Honor the Lieutenant-Governor, in pursuance of the power conferred upon him by the above Act.

3. This license shall continue in force until it is revoked or suspended by the said Lieutenant-Governor of Bengal.

4. When a Muhammadan Registrar desires to give up his license, or is about to leave the place or district in which he has exercised the functions of Muhammadan Registrar, he shall report the circumstances through the District Registrar to the Inspector-General of Assurances for the orders of Government.

5 When a Muhammadan Registrar makes over charge of his office to a successor, a certificate shall be jointly given of the date on which the office is made over, and of the safety and correctness of the records, and this certificate shall be forwarded by the District Registrar to the Inspector-General.

6. Muhammadan Registrars shall not be entitled to leave as of right under the rules in force for Government servants. The District Registrar may, however, grant leave in cases of urgency, but no leave exceeding one month shall be granted without the previous sanction of the Inspector-General. All leave shall be at once reported to that officer, together with the arrangements made for carrying on the duties of the Muhammadan Registrar.

11. In cases of leave or absence from duty, the next nearest Muhammadan Registrar shall ordinarily be appointed to carry on the duties of the absentee, in addition to his own, or the District Registrar may appoint a temporary substitute, on his being licensed, from among the list of candidates for Muhammadan Registrarships registered in his office.

12 It is not intended that service as a Muhammadan Registrar shall count as Not entitled to Government service, so as to give rise to any claim for pension or gratuity, or to leave allowances of any kind.

13. The general control and supervision of the working of the Act shall be exercised by the present inspecting staff attached to the department General control for the registration of assurances, but Muhammadan Deputy Collectors, Sub-Deputy Collectors, or Kanungos may be specially deputed by the District Registrar to inspect Muhammadan marriage registry offices at any time.

14. A Muhammadan Registrar will, on first appointment, Books and station- be supplied with the registers, &c., mentioned below, free of charge—  
ery

1. Register A (Book I).
2. Copies of do for parties
3. Do. do. for the registrar.
4. Do. do for issue
5. Register B (Book II)
6. Copies of do. for parties
7. Do. do for the registrar
8. Do. do for issue.
9. Register C (Book III).
10. Copies of do for parties.
11. Do. do. for the registrar
12. Do. do. for issue
13. Book of refusals
14. Index Book.
15. Do. Sheets.
16. Form of application
17. Catalogue.
18. Act and rules in Urdu.
19. Indent for forms

He will also be supplied with a seal, and will use no ink for making entries in the registers and indexes other than that supplied from the Government stores. All books, registers, &c., which may subsequently be supplied shall be paid for by the Muhammadan Registrar at the time of supply, but in any case when the District Registrar thinks it necessary he may defer the realization of the charge for a term not exceeding three months. In case of failure to pay at the prescribed period, the District Registrar should report the case for orders to the Inspector-General of Registration.

When the first supply is exhausted a Muhammadan Registrar will obtain, on indent from the Government stores, at cost price, Register Books A, B and C, Index Books, Index Sheets, Forms of Application, Catalogues and a seal, which is not to cost more than Rs. 2. He will supply himself with forms 2, 3, 4, 6, 7, 8, 10, 11, 12, on good stout paper, and keep up himself Books of Refusals and Books of Appeals on country paper.

15. The seal shall always remain in the personal custody of the Muhammadan Registrar, and shall be made over with the records to the Custody of seals. officer appointed to receive the same whenever a Muhammadan Registrar ceases, either temporarily or permanently, to exercise his functions.

16. A printed table of fees in the vernacular of the district shall be suspended in some conspicuous place in every Muhammadan Registrar's office.

17. The fees received by a Muhammadan Registrar under sections 9 and 16 of the Act, and rules 20 and 49, may be retained by him as his lawful remuneration, provided that he duly pays for the registers and other articles supplied to him under rule 14. All fees received by a District Registrar shall be credited to Government in the same way as fees realized under the Indian Registration Act.

18. When the attendance of a Muhammadan Registrar is required at the celebration of a marriage or other ceremony, the party requiring his attendance may make an application to the Muhammadan Registrar, specifying the place and time of the marriage or other ceremony, and that officer may attend.

19. It shall be lawful for Muhammadan Registrars to travel on circuit within their jurisdiction for the purpose of attending at the celebration of marriages or other ceremonies.

20. Muhammadan Registrars are at liberty to make their own terms as regards the extra fees to be given them for attending marriages or divorces. They are prohibited from demanding fees beyond the following scale for attending at a marriage or other ceremony —

Rupees 3 *plus* travelling allowance at the rate of three annas a mile

21. Every Muhammadan Registrar shall exhibit in some conspicuous part of his office a table of fees he is authorized to levy under sections 9 and 16.

22. When a Muhammadan Registrar is present at the celebration of a marriage, he shall make an entry of the fact in the register of marriages (A), and a copy of such entry shall be included in the copies to be made under sections 12, 15 and 22 of the Act.

23. If all the persons who, by section 11 of the Act, are required to sign the entry of the marriage or divorce in the proper register are not present registration shall be deferred until they are all present, provided that no marriage or divorce for registration of which application has been made within one month, as required by section 9, shall be registered after the expiration of six months from the date on which the marriage or divorce was effected.

24. The Muhammadan Registrar shall satisfy himself whether or not a marriage was effected by the persons by whom it is represented to have been effected in the following manner —

(1) by examining the parties to the marriage, or, if either or both of them are minors, their lawful guardians. If the woman be a *purda-nashin*, her duly authorized vakil shall be examined instead of the woman,

(2) by examining the two witnesses who were present at the marriage.

25. The Muhammadan Registrar shall satisfy himself whether or not a divorce other than the kind known as *khula*, was effected by the man by whom it is represented to have been effected by examining that man, and if he be of the Shiah sect, by also examining the two witnesses to the divorce being effected

26. The Muhammadan Registrar shall satisfy himself that a divorce of the kind known as *khula* was effected by the persons by whom it was represented to have been effected in the following manner. —

- (1) by examining the parties to the *khula*, provided that if the woman be a *pardah-nashin*, her duly constituted wakil shall be examined instead of the woman,
- (2) If the man be of the Shiah sect, by also examining the two witnesses to the divorce being effected.

27. The Muhammadan Registrar shall satisfy himself of the identity of persons appearing before him as witnesses of a marriage or divorce, unless they are otherwise personally known to him, by examining at least one witness to the identity of each person so appearing.

28. In the case of any person appearing as the representative of the man or woman (whether he appears as guardian or wakil), the Muhammadan Registrar shall satisfy himself of the right of such person to appear, by examining such person. If a wakil so appear, the Muhammadan Registrar shall further examine witnesses to the fact of the wakil having been duly authorized to appear.

29. When the entry of the marriage or divorce has been made in the proper register, it shall be read over by the Muhammadan Registrar to the persons who, by section 11, are required to sign such entry. If they admit its correctness, the entry shall then be signed by them.

30. When a person who cannot write signs his name by means of a mark, his name shall be recorded at length, and the writer shall also sign his name in attestation that the mark was affixed in his presence.

31. If a Muhammadan Registrar discover any error in the form or substance of any entry of a marriage or divorce made by him, he may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of such correction, and he shall also make the like marginal entry in the copies thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And, in case a copy has been already sent to the Registrar, such person shall make and send another copy thereof, containing both the original erroneous entry and the marginal correction therein made.

32. No erasures shall be made with a knife in any register, book or record, but mistakes shall be corrected, when necessary, with the pen, and shall be invariably attested by the registering officer. Corrections are not to be obliterated or blotted out, so as to be illegible, but a line is to be drawn through erroneous words with the pen, so that they may remain legible.

33. The circumstances under which registration of a marriage or divorce should be refused are as follows. —

- (1) If the marriage or divorce was not effected within the jurisdiction of the Marriage Registrar to whom application for the registration is made.
- (2) If the application is not made by the persons specified in section 8 of the Act.



- (3) If application has been made after the expiry of one month from the date on which the marriage or divorce was effected.
- (4) If all the persons required by section 11 to sign the entry in the proper register, fail to appear within the time limited for such appearance by the Muhammadan Registrar under rule 23.
- (5) If the Muhammadan Registrar fail to satisfy himself that the marriage or divorce was effected by the person or persons by whom it is represented to have been effected.
- (6) If the Muhammadan Registrar fail to satisfy himself as to the identity of the persons appearing before him and alleging that the marriage has been effected.
- (7) In the case of any person appearing as the representative of the man or woman (whether he appear as guardian or as wakil), if the Muhammadan Registrar fail to satisfy himself of the right of such person to appear.
- (8) If one of the parties applying for registration of marriage, or if the man applying for the divorce, appear to be of unsound mind.

34 In cases 2 and 8 the order of refusal shall ordinarily be deferred till one month has elapsed from the date on which the marriage or divorce was effected, but if the parties declare their inability to comply with the requirements of the law, or for any other reason wish that registration should at once be refused, this may be done.

35. The reasons for refusal to register to be recorded under S. 20, shall be concisely and clearly stated in each particular case. When registration is refused under cls. 5, 6, or 7 of s. 33, the Muhammadan Registrar shall record the ground of his decision.

36 Fees paid under S. 9 shall not be refunded unless registration is refused for one of the reasons numbered (1), (2), (3), and (8) in r. 33. In what cases fees may be refunded. Fees and travelling allowances paid for the attendance of Muhammadan Registrar at the celebration of marriages shall be refunded only in cases where the Muhammadan Registrar does not attend. Fees paid for searches in the registers and indexes, or for copies of entries, shall be refunded only when the searches are not made or the copies not given.

37. The refund of fees paid to a Muhammadan Registrar shall be made by him at once on application, and he shall take and file a receipt for the amount of such re-payment from the person to whom it is made.

38. When a register book is closed, a certificate to that effect shall be appended at the close of the written portion, and a certificate showing the number of pages written upon shall be entered on the first page.

39 The registers and indexes shall be kept in Bengali. Copies under Ss. 12, 15 and 22 should be prepared in the language in which the registers are kept.

40. The "year" referred to in S. 7 of the Act shall be a year of the Christian Era commencing on the 1st January and ending on the 31st December.

41. The index to marriages and divorces shall be prepared from registers A, B, and C, and contain the following particulars.—

1. Name of party.
2. Father's name.

3. Residence.
4. Place of registration
5. Year of registration.
6. Serial number for the year .
7. Book.
8. Volume.
9. Page.

42. Names shall be indexed according to their first letter, and shall be arranged in the order of the Bengali alphabet. A mere title or designation of race shall not be taken as the index word.

Thus, Shaikh Ramzan, will be indexed Ramzan, Shaikh, Mir Aulad Ali, Aulad Ali Mir.

43. A catalogue, in form given below, shall be kept up and permanently preserved in every Muhammiadan Registrar's office, and on the occasion of every transfer of records, the officer receiving charge of the records shall compare them with the catalogue, and certify therein that he has found them correct. Whenever any of the records are transferred to the district office, the fact shall be noted in the column of remarks, together with the date of transfer —

*Form of Catalogue.*

Serial No.	District or sub-district to which the books relate.	Year	Title of book	Volume	Number of entries in each	Number of pages written on	Remarks
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44. In district offices the following records shall be preserved in perpetuity —

All register books A, B and C, and their indexes.

The Catalogue.

Register of refusals.

Register of appeals.

Reports of the destruction of records, and list of papers destroyed

45. The following records may be destroyed after the expiration of three full years from the period to which they relate. —

\* Application for registration for or attendance at the celebration of marriages under r. 18.

Application for search, or copies of extracts.

All correspondence, whether in the Vernacular or in English which is of an ordinary routine character, and which the Registrar considers may be destroyed.

46. No records or papers whatever shall be destroyed without the previous sanction of the Inspector-General.

47. Applications for search in the records, or for copies of extracts therefrom, shall be made in writing, no stamp shall be required on such applications. Applications made to the District Registrar shall be entered in the register kept by him for that purpose. Applications made to the Muhammadan Registrar shall be filed by him, the date of application and the date on which a search was made, or a copy delivered being noted on the back of the application. If the register from which an extract is required has been transferred to the District Registrar, or other person under S. 23, the application, together with the prescribed fee, shall be forwarded by the Muhammadan Registrar to such District Registrar or other person at the expense of the applicant.

48. A call for information from any Court shall, if it necessitates search in the registers, be accompanied by the necessary fee for search. Officers of Government shall be permitted to inspect the registers without fee, but if the production of a register in any Court is required it shall be produced by the Muhammadan Registrar or other officer whom the District Registrar may depute for the purpose, who will be entitled to claim payment of his expenses like any other witness.

49. Besides the fees leviable under S. 16 of the Act, a fee of eight annas may be charged for extracts and copies of orders and records not otherwise provided for in the law. See Bengal Local Statutory Rules and Orders, 1903, Vol. II, pp. 608 to 619.

# THE MALABAR MARRIAGE ACT, 1896<sup>1</sup>.

(MADRAS ACT IV OF 1896.)

An Act to provide a form of marriage for persons following the Marumakkathayam or the Aliyasantana Law.

WHEREAS it is expedient to enable persons following the Marumakkathayam or the Aliyasantana Law<sup>2</sup> of Inheritance to contract marriages which shall be recognized by Courts of law as legal marriages and to provide for the issue of such marriages, It is hereby enacted as follows —

## *I — “The Malabar Marriage Act, 1896.”*

### **(1) Reasons for the passing of the Act**

In 1891, the Government of Madras, appointed a commission to ascertain the customs connected with marriage contracted by the followers of the Marumakkathayam law of inheritance and to report whether legislation to provide a form of marriage or to recognize any prevailing forms of marriage was necessary and expedient. Five of the Commissioners were in favour of permissive legislation on the grounds that (1) as a permissive law it would not force a legal marriage on those who were unwilling to contract it, (2) a marriage law was an important aid to national progress and good morals; (3) the demand for legislation would be repeated year after year until it was conceded, (4) the right to contract a legal marriage was personal to every one of Her Majesty's subject and the demand for a permissive law was but reasonable, (5) though the minority that desired legislation was small it was a growing and educated minority and every year would add to its strength and influence. The sixth Commissioner also was of opinion that legislation was expedient and necessary if the courts would not recognize the marriages of the classes referred to as legal. The courts had not till then recognized these marriages as legal, and the President of the Commission, Sir T. Mutusami Aiyar, was of opinion that was not likely that the courts would adopt any other view.

The Governments of Madras and India concurred in the view that legislation was necessary and expedient. A Bill was framed to carry out the above suggestion. That Bill subsequently became the present Act.  
*See Statement of Objects and Reasons* **A**

### **(2) History of the Act—Marriage Law in Malabar prior to the passing of the Act—Nature and scope of the Act**

In 1890, The Hon'ble C. Sankaran Nayar asked for leave to introduce a Bill to legalize marriages contracted by the followers of the Marumakkathayam and Aliyasantana Laws of Inheritance in Malabar and Canara, and leave was granted, but the Government of India considered that

1.—“*The Malabar Marriage Act, 1896*”—(Continued).

information regarding the marriage customs prevailing among Hindus of Malabar placed before them was not sufficient to enable them to decide whether even the permissive legislation that was attempted was necessary. In order, therefore, to procure information on this and certain other points, a Commission was appointed. As to the nature of the inquiry made by the Commission the Madras Government says. “The widest publicity was given as to the nature of the inquiry by means of notices in the District Gazette and otherwise and it seems to His Excellency the Governor in Council that the investigations of the Commission have been most searching and that public opinion has been gauged as completely as could be expected in an enquiry of so delicate a nature.”

Five out of the six Commissioners recommended legislation to legalize marriages, while the other Commissioner also recommended it, if the courts would not recognize marriages among the classes referred to as legal.

The Government of Madras and India after a full consideration of the reports and the evidence collected by the Commission, arrived at the conclusion that legislation was necessary and on the lines suggested by them a Bill was framed.

The following is a brief account of the family law of those whom the Bill was intended to affect. Sri T. Muthusawmi Iyer, a member of the commission thus described the condition of their joint family, usually called tarwad.—“In its simplest form, a tarward or marumakkattayam family consists of a mother and her children living together with maternal uncle as their karnavan. In its complex form, it consists of several mothers and their children or their descendants in the female line, all tracing their descent from a common female ancestor, and living together as a joint family in subjection to the power and under the guidance and control of the senior male for the time being as its head or representative. The link of relationship is descent from a common female ancestor and the bond of family union is subjection to a common karnavan. The notion of tarwad property is that the entire family is its owner, that it is impartible except by common consent, and that each individual member is entitled to be maintained in his or her tarwad home and to the fruits of joint beneficial enjoyment. The joint family is called a tarwad and each of the mothers and her children and descendants in the female line constituting the tarwad is called a taivali or the line of a single mother. In its secondary sense the term refers to a branch of the family having separate possession of a portion of the family property for convenience of enjoyment without prejudice to the unity of tarwad interest or to the general control of the tarwad karnavan. The term includes also a branch holding self-acquired property and at the same time retaining its joint interest in tarwad property. If the tarwad is broken up by partition made by common consent, each branch is called a new or branch tarwad and the divided kinsmen are called *attaladakkam* or reversionary heirs. It is noteworthy that the relation of husband and wife or of father and child is not inherent in the conception of a marumakkattayam family. In cases in which a Nayar woman resides with her husband, it is still considered to be in accordance with

1.—“ *The Malabar Marriage Act, 1896* ”—(Continued).

immemorial usage to send her back to her own tarwad, immediately after, or very shortly before, his death, and not to remove his corpse for cremation until she is first sent away. The person that begot a child on a marumakkattayam female was originally regarded as a casual visitor and the sexual relation depended for its continuance on mutual consent.”

But though the relation of husband and wife was not inherent in the conception of a marumakkattayam family, we find as a fact that several forms of marriage are recognized by society as establishing such relation.

As to the practice prevailing in the kovilgams or the families of ancient rulers and petty chieftains, the same learned Judge says “A ceremony called *vel* in some kovilgams and *kalianom* in others, is celebrated with great pomp and at considerable expense. Ordinarily, it is performed before the maiden attains her maturity and the Koil Tamburan ties a piece of gold round her neck in the kovilgams in North Malabar, and a member of the family of the Raja of Cranganore does the same in the kovilgam of His Highness the Zamorin. The ceremony has, however, no significance as creating a binding marriage tie. If the Koil Tamburan or other person tying the neck ornament according to the usage of the kovilgam is willing to become the husband of the maiden when she attains maturity, she consorts with him. If not, she consorts with a Nambudri Brahmin without any further formality or ceremony, and after a time she is free to put him away at her pleasure and take another Nambudri Brahmin in his place with the consent of the karnavan and protector, the senior Raja of the kovilgam for the time being.”

Amongst the classes of Nairs and Tyars also the similar ceremony of *tali kattu kalianom* is performed. It consists, as in the kovilgams, of tying a piece of gold round the girl's neck. The ceremony lasts for four days and at its close the girl may remove the tali if she likes. As to its significance Sir Muthusami Iyer says “There is a preponderance of opinion among the witnesses whom I have examined and those who have sent in answer to our interrogatories that it does not constitute a marriage or create a right in the person who ties the *tali* to cohabit with the girl. In some parts of South Malabar, however, there is a belief that it is a marriage, but even there the custom is to tear up a cloth, called *kachai* cloth, on the fourth day of the ceremony as a symbol showing that the marriage has been dissolved. It is a curious fact that the same man may at one time tie the *tali* upon a number of Nair girls collected together under one decorated pandal or upon several sisters. There is also no objection to the same person tying the *tali* at one time upon the mother and at another time on the daughter.”

This ceremony is regarded as marriage by some, though it does not create a right in the so-called bridegroom to cohabit with the girl.

The other forms of marriage are as stated by Sir T. Muthusami Iyer in his report.—

*Podamuri*, where the bridegroom gives and the bride accepts, a cloth as the token of marriage.

I.—“ *The Malabar Marriage Act, 1896* ”—(Continued).

*Usham Porulla*—The etymology of the term, according to Sir Muthusami Iyer, “ suggests that one had to wait for one's turn.”

*Vidaram Kauruga*, or coming to the house “ A girl married in this form is not to this day taken into the husband's house, unless and until *podamuri* is performed. She is not regarded as fit to be brought by the husband into his own tarward house or to associate with his female relations on terms of equality.

*Manqalam* is peculiar to the Tivans of North Malabar, and during its performance a small sum of money is paid to the bride's karnavan by the bridegroom as the bride's *kanom*, and a further payment is made as a matter of form to the bride's uncle's son as the couple leave her house, as the price of his preferable right to her hand.

*Sumbandham*, as marriage is usually styled in South Malabar, different from *podamuri* in that the gift and acceptance of cloth, form no part of the ceremony. “Betel and nuts are given instead of a cloth by the bridegroom to the bride.”

*Kulakkora*, as marriage is usually styled in Palghat taluk, signifies lying together. As part of the ceremony, a declaration is made by one of the bridegroom's party to the senior female of the bride's house in the presence of the assembled guests in the following terms: “Let this youth visit this damsel for six months, and a reply is given in the terms “Be it so.”

In the above cases the forms are gone through before the consummation of marriage and the intention to create the relation of husband and wife is expressed before cohabitation.

But the evidence before the commission showed that cohabitation followed any time subsequently by acknowledgment is also regarded as marriage, or as Sir Muthusami Iyer puts it—“The evidence shows that, if a Nair female consorts with a male without going through any of the forms of marriage, she is not put out of her caste even in respectable families provided that he acknowledges the intimacy and he is of equal or superior caste. This sort of union is not “treated as prostitution as is the case on the other coast.”

So much for the forms gone through at the commencement of the sexual relation. As to the dissolution of this sexual relation, Sir Muthusami Iyer's conclusion on the evidence is “The husband or the wife may in theory divorce the other at will. But in practice neither does so except for a cause which commends itself to his or her family and to the society in which they move. What grounds of divorce are considered reasonable in Marumakkattayam society and whether any formality is observed when marriage is dissolved, are matters concerning which I have taken evidence. But the evidence is discrepant and conflicting and conveys the impression that, save adultery, no other determinate cause is recognized and no specific form is observed throughout Malabar or even in the same part of the district.”

1.—“ *The Malabar Marriage Act, 1896* ”—(Continued)

As to the question whether there is anything religious about these Malabar marriages, the same authority says “ Looking to the forms of marriage in use, they are not regarded as constituting a religious ceremony, or a *samskaram* or sacrament in the Hindu or European sense of the word. There is no officiating priest in attendance, there is no formula to be repeated, there is no vedic, puranic or religious chant or exhortation, and there is no formal benediction ” Finally he says “ The conclusion I come to is that the marriage customs among Marumakkathayam Hindus have no connection with their religious observances such as exists under ordinary Hindu Law ” This conclusion is accepted in the report of the Malabar Marriage Commission and by the Government of Madras and India on the evidence collected by the Commission

These sexual unions were not accepted as marriages in any Court of law. On the question whether there was any likelihood of the courts recognizing them in future, Sir Muthusami Iyer stated in his report —“ I have considered also the question whether the courts are also likely to recognize the existing social marriages as legal marriages and it is very doubtful that they will do so. It is no doubt true that there is a customary marriage and that a contract may be inferred from its incidents. But having regard to the fact that in theory either party may ordinarily repudiate it at will, the obligation created by it is one which either party may ignore at his or her pleasure and there is no uniform formality which may be accepted as a customary reputation fixing its duration throughout Malabar. It is a contract of which the breach though checked in some measure by public opinion, is neither invariably nor effectually restrained by a definite rule. Such a contract is a contradiction in terms and is not likely to be accepted as creating a binding tie until and unless the practice of divorce is regulated in some mode. The obligation may invariably be taken to subsist until the regulation is complied with. This was in accordance with the view that had always been adopted in the courts. It was the view accepted by one section of the people.

The Governments of Madras and of India had also accepted the conclusion that there was no legal marriage, and that the civil courts were not likely to recognize these forms of sexual relation as legal marriages.

Though the courts did not and would not recognize these marriages, yet the Commission wrote thus in their report —“ According to the North Malabar witnesses the rule is that the union of man and woman lasts for life. The wife lives with the husband. Divorces are almost unheard of or are extremely rare. Respectable people set their faces against polygamy. The father is *de facto* the guardian of his wife and children, and educates the latter. In the absence of testamentary power, men, where they have the means, invariably make provision for their wives and children by gifts *inter vivos* and if they were to die before having made such provision their *tarwad*s would be forced by public opinion to make the widows and orphans an adequate allowance. Thus, according to all the evidence given before us, a Marriage Law in North Malabar and throughout the greater part of South Malabar, would merely legalize what is already the prevailing custom.”



I — "*The Malabar Marriage Act, 1896*"—(Continued).

The facts stated above showed conclusively that there existed a case for legislation on the subject. The facts that these sexual unions were formed with ceremonies which indicated the intention of creating the relation of husband and wife, that though marriage did not form part of the marumakkathayam system, yet the people adopted various forms of marriage, the prevailing practice of husbands and fathers, and occasionally their tarwads after their death, providing for wives and children; the practice of the wives and children living with the husband and father, the education of the children by the father, showed that their sexual unions ought to be recognised as marriages as understood in a court of law, and as there was no probability of the courts recognizing them as marriages, it appeared necessary for the legislature to interfere. The case was forcibly stated in the Proceedings of the Madras Government in the following words.— "The classes governed by the Marumakkathayam law form sexual connections which are, at the time of commencing them, intended to be permanent until the death of either of the parties, and which in the great majority of cases are so, those connections are publicly formed and socially recognized and are accompanied by ceremonies of a characteristic kind which have nothing in them of a religious element but which otherwise are as much marriage ceremonies are entitled to the same respect as marriage ceremonies elsewhere, the connections have however no legal consequences, and, as they are terminable at the will of either party, they receive no legal recognition or protection. His Excellency in Council considers that marriages performed under the Marumakkathayam law are entitled to legal recognition and protection and that the mere statement of the case as above is sufficient to show the propriety of legislating on the subject. The Courts have hitherto refused to recognize those social marriages in Malabar as legal marriages, and it will be observed from paragraph 15 of his memorandum that the President (Sir Muthusami Iyer) is of opinion that such recognition is not likely to be accorded in future."

The Government of India entirely agreed with the Government of Madras and considered that legislation ought to be resorted to in order to give such effect to what was already recognized as a marriage in society among the classes concerned.

The right to contract a legal marriage is personal to every one of her Majesty's subjects, this legislation was intended to be an important aid to national progress and good morals.

The next question was, what form legislation ought to take. Here, as the Governments of Madras and India observed, all those sexual unions which were recognized by usage ought to be recognized as marriages. In the Bill which was drafted in 1890, a statutory form of marriage was provided. To this, strong objection was taken, and accordingly the Bill which was subsequently introduced proceeded on the existing usage. The Bill was only permissive. Those who did not wish that any rights or liabilities ought to be incurred on account of marriage were left alone. See Fort St. George Gazette, suppl., 1895, June, 11th pp. 24 to 28.

*I — "The Malabar Marriage Act, 1896"—(Concluded)*

**(3) Working of the Act**

"From the date on which the Act came into force up to the 4th September 1903, eighty-three Sambandhams have been registered. In his report on the working of the Act for the year 1898-99 the Registrar-General states that the number of notices of intention to register Sambandhams was thirty-six in 1896-97, twenty-four in 1897-98 and only fourteen in 1898-99. He accounts for the falling off as follows — "The mass of the people continue to regard the Marriage law with aversion and suspicion and even the educated members of the community, who are in favour of the measure, shrink from taking advantage of it, from fear of offending the elder members of their tarwad and the all-powerful Nambudris and other great landlords. The Registrar of Calicut also points out that the power conferred by the marriage law to make provision for one's wives and children has hitherto acted as some inducement to persons to register their Sambandhams, but, as Act V of 1898 (Madras), which came into force from 2nd September 1898, enables the followers of Marumakkathayam law to attain this object without registering their Sambandhams, and thus "unnecessarily curtailing their liberty of action and risking the chances of a divorce proceedings," he thinks it unlikely that registrations under the Marriage law would increase in future."

The figures furnished by the Registrar-General show that the Act has as yet had but little practical effect in Malabar or South Canara. See Moore's Malabar Law and Custom, 3rd Ed., pp 90, 91. **C**

**2.—"Persons following the Marumakkathayam and the Aliyasantana Law."**

**(1) Marumakkathayam and Aliyasantana Law — Nature of family governed by such Law**

"That system which is called in Canara, Alya Santana, in the more southern districts, Marumakkathayam, has for its central principle that descent is always traced through the female line to a female ancestor." "The relation of husband and wife, or of father and child is not inherent in the conception of a Marumakkathayam family." Each male who is born into the family acquires a personal position as a member of the tarwad and a claimant upon its property, but he never becomes a stock of descent, the family is perpetuated by the female members. The person who occupies the position of a son to him is not his own son, who is a stranger to the family, but the son of his sister." Mal. Mar. Rep. 105, Mal. Mar. Rep., 49. **D**

**(2) Classes governed by Marumakkathayam.**

The Marumakkathayam system is followed by all the Nayers with the sole exception of the Mannadiyars in Palghat, and by the great majority of the Tiyanas and Mukkavans in North Malabar, and by a very small number of the same classes in South Malabar and Wynaad. The great bulk of the population of Travancore follow the same rule, which has been adopted by a few families of the Nambudris and Muhammedans and by the Ambalavasis, a caste peculiar to Travancore, consisting of Brahmans who, from one cause or another, have

**2.—“Persons following the Marumakkathayam and the Aliyasantana Law ”—(Continued)**

lost caste ” See the Madras Census of 1891, VIII, 222, Mal. Man. I, 111, 131, Mal Man, I, 134, 154, Mal. Mar. Rep, 5, Travancore Census Rep, 1891, pp 253, 743, Cochin Census Rep, 1891, 176. **E**

**(3) Classes governed by the Alya Santana Law**

“ The Alya Santana law is followed in South Canara ” “ by all the old Tulu land-owning, cultivating, and labourer castes, as well as by the Moplas, who are the descendants of Arab settlers who formed connections with Tulu women of the land-owning classes, and adopted the prevailing rule of inheritance, also by the majority of the Bants, a military class, who correspond to the Navars ” S Can Man I, 135, S. Can Man., I, 158 **F**

**(4) Classes governed by Makkathayam Law**

“ The Makkathayam system is followed by all the Brahmans with few exceptions, and by the low-class Malayalis, the agrestal slaves and the hill-tribes ” Mal Man, I, 155, Cochin Census Rep, 1891, 180, Travancore Census Rep, 1891, pp 253, 770—776 **G**

**(5) Alya Santana marriage, how differs from marumakkathayam marriage.**

(a) “ The sexual relations of those who are governed by Alya Santana law bear upon their face less marks of license than those of the Marumakkathayam classes.” Mayne's Hindu Law, 7th Ed, 1906, p 126. **H**

(b) “ The Alya Santana races do not intermarry with Navars or Tiyaars, and the rules of *anuloma* and *pratiloma*, which allow men of superior classes to enter into sambandham with women of inferior classes are not practised among them. Persons of the same *bali* or *gotra* are also incapable of marriage union, and even sexual intercourse between persons so connected entails loss of caste ” Mal Mar Rep, 37, 75, 106, S. Can. Man, I, 143, 160. **I**

**(6) Nature and effects of marital relationship among Nayars.**

(a) “ The relations between the Nayar ladies and their paramours, from the earliest times, were of the loosest and most fugitive description. The ancient rule was that the woman should remain in her own house and be visited by her so-called husbands and that the eldest female should be the head of the Tarwad. Time has brought about modifications in this system and in Malabar, though not in Canara, the eldest female has given way to the eldest male. The wife often has a separate house provided for her where she lives with her husband and, now-a-days when so many members of Nayar Tarwards leave the family house and reside permanently elsewhere as members of the several branches of the public service, the women with whom they have formed sambandham live with them in a strictly monogamous union. Polyandry indeed may now be said to be almost extinct. As to this, the following extract from the report of the Malabar Marriage Commission may be referred to —“If by polyandry we mean a plurality of husbands publicly acknowledged by society and by each other and sharing between them a woman's favours by mutual agreement, the legal and regulated possession publicly acknowledged of one woman by several men who are all husbands by the same title, it may be

2 —“ *Persons following the Marumakkathayam and the Aliyasantana Law* ”—(Continued)

truly said that no such custom is now recognized by the Marumakkathayam castes in Malabar. If by polyandry we simply mean a usage which permits a female to cohabit with a plurality of lovers without loss of caste, social degradation or disgrace, then we apprehend that this usage is distinctly sanctioned by Marumakkathayam and that there are localities where and classes among whom this license is still in practice.” See Moore’s Malabar Law and custom, 3rd Ed. pp. 56, 58. J

(b) “The generally received opinion is that, at all events, up to the date of passing of this Act IV of 1896 (Madras), it was absolutely impossible for a man or a woman who followed the Marumakkathayam law to contract a valid marriage, using the word marriage in its ordinary popular signification.” See Moore’s Malabar Law and Custom, 3rd Ed., p. 69. K

(c) The relation between a so-called husband and wife under the Aliya Santana law was “in truth not marriage but a state of concubinage into which the woman enters of her own choice and is at liberty to change when and as often as she pleases. From its very nature then it might be inferred as probable that the woman remained with her family and was visited by the man of her choice, but the case in this respect is not left to mere probability. Such has undoubtedly been the invariable habit under the Marumakkathayam law, and, although women in Canara under the Aliya Santana system do, it seems in some instances, live with their husbands, still there is no doubt that they do so of their free-will, and that they may at any time rejoin their own families.” 1 M II C. 196, See, also, 6 M 371 (379). L

(d) In Malabar there is no legal marriage, *Per* Parker, J. in 15 M. 75. M

(7) **Marriage is optional with women in Malabar—Its nature and incidents**

(a) “As regards the freedom either to marry, or not to marry, it is conceded to woman as well as to men, the rule of Hindu law, which prescribes marriage as indispensable to women, having no obligatory force either among Nambudri Brahmans, or among Nayars and Tiyyars.” Mal. Mar Rep., 57. N

(b) The following observations of the Learned Chief Justice Turner in 6 M 374 may also be noted —“We have considered the evidence recorded in this case, and are of opinion that it is not sufficient to prove that the cohabitation of a man and woman under the Aliya Santana law constitutes such a marriage as is intended in those sections of the Penal Code which provide for the punishment of offence, against the marriage right. That the Aliya Santana law did not recognize such cohabitation as marriage appears to be shown by the circumstance that it founds upon it no rights of property or inheritance. The authority of the treatise attributed to Bhutala Pandiya has been seriously impugned.” 6 M 374 (379). O

(c) The following observations by Mr Justice Muthusami Aiyar, as to whether, because a Marumakkathayam Sambandham has few of the incidents of a legal marriage, it also necessarily follows that it must be looked as concubinage pure and simple are worthy of consideration. —

2.—“*Persons following the Marumakkathayam and the Aliyasantana Law*”—(Continued).

“That, prior to the introduction of ‘Pudamuri’ and other species of Sambandham (forms of individual marriage), the sexual relation was of a fugitive character and that there was no marriage in the proper sense of the term, is not denied. But the question is not as to the primitive theory of sexual relation, but as to whether, as stated by the Honourable Mr. Sankaran Nayar when asking for leave to introduce his Bill, there is at present a marriage in practice, and, if so, whether the customs relating thereto are such as would furnish a basis for legislation. As I read the report, this position does not seem to be disputed, for, referring to the Marumakkathayam Hindus, the report states that ‘they are all or nearly all of them better than their custom, and the majority (as we are told and believe) cleave to one woman for life.’ Again, referring to the ancient notion that chastity was not a virtue prescribed for Nayar women and that ‘they were specially created for the Nambudri bachelors to play with,’ the report adds that ‘Nayars will not submit to this teaching much longer.’ The very same evidence, from which the above conclusions are drawn, associates the improvement in the relation of the sexes with Pudamuri and other species of Sambandham. It is clear, then, that in the course of social progress the majority of the Marumakkathayam Hindus have engrafted forms of marriage on their ancient practice, that these forms are resorted to as overt acts whereby the intention to marry is manifested, and that the sexual relation thus constituted in the majority of cases endures for life. This being so, the point for consideration seems to be, whether it is legislation on the customary basis or on the basis of Brahmo Marriage Act (the so-called undenominational law) that will, by enlisting the sympathies of the people, more effectually help on social progress. The report, however, overlooking this consideration, mixes up notions of the ancient polyandry with the present social marriage customs and does not discriminate between a legal marriage and a social marriage. Further, by introducing other side issues, the report throws a cloud over the relations of the sexes as it now exists and states that ‘Marumakkathayam was and still is destitute of the institution of marriage.’ If the marriage customs are so bad as to render the sexual relation sanctioned by them nothing better than what it was in the primitive stages of the Marumakkathayam society, how are we to account for the admitted improvements in its moral tone, and how can legislation on the rigid lines of the alternative scheme be recommended? Our colleague, Mr. Chandu Menon, in his interesting Memorandum, describes the marriage customs in detail, and they are accepted in the report as accurate. But the report states that, because a Nambudri Brahman who goes through ‘Pudamuri’ does not consider it a marriage binding upon him, therefore it cannot be regarded as marriage in any other case. A Brahman may not look upon any marriage other than Vedic as binding upon him, but that is no sufficient reason for concluding that, as between Nayars, it is not regarded as binding either. On the other hand, that the Nambudri Brahmans themselves are compelled to go through the same formalities of wedding proves that, owing to social progress, the Nayar women insist on giving the

2.—“Persons following the Marumakkathayam and the Aliyasantana Law”—(Continued)

union the character of a marriage” See Memorandum annexed to the Report of the Malabar Marriage Commission. O-P

- (d) “In North Malabar, it is the practice for Nayar females to reside in the tarwad of the men with whom they cohabit, and, during such residence, they and their children are maintained at the expense of the tarwad of the males. 6 M. 341. Q

(8) Malabar Marriage—Tali-Kattu-Kalyanam—Its nature and incidents.

- (a) “Every girl in a Nayar tarwad, while still a child, goes through a ceremony called Tali-Kattu-Kalyanam, but this ceremony, although in name a marriage, is in reality nothing but a caste rite, the historical origin and exact significance of which are very doubtful, and is in no sense a real marriage” See Moore’s Malabar Law and Custom, 3rd Ed p 69 R

- (b) The Tali-Kattu-Kalyanam is a fictitious marriage the origin and meaning of which is not clear. It is probable that the ceremony is one of purely Brahmanical origin. In North Malabar the Tali was generally tied by an elderly Brahman and it is probable that the Brahman Tali tier was a relic of the time when the Nambudris were entitled to the first fruits, and it was considered the high privilege of every Nayar maid to be introduced by them to womanhood. In this connection the following extract from Captain Alexander Hamilton’s book entitled “A New Account of the East Indies, 1774,” may also be noted.—“When the Zamorin marries he must not cohabit with his bride till the Nambudri or chief priest has enjoyed her and he, if he pleases, may have three nights of her company because the first fruits of her nuptials must be an holy oblation to the God she worships. And some of the nobles are so complaisant as to allow the clergy the same tribute, but the common people cannot have that compliment paid to them but are forced to supply the priests’ places themselves” See Moore’s Malabar Law and Custom, 3rd Ed, pp 69, 70. S

- (c) The Tali-Kattu-Kalyanam is the only ceremonial savouring of matrimony, which appears to be indispensable to a Nayar girl, it is known as the tali-kattu-kalyanam, or marriage by tying the tali. It ought to be performed before puberty, generally about eleven. See Mayne’s Hindu Law, 7th Ed, 1906, p 123 T

- (d) The effect of the ceremony is to give the girl a marriageable status, without which she cannot enter into any matrimonial contract. Failure to perform it is said to involve excommunication from caste. The symbolical character of the ceremony is shown by the fact that the same manavalan will tie the tali on a number of girls at the same time, which naturally reduces the cost to each. Mal Mar Rep., 13, 54, 90, 101, Mal Man, I, 134 U

- (e) “The Tali-Kattu-Kalyanam is somewhat analogous to what a Devadasi (Dancing girl attached to the pagodas) of other countries undergoes before she begins her profession. Among royal families, and those of certain Edaprabhus, a Kshatriya, and, among the Charna sect, a Nedungadi is invited to the girl’s house at an auspicious hour

2—"Persons following the Marumakkathayam and the Aliyasantana Law"—(Continued).

appointed for the purpose, and in the presence of friends and caste-men ties a tali round her neck and goes away after receiving a certain fee for his trouble. Among the other sects, the horoscope of the girl is examined along with those of the boys of her Inangan families, and the boy whose horoscope is found to agree with hers, is marked out as a fit person to tie the tali, and a day is fixed for the tali-tying ceremony by the astrologer, and information is given to the Karnavan of the boy's family. On the appointed day the boy is invited to a house near that of the girl, where he is fed with his friends by the head of the girl's family. The feast is called 'Ayani Unu', and the boy is thenceforth called 'Manavalan' or 'Pillai' (bridegroom). From the house in which the Manavalan is entertained a procession is formed preceded by men with sword and shield shouting a kind of war-cry. In the meantime a procession starts from the girl's house, with similar men and cries, and headed by a member of her tarwad, to meet the other procession, and after meeting the Manavalan, he escorts him to the girl's house. After entering the pandal erected for that purpose he is conducted to a seat of honour and there his feet are washed by the brother of the girl, who receives a pair of cloths on the occasion. The Manavalan is then taken to the centre of the pandal, where bamboo mats, carpets and white cloths are spread, and seated there. The brother of the girl then carries her from inside of the house, and, after going round the pandal three times, places her at the left side of the Manavalan, and the father of the girl then presents new cloths tied in a kambli to the pair, and with this new cloth (technically called "Manthravadi") they change their dress. The wife of the Karnavan of the girl's tarwad, if she be of the same caste, then decorates the girl by putting anklets, etc. The Purohit, called 'Elayath', (a low class of Brahmans) then gives the tali to the Manavalan, and the family astrologer shouts 'Muhurtham' (auspicious hour) and the Manavalan, putting his sword on the lap, ties the tali round the girl's neck, who is then required to hold an arrow and a looking glass in her hand. In rich families a Brahman sings certain songs intended to bless the couple. In ordinary families, who cannot procure her presence, a certain Nair, who is versed in songs, performs the office. The boy and the girl are then carried by Inangans to a decorated apartment in the inner part of the house where they are required to remain under a sort of pollution for three days. On the fourth day they bathe in some neighbouring tank or river, holding each other's hands. After changing cloths, they come home preceded by a procession which varies in importance according to the wealth of the girl's family. Tom-toms and elephants usually form part of the procession, and saffron water is sprinkled. When they come home the doors of the house are all shut, which the Manavalan is required to force open. He then enters the house and takes his seat in the northern wing thereof. The aunt and other female friends of the girl then approach and give sweetmeats to the couple. The girl then serves food to the boy, and after taking their meals together from the same leaf, they proceed to the pandal, where a cloth is severed into two parts, and each part

2.—“Persons following the Marumakkathayam and the Aliyasanatna Law ”—(Continued).

given to the Manavalan and girl separately in the presence of Inangans and other friends. The severing of the cloth is supposed to constitute a divorce ” Account furnished to the Malabar Marriage Commission by Mr. K. R. Krishna Menon. Y

(f) There is a strong resemblance between the Tali-Kattu Kalyanam and the ceremonies by which a Devadasi is dedicated to her profession, and many similar ceremonies observed among other castes in Southern India See Moore's Malabar Law and Custom, 3rd Ed , p. 72. W

(g) “ In the case of the Tali-Kattu-Kalyanam, where the family is poor, a bridegroom is sometimes altogether dispensed with. “ The girl's mother makes an idol of clay, adorns it with flowers and invests her daughter with the Tali in the presence of the idol ” This, would seem to be an almost exact counterpart of the consecration of the East Coast Devadasi to her profession as a temple prostitute.” See Report of the Malabar Marriage Commission, pp 19, 20 X

(h) Mr Justice Muttusami Aiyar, as President of the Malabar Marriage Commission, discussing the ceremony of Tali-Kattu Kalyanam from a religious and historical point of view stated as follows. —“ According to custom every girl must go through the ceremony called ‘ Tali-Kattu-Kalyanam ’ before she attains puberty, otherwise, she is considered to lose her caste. In its essence the ceremony consists in tying a piece of gold round the girl's neck, and in its detail I notice certain observances which symbolise a few forms of religious belief amongst the people. As a religious ceremony it is taken to give the girl a marriageable status and in North Malabar she is addressed afterwards as Amma or Lady. But in relation to marriage it has no significance save that no girl is at liberty to contract it before she goes through the Tali-Kattu ceremony. On the east coast a tali is regarded as a token of marriage and no woman removes it from her neck during her husband's life, but it is not so regarded in Malabar. The ceremony lasts for four days and at its close the girl may remove the tali if she likes. It does not constitute a marriage or create a right in the person who ties the tali to cohabit with the girl. In some parts of South Malabar, however, there is a belief that it is a marriage, but, even there, the custom is to tear up a cloth, called Kachai cloth, on the fourth day of the ceremony as a symbol showing that the marriage has been dissolved. A ceremony which creates the tie of marriage only to be dissolved at its close suggests an intention rather to give the girl the merit of a marriage right of a Samskara, or a religious ceremony, than to generate the relation of husband and wife. It must be observed here that the tearing up of the Kachai cloth is a form not gone through in North Malabar. The ceremony is designated by some to be a sacramental marriage, and, if such is the case, it is so in form but not in substance. That it cannot be otherwise is clear from the fact that the ‘ Manavalan ’ as the person who ties the tali is usually called, does not acquire a right to cohabit with the girl. In North Malabar it is a Brahman who ties the tali and he is usually dismissed after the ceremony is over with a small present in acknowledgment of the service rendered by him on the



2 — "*Persons following the Marumakkathayam and the Aliyasantana Law*" — (Continued).

occasion. In South Malabar it is usually an Inangan, or a man of equal caste, that ties the tali, though, according to custom in some families, a person belonging to a particular family is eligible for the purpose. Among the Marumakkathayam Tiyanas of North Malabar, a woman of the barber caste formerly used to tie the tali, but a party of reformers, headed by the late Deputy Collector Mr. Kanaran, altered the practice and, according to the altered practice, it is the intended husband's sister and in some cases the intended husband himself that ties the tali. It is a curious fact that the same man may at one time tie the tali upon a number of Nayar girls collected together under one decorated pandal or upon several sisters. There is also no objection to the same person tying the tali at one time on the mother and at another time on her daughter. The fact is that, whatever may have been its historical origin, the ceremony has at present no other import than that of an essential caste observance preliminary to the formation of sexual relation and is analogous to the ceremony of Samavartana prescribed for Brahman bachelors who desire to terminate the Brahmachari Asrama, or the status of Vedic student, and enter on Grihasta Asramam, or the status of a married man. Having regard to the fact that several of its details bear a resemblance to a portion of the marriage ritual observed by Nambudri Brahmans, it is not unlikely that they introduced the ceremony among Nayars as a caste rite, but it must be remembered that the essential element of a Brahmanical marriage, viz., taking the bride by the hand, or Pani-grahanam and the walking of seven steps, or Saptapadi, and the Homam, or sacrifice to the fire are not to be found among its details. See Memorandum attached to the report of the Malabar Marriage Commission.

(9) **Sambandam—Its nature and incidents.**

(a) The connection between the parents which is termed sambandham should be looked on, not as concubinage pure and simple, but rather as quasi-marriage contract based on mutual consent and dissoluble at will. Moore's Malabar Law and Custom, 3rd Ed., p. 58. **Z**

(b) A girl in a Marumakkathayam tarwad, having as a child gone through the mere form of marriage called the Tali Kattu Kalyanam when she arrives at maturity is united to a Brahman or to a man of her own caste in a quasi-matrimonial connection known as *Sambandham*. Whether this Sambandham can be looked on as in any real sense a marriage has been the subject of much discussion. The late Mr. O. Chandu Menon, a member of the Malabar Marriage Commission wrote as follows —

"Sambandham is the principal Malayalam word for marriage, as Vivaham is in Sanskrit. Whatever may be the basis of the Sambandham of the Marumakkathayam Nayars, there can be no doubt that the idea which the word conveys to a Malayali is the same as the word Vivaham". See Report of the Malabar Marriage Commission. **A**

(10) **Sambandham how differs from tali-kattu-kalyanam.**

"The difference between the tali-kattu-kalyanam, and the various forms of marriage, which come within the generic name sambandham, or

**2.—“Persons following the Marumakkathayam and the Allyasantana Law ”—(Continued).**

marriage properly so called, is that the latter is intended to be followed by cohabitation and the former is not. This being so, the persons who can enter into this relation with each other are strictly defined. All sexual relations between Nayers and Tijars, or members of any other caste, are absolutely forbidden on penalty of excommunication. The man can associate with a Nayar woman of sub-divisions of the caste inferior to his own. A Nayar woman can associate with men of castes superior to her own, but not with men of lower castes, or sub-divisions of the Nayar caste inferior to her own. There is an exception to the latter part of the rule in the case of Nayar women in and around the Cochin taluq. As regards relationship, the limit within which one may not marry, is for both males and females in South Malabar the circle of one's own tarwad, meaning by tarwad all members tracing descent from a common female ancestor in the female line only. In North Malabar, this limit is wider, and includes all the members of the same illom, which consists of several tarwads, with no community of interest or even pollution, provided they can all be traced back to a common ancestor, however remote". *Mal. Mar. Rep.*, 5, 7, 55, Madras Census, 1891, XIII, 227 **B**

**(11) Ceremonies if essential in Sambandam.**

As to the essentials of a sambandham, the Malabar Marriage Report says:—  
 “Many respectable witnesses tell us that no formality, religious or secular need attach to sambandham, and that in very many cases the consent of the girl and of her guardian are all that is thought necessary. But it is also an undoubted fact that recent usage (especially in North Malabar) tends to surround the occasion of first cohabitation with a more or less elaborate ceremonial.” The ceremonies usual with various forms of sambandham are then described in much detail, the most solemn and fashionable being the “pudamuri” form. *Mayne's Hindu Law* 7th Ed., 1906, p. 121 **C**

**(12) Sambandam how contracted, Pudumuri form**

(a) “Of all the forms of Sambandham I consider the Pudamuri form the most solemn and the most fashionable in North Malabar. The preliminary ceremony, in every Pudamuri, is the examination of the horoscope of the bride and the bridegroom by an astrologer. This takes place in the house of the bride, in the presence of the relations of the bride and bridegroom. The astrologer, after examination, writes down the results of his calculations on a piece of palmyra leaf, with his opinion as to the fitness or otherwise of the match, and hands it over to the bridegroom's relations. If the horoscopes agree, a day is then and there fixed for the celebration of the marriage. This date is also written down on two pieces of cadjan, one of which is handed over to the bride's Karnavan, and the other to the bridegroom's relations. The astrologer and the bridegroom's party are then feasted in the bride's house and the former also receives presents in the shape of money or cloth, and this preliminary ceremony, which is invariably performed at all Pudamuris in North Malabar, is called ‘Pudamuri Kurikkal’, but is unknown in South Malabar.”

2.—“ *Persons following the Marumakkathayam and the Allyasantana Law* ”—(Continued).

“ Some three or four days prior to the date fixed for the celebration of the Pudanuri, the bridegroom visits his Karyavan and elders in caste to obtain formal leave to marry. The bridegroom on such occasion presents his elders with betel and nut and obtains their formal sanction to the wedding. On the day appointed the bridegroom proceeds, after sunset, to the house of the bride accompanied by a number of his friends. He goes in procession and is received at the gate of the house by the bride's party and is conducted with his friends, to seats provided in the Tekkini or southern hall of the house. There the bridegroom distributes presents (Danam) or money gifts to the Brahmans assembled. After this the whole party is treated to a sumptuous banquet. It is now time for the astrologer to appear and announce the auspicious hour fixed. He does it accordingly and receives his dues. The bridegroom is then taken by one of his friends to the Padinhatta, or principal room of the house. The bridegroom's party has, of course, brought with them a quantity of new cloths and betel leaves and nut. The cloths are placed in the western room of the house, called padinhatta, in which all religious and other important household ceremonies are usually performed. This room will be decorated and turned into a bed-room for the occasion. There will be placed in the room a number of lighted lamps and Ashtamangalam which consists of eight articles symbolical of mangalam or marriage. These are rice, paddy, the tender leaves of the cocoanut trees, an arrow, a looking-glass, a well-washed cloth, burning fire, and a small round wooden box called 'Cheppu' made in a particular fashion. These will be found placed on the floor of the room aforesaid as the bridegroom enters it. The bridegroom with his groomsman enters the room through the eastern door. The bride dressed in rich cloths and bedecked with jewels, enters the room through the western door accompanied by her aunt or some other elderly lady of her family. The bride stands facing east with the Ashtamangalam and lit-up lamps in front of her. The groomsman then hands over to the bridegroom a few pieces of new cloth, and the bridegroom puts them into the hands of the bride. This being done the elderly lady who accompanied the bride, sprinkles rice over the lit-up lamps and the head and shoulders of the bride and the bridegroom, and the bridegroom immediately leaves the room, as he has to perform another duty. At the Tekkini or southern hall, he now presents his elders and friends with cakes, and betel leaf and nut. Betel and nut are also given to all the persons assembled at the place. After the departure of the guests the bridegroom retires to the bed-room with the bride.” Account furnished by Mr O. Chandu Menon as a member of the Malabar Marriage Commission. ' D

- (b) The Malabar Marriage Commission says in the Report. “ It is an essential part of the pudanuri ceremony that there should be a gift of cloth by the bridegroom to the bride, and of no other form of sambandham can it be said that any formality is of its essence.” Mal. Mar. Rep., 21—24, 98. E

**2 —“ Persons following the Marumakkathayam and the Aliyasantana Law ”—(Concluded)**

**(13) Ceremonies among Nambudri Brahmins.**

“ Among the limited class of Nambudri Brahmins, who follow the Marumakkathayam law, marriage is said to be “solemnized with all the religious ceremonies that are undergone with every Brahman marriage in India. The *homam*, the *mantrams*, the *saptapadi* ceremonies are rigidly and strictly observed ” Mal. Mar. Rep , 103 **F**

**(14) Widow marriage in Malabar.**

“Widows are allowed to marry, but the exercise of the privilege is generally confined to young widows. Those who have had children by their first husbands do not ordinarily remarry. In no case can a widow marry any one but a widower. The gradual tendency to follow Hindu practices is causing permanent widowhood to be looked upon as more respectable.” Mal. Mar. Rep , 75, 10, S. Can. Man , 1, 143, 161 **G**

**(15) Widow marriage among Nambudris.**

In the case of all Brahman marriages whether of Nambudris or others, widow marriages are strictly forbidden. Mal. Mar. Rep , 57, 103, Travancore Census, 1891, 685 **H**

**(16) No Divorce among Nambudris**

Among Nambudris neither husband nor wife can divorce the other except on the ground of excommunication from caste. Travancore Census, 1891, 643, Mal. Mun., 125

**1.** This Act may be called “the Malabar Marriage Act, 1896,” and it shall be applicable to all Hindus domiciled in the Presidency of Madras following the Marumakkathayam or the Aliyasantana Law of Inheritance

Title and application

Definitions

**2.** In this Act unless there is something repugnant in the subject or context,

“Sambandham <sup>1</sup>” means an alliance between a man and a woman by reason of which, they, in accordance with the custom of the community to which they belong or either of them belongs, cohabit or intend to cohabit as husband and wife.

Sambandham

“Children” means sons and daughters of parents whose Sambandham has been registered as a marriage under this Act, whether born before or after such registration; but shall not include step-sons or step-daughters. In the case of any one whose personal law permits adoption <sup>2</sup>, “children” shall include adopted sons and daughters.

Children.

“Marriage” with its grammatical variations and cognate expressions means, except in S. 3, clause (a), the last word of section 3, clause (c), section 15, clause (a), and the last word of section 15, clause (c), a Sambandham registered under the provisions of this Act.

“Tarwad” means and includes all the members of a joint family with community of property governed by the Marumakkathayam or the Aliyasanthana law of Inheritance.

### (Notes)

#### 1—“Sambandam.”

See notes under the “Preamble”.

J

#### 2 —“Adoption.”

##### (1) Adoption different forms of, in Malabar

**N.B.**—There are three kinds of adoption in use in Malabar —

##### (i) Adoption by ten hands

(a) Adoption by ten hands, *i.e.*, by the hands of the adoptors (male and female), the adoptee, and the adoptee's parents or guardians is one form of adoption. In the case of those following the Marumakkathayam system of inheritance, the adoptors will be the Karnavan and the senior female in the tarwad, whilst the adoptee's guardians will be his Karnavan and mother. See Malabar Law and Custom by Moore, 3rd Ed., 1905, p. 31.

K

(b) This form of adoption is very rarely used except in Brahman families, and the boy selected is usually one on whom the Upanayana ceremony has not been performed. It is probably almost identical with the ordinary Hindu adoption (*Ibid.*)

L

##### (ii) Adoption by chamatta or by burning a pan of grass

Adoption by chamatta, *i.e.*, by burning a pan of a sacred grass is another form of adoption prevailing in Malabar (*Ibid.*)

M

##### (iii) Adoption by taking into the family

(a) Is the third form of adoption in use in Malabar. (*Ibid.*)

N

(b) This last is the form commonly adopted by Brahman widows and Nayers for the purpose of perpetuating the family when it is in danger of becoming extinct. There is no limit as to age or number of persons adopted. The only limit seems to be that the person or persons adopted should be of the same *vamsham* or tribe as the adoptor. (*Ibid.*)

O

(c) Whatever religious motive may be attached to the first two modes of adoption (*viz.*, adoption by ten hands, and adoption by burning a pan of grass), the other mode appears to be based on entirely secular motives, and to be closely akin to the *Kritima* form of adoption, which is still in force in the Mithila country. Moore's Malabar Law and Custom 3rd Ed., p. 32.

P

**2.—“ Adoption ”—(Concluded).**

**(2) Who can be adopted.**

- (a) Among Nayers the adoption may be of either males or females. Sometimes a whole family of adults is adopted. (*Ibid*) **P**
- (b) The Karnavan of a Nayar tarwad cannot adopt strangers into the family so as to make them and their descendants heirs to its property without the consent of the other members. Moore's Malabar Law and Custom, 3rd Ed, 1905, p. 32 **Q**
- (c) In selecting an heir for adoption, preference should be given to the distant kindred, but it is doubtful whether this is more than a moral precept. (*Ibid*.) **R**

**(3) Notice to ruling power.**

Notice should also be given to the Ruling power, before making an adoption. (*Ibid*) • **S**

**N B.**—Whether the Ruling power might, in the case of a person whose property would escheat for want of heirs, place a veto on the adoption is a question which has never yet been decided. (*Ibid*.) •

**3 —“ Tarwad ”**

**Tarwad, what is a.**

Tarwad is a Marumakkathayam family consisting of all the descendants in the female line of one common female ancestor. See Moore's Malabar Law and Custom, 3rd Ed, p. 121 **T**

**3.** A sambandham between Hindus <sup>1</sup> both or either of whom follow the Marumakkathayam or the Aliyasantana Law of Inheritance may be registered under this Act as hereinafter provided subject to the following conditions —

Conditions subject to which a sambandham may be registered as a marriage.

- (a) Neither party must be subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other party
- (b) The relation of the parties must not be such in respect of consanguinity or affinity that a sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs <sup>2</sup>
- (c) Neither party must at the date of the notice under Section 5 have a husband or wife living whose sambandham with her or him has been registered under this Act, and which marriage is not null and void under Section 15 or with whom she or he is otherwise legally married <sup>3</sup>
- (d) The parties must not belong to different communities between the members of which, according to the custom

or usage applicable to either community, cohabitation is prohibited <sup>4</sup>.

- (e) The sambandham must have been formed in accordance with the customary ceremonies, if any, prevailing in the community to which they belong or either of them belongs <sup>5</sup>.
- (f) A party to a sambandham who is a minor must have obtained the consent of his or her legal guardian to the registration of the Sambandham as a marriage <sup>6</sup>.

**(Notes).**

**General.**

**History of the Section—How it stood in the original Bill—Reasons for the change in the present form.**

The first Bill left it to the members of the Tarwad of either of the parties and other persons interested to raise objections to the registration of marriage on certain grounds therein specified, and section (13) of that Bill then declared that the marriage should be null and void on the grounds (a) that the parties are related within the prohibited degrees ; (b) that one or both of the parties has a husband or wife living. The Select Committee considered it desirable to declare first the conditions subject to which alone marriages shall be registered, and then to specify the grounds which shall render the marriage absolutely null and void or render registration open to objection. They accordingly declared by section 3 the conditions subject to which alone marriages shall be registered and by a subsequent section the grounds which shall render the marriage null and void or the registration open to objection. Thus—(1) Section 15, clause (1), declares that a marriage is absolutely null and void if (a) the parties are related within certain prohibited degrees, (b) either of the parties has a husband or wife living, and (c) either party is subject to a personal law of marriage according to which he or she, as the case may be, cannot validly contract a marriage with the other by sections, 8, 9 and 10 registration may be objected to on certain other grounds within a time limited. If the objection is taken within that time and is well founded, the Registrar shall not register, but if no objection is taken to the registration within the times specified, the registration shall not be cancelled on any of the said grounds unless notice has not been served on those entitled to object to the registration, in which case S. 16 enables such persons to get the registration cancelled if they take legal proceedings for that purpose within a specified time after the registration. See Report of the Select Committee

U

**1.—“Hindus.”**

**(1) The capacity of persons—Parties must be Hindus**

“The parties must be Hindus. It has been considered advisable to exclude Muhammadans who follow the Marumakkattayam Law from the operation of this Bill, as there has been no demand for legislation on their part. Marriages between the followers of the Marumakkattayam

**1.—“Hindus” —(Concluded)**

system and others who do not follow the same law are very common and their validity has to be recognized by legislation as suggested by Sir Muthusami Aiyar and the Commission following the existing usage” See the Speech of the Hon’ble Mr Sankaran Nair in the Madras Legislative Council, Fort St George Gazette, Suppt, 11th June 1895, pp 28, 29 **Y**

**2.—“Clause (b)”****Scope and nature of the provision contained in clause (b)**

“With respect to the prohibited degrees the Bill follows the usage. It enacts that if marriage would make the parties liable to excommunication on account of their relationship, then objection may be raised to their recognition by registration, and the Registrar shall then refuse to register the same” See the Speech of the Hon’ble Mr Sankaran Nair in the Madras Legislative Council, Fort St George Gazette, Suppt., 11th June 1895, pp 28, 29 **W**

**3.—“Clause (c)”****Scope and nature of the provisions contained in this clause**

“Polygamy is now rare. Polyandry may be said to be practically unknown. The Commission unanimously recommended that they need not be recognized by legislation. The Bill provides that neither party, at the time the recognition of marriage is sought by registration, must have a husband or wife living whose marriage has been registered under this Act” See the Speech of the Hon’ble Mr Sankaran Nair in the Madras Legislative Council, Fort St George Gazette, Suppt, 11th June 1895, pp. 28, 29 **X**

**4.—“Clause (d)”****Scope and nature of the provision contained in cl (d)**

“The marriage must not be one which is prohibited by the rules of the castes to which the parties belong, objection may be raised to the registration of marriage if the parties are not permitted to cohabit with each other by any custom obtaining in their castes. If the parties are not recognized as belonging to any caste, then this rule will of course have no application. There are men who are not recognized as belonging to any caste and we have to concede to recognize the same right to them to contract a legal marriage as is conceded to others” See the Speech of the Hon’ble Mr Sankaran Nair in the Madras Legislative Council, Fort St George Gazette, Suppt, 11th June 1895, pp 28, 29 **Y-Z**

According to usage there are restrictions due to caste. A Nambudri may marry any Nair girl, a Nair of a higher caste may marry a Nair female of a lower caste, but a female of a higher caste is not allowed to marry one belonging to a lower caste. Those restrictions, the violations of which will lead to religious excommunication, are recognized and the Act provides that the Registrar shall refuse to register such marriages as are not allowed by the castes as said above. See Statement of Objects and Reasons



5.—“*Clause (e)*”**Scope and nature of the provisions contained in cl. (e).**

- (a) “The marriage must have been contracted in the form customary in the caste or class to which the woman belongs. When a Brahmin or a member of any kovilgam marries a Nair girl, it is not usual to observe the Brahmin or the Kshatriya ritual. But in many such cases the forms that are observed as between Nairs themselves are gone through by the Brahmin also. It was therefore necessary, as suggested by Sir Muthusawmi Iyer that the form of marriage must be one prevailing in the woman's caste. Where it is not customary to observe any form, the Bill does not insist on the observance of any. Where the parties do not belong to any recognized caste, the restriction cannot of course apply. Mere irregularity will not invalidate a marriage ceremony otherwise duly performed. Marriage ceremony will no doubt be held to be duly performed if it discloses the intention of constituting the relation of husband and wife.” See the Speech of the Hon'ble Mr. Sankaran Nair in the Madras Legislative Council, Fort St. George Gazette, Suppt., 11th June, 1895, pp. 28, 29. **A**
- (b) “There are various forms of marriage prevailing in the districts of Malabar and Canara among those following the Marumakkattayam and Aliyasautana laws. The Act provides accordingly that the form in which marriages may be contracted under the Act ought to be described as the one customary in the caste or class to which the woman belongs. “It is necessary to describe it so in order that a Nambudri Brahmin or a male member of a Kovilgam may contract a marriage under the Act if he chooses to do so, otherwise there may be no form applicable to the case as the Brahmin or the Kshatriya marriage ritual does not apply to a marriage with a Nair woman.”

The evidence showed that polyandry has almost died out in the district of Malabar and that polygamy is very rare. The Commissioners were of opinion that polygamy ought not to be recognized, in the interests of women. The Government considers “that the Bill should contain provisions prohibiting the registration thereunder of a marriage between parties either of whom has previously registered a marriage which is still subsisting.” “Such a prohibition is necessary to prevent those difficulties as to the right of maintenance and the devolution of property, which will certainly arise, and if freedom of divorce is allowed, the prohibition cannot be objected to as effecting a material change in the habits of the people.” The Bill adopts this view and it declares that a marriage though registered is null and void if either party has another husband or wife living whose marriage has been registered under this Act.” See Statement of Objects and Reasons. **B**

6.—“*Clause (f)*.”**Scope and nature of the provisions contained in cl. (f).**

“In the Marumakkattayam family every member, whether a minor or an adult, is subject to the karnavan. But it appears according to the evidence before the commission that the junior members do not always obtain the consent of their guardians and that the only mode in which the karnavans deal with such conduct is that of refusing permission to the junior member bringing his wife into the tarwad house unless

**6.—“ Clause (f) ”—(Concluded).**

and until he is reconciled to the union It is advisable not to interfere with the freedom of the adults to marry without the consent of the karnavan and at the same time “to fix the age at which the karnavan’s consent may be dispensed with sufficiently high to enable the contracting parties to see whether they can support the obligations of married life without aid from their tarwad.” Section 8 accordingly provides that if any objection is raised the Registrar may refuse to register if either the husband or wife is below the proper age and the consent of the guardian has not been obtained ” See Statement of Objects and Reasons. **C**

**4. The Local Government may appoint one or more Registrars under this Act either by name or as holding any office for the time being for any portion of the territory subject to its administration The officer so appointed shall be called “ Registrar of Marriages under the Malabar Marriage Act, 1896,” and is hereinafter referred to as the “ Registrar ” The portion of territory for which any such officer is appointed shall be deemed his district**

Appointment of Marriage Registrars

*Registration*

**5 When it is intended to register a Sambandham as a Marriage under this Act, both or either of the parties <sup>1</sup> shall give notice in the form (A) to this Act annexed to the Registrar within whose local jurisdiction either of the parties resided at the time when the Sambandham was formed or within whose local jurisdiction it is intended to form it.**

Notice of intention to register a Sambandham to be given to the Registrar .

**(Notes).**

**General.**

**(1) Scope of the section**

The following extract taken from the proceedings in the Madras Legislative Council throws light on the scope and effect of this section .—“ We do not propose to legalize all marriages. Many would undoubtedly prefer to live under the existing customary law. It is therefore obviously necessary to prescribe some mode whereby marriages prescribed under the Act may be distinguished from the other marriages. Strong objections have been raised to the celebration of marriage before a Registrar, and registration purely as evidence of legal recognition has been suggested instead, and such suggestion has been accepted in this Bill There was a conflict of opinion as to who was to be appointed registrar, and the Bill empowers the local Government to appoint such person as it may consider fit , such appointment will of course be made only after a consideration of the circumstances of the locality which may require the services of a registering officer.” Fort St George Gazette, Suppl , 11th June, 1895, p. 29. **D**

**General—(Concluded).****(2) Requirements preliminary to Marriage.****(i) Notice and Residence**

The Bill provides that notice must be given to the Registrar by one of the parties to the marriage stating the name, the tarwad name, the profession, condition and caste, of each of the parties to the marriage connection, their dwelling place and the village where the marriage connection was formed (*Ibid*) **E**

**(ii) Communication of notice**

The Bill also provides that all such notices should be filed and that a copy of each notice be entered in the "Marriage notice book" which shall be open to inspection by all persons. The Bill provides that a copy of the notice shall be served on—

- (a) the other party to the marriage,
- (b) the legal guardians, if any, of the bride and bridegroom,
- (c) the karnavans of their tarwads (*Ibid*) **F**

**1 —"Both or either of the parties."****Scope and nature of this provision**

In order to obviate the necessity for each consenting party giving notice to the other the select committee provided for their applying jointly to the Registrar See Report of the Select Committee **G**

**6 The Registrar shall file all such notices and keep them**

Registrar to file such notices and to maintain the "Marriage Notice Book"

with the records of his office and shall also forthwith enter a true copy of all such notices fairly into a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Notice Book" Such book shall be open at all reasonable times without fee to all persons desirous of inspecting the same

**7. (1) Every Registrar shall on receiving any such notice**

Copies of notice to be served on interested parties

forthwith cause a copy thereof to be affixed to a Notice Board in some conspicuous place in his office, and shall then serve or cause to be served at the expense of the party giving such notice a copy thereof on the other party to the Sambandham, if both parties have not joined in giving such notice on the guardians, if any, of the parties thereto, and on the managing members of the tarwads of families to which they respectively belong.

**(2) If at any time before registration is effected the party by**

Withdrawal of notice

whom notice was given under S. 5 signifies in writing to the Registrar that he withdraws such notice the Registrar shall, thereupon, at the expense of the party withdrawing the same, communicate the fact of withdrawal to the persons mentioned in sub-section (1)

8. (1) Any person entitled to receive a notice under sub-section (1) of S 7 any member of the tarwad or family of either party or any person having any expectancy of succession to the property <sup>1</sup>, if any, of such tarwad or family of either party may within one month from the date of such service of notice object to such registration on the ground that such Sambandham or registration is in contravention of the conditions prescribed in S 3

Persons entitled to object to registration of a Sambandham.

Grounds on which objection may be taken.

(2) Such objection shall be in writing signed by the person objecting and shall be presented by the objector or his duly authorized agent to the Registrar who shall file the same in his office. A copy of such objections shall at the expense of the objector be served on the party by whom notice was given under S 5

Procedure of Registrar if objection is taken.

(3) On receipt of a notice of objection under S 7, the Registrar shall not proceed to register the Sambandham as a marriage until the expiry of four months from the receipt of such notice unless such notice is in the meantime withdrawn

(4) If no such objection be made under this section and if neither party withdraws the notice under S. 7, sub-section (2), such Sambandham may at any time, not being less than one month nor more than six months from the service of the notice under S. 7, be registered as a marriage

Procedure if no objection is taken.

#### (Notes)

#### General

N. B.—See also notes under S. 3

#### Scope and object of the section—Procedure

(a) This provision in the Act is intended to prevent registration of improper marriages. Provision is made in a previous section for notice to be served on the guardians and the karnavans of the parties. They may object to the registration of the marriage on the ground that it violates any one of the conditions referred to in S 3. The section also provides that each party to the marriage must have obtained the consent of his or her guardian if below proper age. Power is given not only to the karnavans or guardians, but also to "all persons entitled to receive notice under S. 7," and certain others to raise objection to the registration of the marriage.

On receipt of such objection, the Registrar shall not proceed to register the marriage for the next four months to enable the person who has

**General—(Concluded).**

objected to take the necessary steps in a court of law. He may file a suit to obtain a declaration that such registration would contravene one or more of the conditions already referred to. Fort St George (Gazette, Suppl., 11th June, 1895, pp. 29, 30) H

- (b) "The Judge before whom the suit is filed shall give a certificate to the effect that such suit has been filed, and if such certificate be lodged before the Registrar within three months, then the marriage shall not be registered till the final determination of the suit. In case the Court decides against the validity of the marriage, such marriage of course shall not be registered. Otherwise, the Registrar shall proceed to register the same." (*Ibid.*) I

- (c) According to the Marumakkattavam usage, persons descended from a common female ancestor are not at liberty to marry one another. There is a difference of opinion as to whether the member of the tarwad of a deceased wife or husband is eligible as a second wife or husband. This section accordingly provides that certain interested persons might object to the registration of marriages on the ground that, according to the custom of the country, a marriage between the parties would be against the custom of the country and render them liable to religious excommunication, (see S. 3, *supra*) and if the objection is proved valid in a court of law, then the marriage will not be registered. If however a marriage which is against the custom of the country is registered, then it will be null and void if a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-grandfather or great-grandmother. See Statement of Objects and Reasons J

***I—"Any person having any expectancy of succession to the Tarwad property."***

**Scope and effect of this provision—How it stood in the original Bill and the reason for the change in the present form**

Instead of the words "any person having any expectancy of succession to the Tarwad property" the original Bill contained the words "parties interested." Objection was taken to the term "parties interested" as being too vague and likely to lead to vexatious suits by parties who had really no interest in the marriage. The Select Committee have therefore limited the power of objection to persons "having any expectancy of succession to the Tarwad property." This provision is wide enough to include all persons who are likely to be affected in any way by the registration of marriage. See Report of the Select Committee. K

- 9. Any person objecting to the intended registration of a Sambandham may, after complying with the provisions of S. 8, file a suit in a competent civil Court for a declaratory decree declaring that such registration would contravene one or more of the conditions prescribed in S. 3.**
- Person objecting may file a suit in a Civil Court.

**10.** The Judge before whom such suit is instituted shall thereupon give the person instituting the same a certificate to the effect that such suit has been filed. If such certificate be lodged with the Registrar within four months from the receipt of notice of objection, the Sambandham shall not be registered as a marriage under this Act till the decision of such Court has been given and the period allowed by law for appeals from such decision has elapsed, or if there be an appeal from such decision, till the decision of the Appellate Court has been given or such suit or appeal has been withdrawn or dismissed for default.

If such certificate be not lodged within the period prescribed in the last preceding paragraph, or if the suit by the objector be finally dismissed or withdrawn the Sambandham may be registered as a marriage.

**11** Before a Sambandham is registered as a marriage, the parties thereto and three witnesses shall, in the presence of the Registrar, sign a declaration in the form (B) to this Act annexed. If either party is a minor, the declaration shall also be signed by his or her legal guardian, and in every case it shall be countersigned by the Registrar.

Declaration to be signed before registration

**(Notes)**

**General.**

**Preliminaries to registration—Scope and object of the provision.**

(a) Before registration a declaration has to be signed by the bridegroom and bride that the registration will not contravene any of the conditions referred to in S. 3. They must declare their age and their consent to the registration of the marriage. If either of them is a minor the declaration must also be signed by the legal guardian, and in every case it must be countersigned by the Registrar. *Port St George Gazette, Suppl., 11th June 1895, p. 30* **L**

(b) The marriage certificate must also be signed by the Registrar, countersigned by the parties and three witnesses, and, if either party be a minor by the legal guardian. The Marriage certificate book shall at all reasonable times be open for inspection. (*Ibid*) **M**

(c) "It will thus appear that every facility is offered to persons interested to show cause against registration. They have been given a period of four months within which to institute a suit for prohibition of registration, and it is only reasonable therefore, that they ought not to have any power to raise further objections after registration has once been effected. Registration is therefore final, except in the case of a marriage between persons related to each other within a certain degree,

**General—(Concluded).**

*i. e.*, if a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great grandfather or great-great-grandmother. No marriage, however, which is not opposed to custom will be null and void. A marriage, though registered, will also be null and void if registration takes place when either party has another husband or wife living whose marriage has been registered under this Act. (*Ibid.*)      **N**

**12.** When such declaration has been made, the Registrar shall enter a certificate of marriage in a book to be for that purpose supplied to him by the Local Government and to be called "The Marriage Certificate Book" in the form (C) to this Act annexed and such certificate shall be signed by the Registrar and countersigned by the parties, three witnesses and, if either party is a minor, by his or her guardian also

Registrar to enter certificate of marriage in "The Marriage Certificate Book."

**13** Subject to such rules as may be prescribed in that behalf by the Local Government, the Registrar may attend at the private residence of the parties or of the guardian of a party who is a minor for the purpose of such declaration and marriage certificate book being signed by them in his presence

Registration at a private residence

**(Note).**

**General.** ,

**Scope and object of the section**

This section is intended to enable the Registrar to attend at the private residence of parties, or their guardians, for the purpose of registration.  
See Report of the Select Committee      **O**

**14** The Local Government shall prescribe the fees payable for the duties to be discharged by the Registrar under this Act.

Fees payable to Registrar.

The Registrar may demand payment of any such fee before the registration of the Sambandham or performance of any other duty in respect of which it is payable

The said marriage certificate book shall, at all reasonable times, be open for inspection. The Registrar shall furnish certified extracts from the marriage certificate book upon payment of the fee prescribed by the Local Government therefor and such extracts shall be admissible as evidence of the due registration as marriage of the Sambandham therein mentioned.

**15. (1) A marriage shall be null and void only—**

**Marriage when null and void.** (a) If either party is subject to a personal law of marriage according to which he or she as the case may be cannot validly contract a marriage with the other

(b) If a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great-grandfather or great-great-grandmother, and by reason of such relationship a Sambandham between them is prohibited by any custom or usage applicable to the community to which they belong or either of them belongs

(c) If either party has a husband or wife living whose Sambandham with such party has been registered as a marriage under this Act and such marriage is not null and void under clauses (a) and (b) of sub-section (1) or with whom she or he has been otherwise legally married.

(2) A marriage shall not be invalid on the ground that the sambandham or registration contravenes any of the grounds mentioned in S. 3 other than those specified in clauses (a), (b) and (c) of sub-section (1)

**16: (1) No marriage under this Act shall be held invalid by**  
**Marriage not invalid by reason of irregularity in procedure.** reason of any irregularity in the giving of notice under S. 5 or of failure to give notice under S. 7 to any person entitled to receive it, or by reason of any irregularity in the publication or service of the copy of such notice or in complying with the provisions of Ss. 5, 11 and 12

(2) But when any person entitled to be served with copy of notice under S. 7 has not been so served, it shall be competent to him to institute a suit within three months from the date of registration of the Sambandham for cancellation of such registration on all or any of the grounds mentioned in S. 3

#### *Maintenance.*

**17. (1) The wife and children shall be entitled to be maintained by the husband or father, as the case may be. In a civil suit by the wife or children for maintenance, it shall be open to the husband or**  
**Maintenance of wife and children.**



father to plead all defences open in such a suit to a Hindu governed by the ordinary Hindu Law <sup>1</sup>

(2) Nothing herein contained shall affect the right of the wife and children to be maintained by the tarwad <sup>2</sup>.

(Notes)

*1.—“ Defences open in such suit to a Hindu governed by the ordinary Hindu Law. ”*

**Scope and reason of the section**

(a) According to the usage the husband maintains his wife, and where he is unable to do so his Tarwad maintains the wife and children where the marriage has taken place with the consent of the Tarwad, except in cases where the wife may forfeit such claim by her conduct. This section declares the liability of the husband or father to maintain the wife or children. Sir Muthusami Iyer considered that whatever defence would be available to the husband under Hindu law in answer to the wife's claim for maintenance must be available to him under the proposed Act. See Statement of Objects and Reasons P

(b) “ The Commissioners were agreed and the Governments of Madras and India also considered that the claim of the wife and children to be maintained by the husband ought to be recognized. Some of the Commissioners considered that such right ought not to be recognized in cases in which the wife may forfeit it by her conduct or refuse to live with her husband without lawful excuse. Sir Muthusami Iyer considered that whatever defence is available to the husband under Hindu Law in answer to the wife's claim for maintenance must be made available under this Act. He considered that the Malayalis being Hindus, the rules of Hindu Law on the subject are likely to prove more acceptable. Hence this provision in the section. See Fort St. George Gazette, Suppl., 11th June 1895, p. 30 Q

*2.—“ Right of the wife and children to be maintained by the tarwad. ”*

**Reason of this provision**

“ The wife and children do not lose their claim for maintenance from the tarwad kamayan. Some objection was raised to this on the ground that it enables the wife and children to claim maintenance from the tarwad while she is being maintained by her husband in his residence. But as Sir Muthusami Iyer points out, those who raise this objection “ overlook the fact that like a male anandiravan a female is, under the manumalkattayam usage, only entitled to be maintained in her tarwad house and that she is not at liberty to claim separate maintenance from her kamayan unless he refuses to support her when she offers to live under his protection.” The Bill only preserves her right to be maintained in the tarwad house thereby to enable her to fall back upon it either if her husband is unable to support her or if she cannot live with him. To make the intention clear the Bill expressly states that the right to be maintained in the “ tarwad house ” shall not be affected. ” Fort St. George Gazette, Suppl., 11th June 1895, p. 30 R

### *Guardianship.*

**18.** When a man's wife and children are minors maintained by him or his tarwad he shall, subject to the provisions of the "Guardians and Wards Act, 1890," be the guardian of his wife when she is over fourteen years of age and of his children, provided that such guardianship shall not extend to the right and interest of his wife or children in the property of the tarwad to which his wife and children belong.

#### (Notes)

##### General.

#### Scope and nature of the provisions contained in the section

- (a) Under marumakkattayam Law the karnavan is the legal guardian and not the father, but occasionally the mother's claim to the guardianship of the children also has been recognized. In the Bill as originally drafted, the father was recognized as the legal guardian of the wife and children. But objection was taken to that proposal on the ground that such a right of guardianship ought not to be recognized when the wife and children live in their own tarwad house and under their karnavan's control. It has accordingly been suggested, and that suggestion has been accepted, in the Act that the father should be declared to be the guardian to his wife and children when they are living with him and under his control and are being maintained by him or his tarwad. In such case the section only converts the present *de facto* guardianship of the father into *legal* guardianship. The section in fact only follows existing usage. *Port St. George Gazette, Suppt*, 11th June 1895, pp. 30, 31. S
- (b) Under the Marumakkatayam law, the karnavan is the legal guardian, whether the wife and children live in the Tarwad house or with the husband and father. But practically the father is the guardian of the children when they permanently live with him or in his Tarwad. The proposed law converts this *de facto* guardianship into legal guardianship. No right of guardianship is recognized in the husband and father, when the wife and children do not live in his Tarwad. *See Statement of Objects and Reasons*. T
- (c) To avoid any conflict with the provisions of Act VIII of 1890, the Select Committee have modified the section by providing that the right of guardianship shall be subject to the provisions of that Act. They have also declared that the guardianship shall not extend to the interests of the wife and children in the Tarwad property as it is clear that such a right was not intended to be given to the husband. *See Report of the Select Committee*. U

### *Divorce*

**19** A husband and wife or either of them may present a petition for dissolution of the marriage in the Court of the District Munsif within the local limits of whose jurisdiction either the husband or wife,

Petition for dissolution of marriage

or, in cases in which one of them alone is petitioner, the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain at the time when the petition is presented.

*Explanation.*—For the purposes of this section the Madras Civil City Court shall be deemed to be the Court of the District Munsif in respect of the area within the local limits for the time being of the ordinary original Civil Jurisdiction of the High Court of Madras.

(Notes).

General.

**Scope of the provisions contained in the section—Various proposals made in the Bill stage and abandoned.**

- (a) "Sir Muthusami Iyer suggested that one of the parties to the marriage must be declared to be entitled to give notice to the other side of the intention to divorce and that such notices should have the consent of the karnavan of the tarwad, except in cases in which the husband who divorces his wife lives separately from the tarwad and has independent means of support. This restriction was imposed in order to prevent the exercise of the right on any sudden and hasty impulse. Another restriction was also suggested, *ie*, to prescribe an interval of one year before the marriage is actually dissolved. This was intended to afford every opportunity for reconciliation and to render temporary dissension innocuous. An alternative scheme was suggested in which the causes specified in the Indian Divorce Act and in other cognate enactments are recognized as just causes for dissolution of marriage or other judicial separation, and this scheme also suggested that, if either party dissolved the mutual relation 'without just cause, the guilty person shall forfeit one-quarter of his self-acquired property, and that if there are children the ownership shall vest in them, the usufruct alone vesting in the innocent wife or husband during his or her life. Some of the other Commissioners were in favour of divorce only on reasonable and just grounds. One of the Commissioners, Mr Winterbotham, was of opinion that divorce should only be allowed on proof of adultery before the courts. Two Commissioners were in favour of free divorce with a probationary period of not less than one year after notice. Sir Muthusami Iyer subsequently changed his mind and abandoned the alternative system of divorce suggested by him. The Governments of Madras and India were of opinion that divorce should be entirely free, and that the only restriction which it was desirable to impose was a provision to the effect that the divorce shall not actually take place until six months after the service of notice or declaration. The suggestion of the Government of Madras has been accepted in the Act and it has accordingly been provided that the husband or wife may present a petition to the court for the dissolution of marriage and that six months after the service of the notice the court shall pronounce a decree declaring such marriage to be dissolved." Fort St. George Gazette, Suppt., 11th June 1895, p. 31.

**General—(Concluded).**

(b) The following extract from the statement of Objects and Reasons also throws light on the above point —“ Sir Muthusami Iyer says in his report, “ Among Marumakkatayam Hindus marriage has yet to be legalized ; polyandry has ceased but recently, and no religious sanction sustains the notion that one man is united in wedlock to one woman all life for better or for worse,” and further that “ save adultery no other determinate cause is recognized and no specific form is observed throughout Malabar or even in the same part of the district ” The Government considers that though divorce is practically unrestricted at present, yet such freedom of divorce is not abused, and there is no reason to suppose that it will be abused in the case of marriages registered under the proposed Act. Beyond, therefore, prescribing an interval of six months to afford ample opportunity for reconciliation and to render temporary dissension innocuous before the marriage is dissolved, the Government considers that divorce should be unrestricted. The imposition of further restrictions, in the opinion of Government, would render the new law unpopular and prevent it from attaining that measure of success which may otherwise be anticipated. This section accordingly provides that a husband or wife may apply to a Court to dissolve the marriage and six months after the service of notice on the other party the Court shall declare the marriage dissolved.” See Statement of Objects and Reasons **W**

Notice to be given to other party, if petition is not joint

**20** A copy of such application when made by one party alone shall be served on the other party to the marriage at the expense of the petitioner.

**21.** Six months after the presentation of a petition by both parties or in cases where the application is made by one party alone six months after the service of notice under S. 20, the Court shall, on the motion of the applicants or applicant, declare in writing the marriage dissolved, provided that such motion is made within 7 days after the expiration of the 6 months or, if the Court is closed, then that such motion is made on the day on which the Court is re-opened. Upon such declaration the marriage shall be deemed dissolved from the date of such declaration ; and no declaration made under this section shall be held invalid by reason of any irregularity in complying with the provisions of Ss. 19, 20 and 21. If no such motion is made within the time hereinbefore prescribed the Court shall dismiss the petition.

Court to declare marriage dissolved on motion made within a specified period.

**22.** Where a marriage has been dissolved without the consent of the wife, she shall, notwithstanding such dissolution, be entitled to claim maintenance from the husband so long as she remains a Hindu, continues chaste, and does not form a Sambandham or contract a

Maintenance when claimable by divorced wife.

marriage, provided that she was not guilty of adultery uncondoned before such dissolution

**(Note).**

**General**

**Scope and object of this section.**

The following extract from the report of the Select Committee throws light on the scope and object of this section — "This section enables a wife who is divorced without her consent, and whose divorce is not in consequence of her adultery, to claim maintenance so long as she remains chaste and unmarried. Free divorce must at present be permitted, but we do not see any reason why a wife who is entitled to maintenance from her husband should be deprived of that right through no fault of her own by a capricious exercise of the right of divorce on the part of her husband. In such cases we consider her claim should be preserved. Capricious divorce seems to be rare, and this provision is not therefore likely to be seriously objected to."

*See Report of the Select Committee*      **X**

- 23** Where a man following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one-half of such property or in the event of no member of his tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children, or on his children in equal shares if he leaves no widow, or on his widow and children in equal shares if he leaves both widow and children

Succession to separate property of a married man dying intestate

**(Notes).**

**General.**

**(1) Reason of the section.**

Ss. 23 and 24 deal with the question of inheritance. Once marriage is legalized, it appears to follow that the fate of a man's family after his death should not be left altogether to the mere chance of his having married a wife. For the sake of simplicity and in view of prevailing practice in the district it has been suggested that one-half of the self-acquired or separate property of the deceased should go to his wife and children and the other half to his Tarwad. The section accepts this suggestion. If he leaves no widow, then his children take that share. In the case of a woman whose marriage has been registered under this Act one-half shall devolve upon her children. As registration is only evidence of a marriage relation already formed, whether the children were born before or after registration they will inherit.

*See Statement of Objects and Reasons.*      **Y**

**(2) Reason of the section—Another proposal made at the Bill stage and abandoned.**

"Sir Muthusami Iyer was of opinion that a moiety of the self-acquired property of the deceased should descend to the wife and children and that they should take the property in the same way in which they take property

**General—(Continued)**

given by the husband or father during his life, namely, as the exclusive property of their branch of the tarwad. Considering that the marumakkattayam system of inheritance is the immemorial territorial law of a large community and that a majority advocate its retention, he considered that the time has not arrived for modifying that system or introducing into the marumakkattayam family a system of inheritance under which the entire self-acquisition would descend to the wife and children to the exclusion of the tarwad. He was further of opinion that, when the time comes, the legitimate mode of breaking up the tarwad system consists in the recognition of the individual right of partition in respect of tarwad property. As the usage in the district justified him in going only so far, he declared himself of opinion that the share of the wife and children should be restricted to half the self-acquisition. Three of the Commissioners were of opinion that the wife and children ought to succeed to the entire property of the deceased.

They were of opinion that once marriage is legalized the obligation of the husband to provide for his wife and children ought to be recognized as paramount. They considered that in the great majority of cases the entire self-acquired property will be but a pittance for the wife and children of which no part should be taken from them. According to them the proposed division into shares would generally result in ruinous litigation and they maintained that in those cases, where the family was composed of father, mother and children, it was unjust to constitute an outsider a co-heir and thus deprive, partially at any rate, the wife and children of the property of which they were in enjoyment in the lifetime of the deceased and that the power of devise by will would give every man the power to dispose of his property according to the necessities of his individual family.

\*They contended that the question of interference with the marumakkattayam system did not arise as the property of the marumakkattayam tarwad was not interfered with in any way and as the Bill proposed to deal with only such property as could have been disposed of by the deceased in his lifetime even against the wishes of the other members of the tarwad.

The Governments of Madras and India have accepted the conclusion of Sir Muthusami Iyer that the wife and children ought to be declared entitled to half the property only. This section carries out the conclusions accepted by the Government. See statement of Objects and Reasons. See Port St. George Gazette, Suppl., 11th June, 1895. Z

**(3) How this section stood in the first Bill—Scope and nature of the provisions contained in the section—Reasons for the present form in which it stands.**

Under the first Bill the widow and children of the deceased intestate were to take the half-share of the deceased's separate or self-acquired property as if they formed a Tarwad. This provision was found unworkable as it ignored those cases where a man left (a) children by different wives who would be members of different Tarwads, or (b) a widow and children by a deceased or divorced wife who similarly would be members of different Tarwads. It was impossible for them to hold property "as if they formed a Tarwad."

**General—(Concluded).**

The Select Committee carefully considered whether it was possible to allow the successors to hold the property devolving on them as members of a "Tavazhi" or branch of the tarwad to which they belonged and they came to the conclusion that this was impracticable. A "Tavazhi" in its restricted sense consists of a mother and all her issue in the female line. If the widow and children took the property of the deceased intestate as a "Tavazhi," then in case such widow had other children not born to the deceased husband, such children also were regarded as members of such "Tavazhi" and thus they would become entitled to the property of the deceased. They did not consider it desirable that the children of the mother (a) by a person other than the deceased husband (b) born of a union not registered under this Act or (c) born of concubinage (all of whom would be members of the "Tavazhi") should be entitled to the property of the deceased.

If on the other hand it was declared that the "Tavazhi" shall consist of the widow and her children by her deceased husband alone, and should not include any other children she might have, there were other grave difficulties

If she remarried, she and her children by the second husband would inherit his property as a "Tavazhi" although she was already the member of a "Tavazhi" consisting of herself and her children by the first husband. She could not be a member of two Tavazhis or branches

Further, the constitution of such a "Tavazhi" by separating the mother from some of her children was totally repugnant to the notions of those who followed the Marumakkathayam law or usage which regarded all the children of one mother as members of one "Tavazhi" with their mother. The Marumakkathayam system did not recognize the offspring of a male ancestor as constituting a "Tavazhi."

When a female member of a "Tavazhi" or branch married, under the Act, she would become the head of another branch. The result would be the creation of numerous "Tavazhis" within "Tavazhis" (branches within branches) leading to great complications unknown and repugnant to the Marumakkathayam system.

The Select Committee have therefore declared that the property of the intestate should devolve upon his widow and children as their own property absolutely and in equal shares. In the absence of a Tarwad, they have provided for the widow and children taking the entire property. See Report of the Select Committee.

**24** Where a woman following the Marumakkathayam or the Aliyasantana Law of Inheritance dies intestate, in respect of her separate or self-acquired property or any portion thereof one half of such property shall devolve in equal shares upon her children and, in the event of no member of her tarwad surviving her, the whole of such property shall devolve on her husband.

Succession to separate property of a married woman dying intestate.

(Note).

N.B.—See Notes under S. 23.

25. Copies of notices under sub-section (1) of section 7, notice of withdrawal under sub-section (2) of section 7, copies of objections under sub-section (2) of section 8, shall be served through such officer of Court as the Local Government may direct in this behalf, and the law in force for the time being for the service of summons on a defendant in a civil suit shall apply to such service.

FORM (A)

SECTION 5.

*Notice of Marriage*

To  
....., a Registrar of Marriages under Act ..... for the District of .....

I hereby give you notice that, I intend registering as a marriage under Act ..... the Sambandham between me and the other party herein named and described —

Name.	Names of farwad and of the managing member thereof.	Names of the legal guardians (if any)	Rank or profession or calling	Residence	Age	Caste	The place in which the Sambandham was formed or is intended to be formed
A.B.							
C.D.							

Witness my hand, this ..... day of ..... 189 ..

(Signed )



## FORM (B).

## SECTION 11.

Declaration to be made separately by the Bridegroom and by the Bride.

I, A.B., hereby declare as follows —

(1) I am a Hindu governed by the Law of Inheritance.

(2) I am                years of age

(3) The registration of my Sambandham with will not contravene any of the conditions prescribed in section 3 of Act

(4) I consent to the registration as a marriage of the Sambandham between me and C D. (or, if the party making the declaration is a minor, “ (4) my legal guardian consents to the registration as a marriage of the Sambandham between me and C D.”).

(5) I am aware that, if any statement in this declaration is false and if in making such statement I either know or believe it to be false or do not believe it to be true, I am liable to imprisonment and fine.

(Signed ) A.B. (the Bridegroom or Bride)

(Signed ) G.H. }	( „ ) E.F. (Guardian, if any).
( „ ) L.J. }	Three witnesses. (Countersigned) M N ,
( „ ) K.L. }	Registrar of Marriages under Act for the District of

## FORM (C).

## SECTION 12.

*Marriage Certificate.*

I, E.F., certify that, on the        of        189 , appeared before me A.B. and C D., each of whom in my presence and in the presence of three witnesses, whose names are signed hereunder, made the declarations required by Act and that the Sambandham between them was registered as a marriage under the said Act in my presence.

(Signed.) E.F., Registrar of Marriages  
under Act for the District of        .

(Signed.) G.H. }	(Signed.) A.B.
( „ ) L.J. }	(Signed.) C.D.
( „ ) K.L. }	( „ ) M.N. (Guardian if any).
Dated the	day of        189 .

# THE BENGAL SATI REGULATION, 1829.

## (REGULATION XVII OF 1829.)

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[4th December, 1829.]

A Regulation for declaring the practice of sati or of burning or burying alive the widows of Hindus illegal and punishable by the Criminal Courts

1. The practice of sati or of burning or burying alive the widows of Hindus is revolting to the feelings of human nature, it is nowhere enjoined by the religion of the Hindus as an imperative duty, on the contrary, a life of purity and retirement on the part of the widow is more especially and preferably inculcated, and by a vast majority of that people throughout India the practice is not kept up nor observed. in some extensive districts it does not exist, in those in which it has been most frequent it is notorious that in many instances acts of atrocity have been perpetrated which have been shocking to the Hindus themselves and in their eyes unlawful and wicked

Preamble

The measure hitherto adopted to discourage and prevent such acts have failed of success, and the Governor General in Council is deeply impressed with the conviction that the abuses in question cannot be effectually put an end to without abolishing the practice altogether.

Actuated by these considerations, the Governor General in Council, without intending to depart from one of the first and most important principles of the system of British Government in India, that all classes of the people be secure in the observance of their religious usages, so long as that system can be adhered to without violation of the paramount dictates of justice and humanity, has deemed it right to establish the following rules, which are hereby enacted to be in force from the time of their promulgation throughout the territories immediately subject to the Presidency of Fort William.

(Notes)

General.

Local extent of the Act.

This Regulation was passed for the whole of Bengal - See the clause at the end of S. 1. It has been declared, by the Laws Local Extent Act, 1874 (XV of 1874), S. 6 to be in force throughout Bengal except as regards the Scheduled Districts.

**General—(Concluded).**

It has been declared, by notification under the Scheduled Districts Act, 1874 (XIV of 1874), S. 3, to be in force in the following Scheduled Districts, namely.—

West Jalpaiguri and the Western Duars, in the Jalpaiguri District, and the Hazaribagh, Panchi, Palamau and Manbhum Districts, and Pargana Dhalbhum, the Kolhan and the Porshat Estate, in the Singhbhum District, in the Chota Nagpur Division

The regulation is in force in the following de-regulationized tracts, namely —  
The Angul District and the South of Parganas, but its application in the other de-regulationized tracts in Bengal, namely, the Chittagong Hill-tracts, is barred by the Chittagong Hill tracts Regulation, 1906 (1 of 1900), S. 1 (2).

Sati declared illegal and punishable

**2** The practice of sati or burning or burying alive the widows of Hindus is hereby declared illegal and punishable by the Criminal Courts.

**3. First**—All zamindars, talukdars or other proprietors of land, whether malguzari or lakhiraj, all sadai farmers and under-renters of land of every description, all dependent talukdars, all munsifs and other local agents, all Native officers employed in the collection of the revenue and rents of lands on the part of Government or the Court of Wards, and all mandals or other headman of villages, are hereby declared especially accountable for the immediate communication to the officers of the nearest police-station of any intended sacrifice of the nature described in the foregoing section; and any zamindar or other description of persons above noticed, to whom such responsibility is declared to attach, who may be convicted of wilfully neglecting or delaying to furnish the information above required, shall be liable to be fined by the Magistrate or Joint Magistrate in any sum not exceeding two hundred rupees, and in default of payment to be confined for any period of imprisonment not exceeding six months

Penalty in case of neglect.

Police how to act on receiving intelligence of intended sacrifice.

**Second**—Immediately on receiving intelligence that the sacrifice declared illegal by this Regulation is likely to occur, the police-daroga shall either repair in person to the spot, or depute his muharrir or jamadar, accompanied by one or more barkandazes of the Hindu religion, and it shall be the duty of the police-officers to announce to the persons assembled for the performance of the ceremony that it is illegal, and to endeavour to prevail on

them to disperse, explaining to them that, in the event of their persisting in it they will involve themselves in a crime and become subject to punishment by the Criminal Courts

Should the parties assembled proceed in defiance of these remonstrances to carry the ceremony into effect; it shall be the duty of the police-officers to use all lawful means in their power to prevent the sacrifice from taking place, and to apprehend the principal persons aiding and abetting in the performance of it, and in the event of the police-officers being unable to apprehend them they shall endeavour to ascertain their names and places of abode, and shall immediately communicate the whole of the particulars to the Magistrate or Joint Magistrate for his orders

*Third.*—Should intelligence of a sacrifice declared illegal by this Regulation not reach the police-officers until after it shall have actually taken place, or should the sacrifice have been carried into effect before their arrival at the spot they will nevertheless institute a full inquiry into the circumstances of the case, in like manner as on all other occasions of unnatural death, and report them for the information and orders of the Magistrate or Joint Magistrate to whom they may be subordinate

**4, 5.** (Trial of persons concerned in the sacrifice, sentence of death by Court of Nizamat Addalat) Rep. by Act XVII of 1862



# MADRAS REGULATION, 1830.

## (REGULATION I OF 1830.)

[*Passed on the 2nd February, 1830.*]

A Regulation for declaring the practice of Sati, or of burning or burying alive the widows of Hindus, illegal, and punishable by the Criminal Courts.

**1. The practice of sati, or of burning or burying alive the widows**

**Preamble.**

of Hindus, is revolting to the feelings of human nature, it is nowhere enjoined by the religion of the Hindus as an imperative duty, on the contrary, a life of purity and retirement on the part of the widow is more especially and preferably inculcated, and by a vast majority of that people throughout India the practice is not kept up nor observed, in some extensive districts it does not exist in those in which it has been most frequent it is notorious that in many instances acts of atrocity have been perpetrated which have been shocking to the Hindus themselves, and in their eyes unlawful and wicked. The measures hitherto adopted to discourage and prevent such acts have failed of success, and the Governor in Council is deeply impressed with the conviction that the abuses in question cannot be effectually put an end to without abolishing the practice altogether. Actuated by these considerations, the Governor in Council, without intending to depart from one of the first and most important principles of the system of British Government in India, that all classes of the people be secure in the observance of their religious usages, so long as that system can be adhered to without violation of the paramount dictates of justice and humanity, has deemed it right to establish the following rules, which are hereby enacted, to be in force throughout the territories immediately subject to the Presidency of Fort St. George.

**Sati declared illegal and punishable.**

**2. The practice of sati, or of burning or burying alive the widows of Hindus, is hereby declared illegal, and punishable by the Criminal Courts.**

**3. First.**—All zemindars, taluqdars or other proprietors of land, whether malguzari or lakhiraj, all sadr farmers and under-renters of land of every description, all dependent taluqdars, all nabbs and other local agents, all Native officers employed in the collection of the revenue and rents of lands on the part of

**Zemindars, &c. responsible for immediate communication to police of intended sacrifice.**

Government or the Court of Wards, and all headmen of villages, are hereby declared especially accountable for the immediate communication to the officers of the nearest police-station of any intended sacrifice of the nature described in the foregoing section; and any zemindar, or other description of persons above noticed, to whom such responsibility is declared to attach who may be convicted of wilfully neglecting or delaying to furnish the information above required, shall be liable to be fined by the Magistrate or Joint Magistrate in any sum not exceeding two hundred rupees, and in default of payment to be confined for any period of imprisonment not exceeding six months

Penalty in case of neglect.

*Second* --Immediately on receiving intelligence that the sacrifice declared illegal by this Regulation is likely to occur, the head of police shall either repair in person to the spot, or depute one of his subordinate officers, accompanied by one or more peons of the Hindu religion, and it shall be the duty of the Police-officers to announce to the persons assembled for the performance of the ceremony that it is illegal, and to endeavour to prevail on them to disperse, explaining to them that, in the event of their persisting in it, they will involve themselves in a crime, and become subject to punishment by the Criminal Courts. Should the parties assembled proceed, in defiance of these remonstrances, to carry the ceremony into effect, it shall be the duty of the police-officers to use all lawful means in their power to prevent the sacrifice from taking place, and to apprehend the principal persons aiding and abetting in the performance of it, and, in the event of being unable to apprehend them, they shall endeavour to ascertain their names and places of abode, and shall immediately communicate the whole of the particulars to the Magistrate or Joint Magistrate for his orders.

Police how to act on receiving intelligence of intended sacrifice

*Third*.—Should intelligence of a sacrifice, declared illegal by this Regulation, not reach the Police-officers until after it shall have actually taken place or should the sacrifice have been carried into effect before their arrival at the spot, they will nevertheless institute a full inquiry into the circumstances of the case, in like manner as on all other occasions of unnatural death, and report them for the information and orders of the Magistrate or Joint Magistrate to whom they may be subordinate.

How to act when intelligence of sacrifice does not reach them until after it has taken place.

**4** *First*.—On the receipt of the reports required to be made by the heads of police under the provisions of the foregoing section, the Magistrate or Joint Magistrate of the jurisdiction, in which the sacrifice may have taken place, shall inquire into the circumstances of the case, and shall adopt the necessary measures for bringing the parties concerned in promoting it to trial.

*Second*—It is hereby declared that, after the promulgation of this Regulation, all persons convicted of aiding and abetting in the sacrifice of a Hindu widow, by burning or burying her alive, whether the sacrifice be voluntary on her part or not, shall be deemed guilty of culpable homicide, and shall be liable to punishment by fine or by imprisonment, or by both fine and imprisonment, according to the nature and circumstances of the case, and the degree of guilt established against the offender, nor shall it be held to be any plea of justification that he or she was desired by the party sacrificed to assist in putting her to death.

*Third*—Persons committed to take their trial for the offence above mentioned shall be admitted to bail or not at the discretion of the Criminal Judge, subject to the general rules in force in regard to the admission of bail.

**5.** It is further deemed necessary to declare that nothing contained in this Regulation shall be construed to preclude the Court of Faujdari Adalat from passing sentence of death on persons convicted of using violence or compulsion or of having assisted in burning or burying alive a Hindu widow while labouring under a state of intoxication or stupefaction, or other cause impeding the exercise of her free will, when, from the aggravated nature of the offence proved against the prisoner the Court may see no circumstances to render him or her a proper object of mercy.





## APPENDIX I.

### STATUTE LAW RELATING TO INDIA CONCERNING THE SUBJECT OF MARRIAGE AND DIVORCE

**N.B.**—The following statutes passed by Parliament and applying to India are given below as they relate to the subject of Marriage and Divorce. They are also to be found in the two volume Edition of "The Collection of Statutes relating to India" published by the Government of India, in 1899.

## THE DIVORCE BILLS EVIDENCE ACT, 1820.

(1. GEO 4. C. 101.)

*An Act to enable the Examination of Witnesses to be taken  
in India in support of Bills of Divorce on account of  
Adultery committed in India*

[24th July, 1820]

### [PREAMBLE]

1    Whensoever and as often as either House of Parliament, upon the petition of any party praying for a bill for the dissolution of any marriage, and stating that the witnesses necessary to substantiate the allegations of such bill are resident in India, shall see cause to direct that the examinations of such witnesses shall be taken in India, the speaker of such House of Parliament shall thereupon issue his warrant or warrants to the Judges of the Supreme Court of Judicature of the presidency of Calcutta, the Judges of the Supreme Court of Judicature of the presidency of Madras, the Recorder of the presidency of Bombay, or the judges of the Supreme Court of Judicature of the island of Ceylon, respectively, accordingly as the witnesses proposed to be examined shall be resident within any one or more of the said presidencies or the said island, for the examination upon oath of all such witnesses as shall be produced before them touching the allegations of such bill and touching any notices or other matters which shall in such warrant be specified,

and in all cases where such warrants shall be so issued, duplicates of such warrants, together with copies of such bill, shall be transmitted by different ships, at the desire of the agent of the party or parties soliciting such bill, to the persons to whom such warrants shall be directed

2.    \*    \*    \*    \*    in all cases immediately upon the receipt of such warrant or warrants the Judges or Recorder to whom the same shall have been directed shall appoint some time or times with all convenient speed for the examination of witnesses and receiving other proofs touching the allegations of such bill and in opposition thereto, and touching such notices and other matters as shall in such warrant have been specified, and in the meantime shall cause such public notice to be given of such examination, and shall issue such

Judges in India, on receipt of such warrant, shall examine such witnesses, etc.

summons or other process as may be requisite for the attendance of witnesses and of the agents or counsel of all or any of the parties respectively, and of such other witnesses as after mentioned, and to adjourn from time to time as occasion may require,

and such examinations as aforesaid shall be then and there openly and publicly taken  *viva voce*  upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their several religions, and shall, by some sworn officer of the court, be reduced into writing, and two copies thereof shall be made,

and the Judges or Recorder, before whom such examination shall have been taken,

Two copies of such Examinations shall be certified and transmitted to the speaker of either House of Parliament, and shall be admissible in evidence

shall certify the same under the official seal of their several Courts, together with a declaration of such Judges or Recorder, that such examinations have in their or his judgment been fairly and properly conducted, and that all such witnesses had been produced as were fit to be produced for the purpose of ascertaining the whole truth, so far as the attendance of such witnesses could be reasonably obtained, and shall transmit the same by different ships to the speaker of either House of Parliament, under whose warrant such examination shall have been taken,

and every such examination so returned to the speaker of either House of Parliament as aforesaid shall be competent and admissible evidence, and shall be allowed and read in both Houses of Parliament, or either of them respectively, as occasion may require, any law or usage to the contrary notwithstanding

3 \* \* \* it shall and may be lawful

Judges may ask such questions and require such further witnesses to be produced, etc., as shall be necessary

for such Judges or Recorder, upon any such examination, to ask any such questions of any witness who shall be produced before them or him, and to require such further witnesses resident within such presidency or island respectively to be produced, as shall appear fit and necessary for the due investigation of the allegations of such bill, or of any other matters in such warrants specified,

and to allow such attendance by counsel, and such cross-examination of witnesses, as shall be deemed by such Judges and Recorder to be fit and proper for the purpose of such investigation,

and for such purpose, if necessary, to name some proper person or persons to attend as counsel and agent in opposition to such bill, and to procure any evidence which may be necessary for the purpose of such opposition, to the end that a full and fair disclosure may be made of all the facts and circumstances of the case.

Proceedings not to be discontinued by prorogation, etc., of Parliament, where such warrants have been issued.

4 \* \* \* no proceedings in Parliament touching any bill for the dissolution of marriage, wherein such warrant as aforesaid shall have been issued, shall be discontinued by any prorogation or dissolution of Parliament, until the examination therein directed shall have been returned,

but such proceedings may be resumed and proceeded upon in a subsequent session or in a subsequent Parliament in either House of Parliament in like manner and to all intents and purposes as they might have been in the course of one and the same session, any law, usage, or custom to the contrary notwithstanding.

# THE CONSULAR MARRIAGE ACT, 1868.

(31 AND 32. VICT. c. 61.)

*An act for removing Doubts as to the Validity of certain Marriages between British Subjects in China and elsewhere, and for amending the Law relating to the Marriage of British Subjects in Foreign Countries*

[16th July, 1868]

Whereas by an Act of the session of the twelfth and thirteenth years of the reign of Her present Majesty chapter sixty eight, intituled "An Act for facilitating the marriage of British subjects resident in foreign countries," provision is made for the solemnization of marriages in foreign countries or places where there may be a British consul duly authorized in that behalf, between persons both or one of whom is or are a British subject or British subjects, and it is thereby enacted, that every British consul general and consul appointed or to be appointed to reside in any foreign country or place, who shall be directed or authorized in writing under the hand of one of Her Majesty's Principal Secretaries of State to solemnize and register marriages, and any persons duly authorized to act in the absence of such consul shall, in the country or place in which he is so appointed to reside, or in which he is directed or authorized to solemnize or register marriages as aforesaid, be a consul duly authorized for all the purposes of the said Act

And whereas marriages have been from time to time solemnized at certain places in China and elsewhere, between persons being both or one of them subjects or a subject of this realm, by persons acting temporarily as consuls in such places.

And whereas doubts are entertained as to the validity of the said marriage owing to a question having arisen whether the persons by whom the same were solemnized were duly authorized in that behalf, and it is expedient to remove such doubts as to the said marriages, and as to any marriages which may be celebrated in like manner after the passing of this Act

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present Parliament assembled, and by the authority of the same, as follows

## Short title

1. This Act may be cited for all purposes as "The Consular Marriage Act, 1868"

## 2. All marriages

Certain parts of marriages herein specified confirmed

solemnized before the passing of this Act (both or one of the parties thereto being subjects or a subject of this realm,) by or in the presence of any person acting or purporting to act in the place of a British consul, such consul being duly authorized to solemnize and register marriages according to the provisions of the said recited Act, shall be as valid in law as if the same had been solemnized by or in the presence of such British consul

## 3. From and after

Acting consul to have power to solemnize marriages under recited Act.

the passing of this Act, every person acting or legally authorized to act in the place of a British consul, such consul being duly authorized to solemnize and register marriages between persons (both or one of them being a subject or subjects of this realm) shall be deemed to be a British consul duly authorized for all the purposes of the said recited Act.

# THE NATURALIZATION ACT, 1870.

## (33 AND 34 VICT. C. 14.)

*An Act to amend the Law relating to the legal condition of  
aliens and British subjects.*

[12th May, 1870]

### *National Status of married Women and infant Children*

National status of married women and infant children	10	The following enactments shall be made with respect to the national status of women and children
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(1) A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject

(2) A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of re-admission to British nationality in manner provided by this Act

(3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this Act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject and not a British subject

(4) Where the father, or the mother being a widow, has obtained a certificate of re-admission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents

(5) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, [or with such father while in the service of the Crown out of the United Kingdom,] shall be deemed to be a naturalized British subject

THE  
REGISTRATION OF BIRTHS, DEATHS  
AND MARRIAGES (ARMY) ACT, 1879.  
(42 AND 43 VICT., c. 8.)

*An Act to make further provision for the Registration of Deaths,  
Marriages, and Births occurring out of the United Kingdom  
among officers and soldiers of Her Majesty's Forces,  
and their families*

[23rd May, 1879.]

[PREAMBLE]

**Short title.**

1 This Act may be cited as the Registration of Births, Deaths, and Marriages (Army) Act 1879

2 If Her Majesty is pleased from time to time to make regulations respecting the registration of deaths and births occurring and marriages solemnized out of the United Kingdom among officers and soldiers of Her Majesty's land forces and their families or any of them, the registers kept from time to time in pursuance of the said regulations shall, in manner provided by the regulations for the time being in force, be authenticated and transmitted to the Registrar General of Births and Deaths in England

Transmission to Registrar of register of births, deaths, and marriages of army kept in pursuance of Her Majesty's regulations.

Where it appears from any such register that an officer or soldier whose death or marriage is entered therein, or to whose family a person whose death, marriage, or birth is entered therein belonged, was a Scotch or Irish subject of Her Majesty, the Registrar General of Births and Deaths in England shall, as soon as may be after receiving the register, send a certified copy of so much thereof as relates to such death, marriage, or birth to the Registrar General of Births and Deaths in Scotland or Ireland, as the case may require.

Every Registrar General of Births and Deaths to whom a register or certified copy of a register is sent, in pursuance of this section, shall cause the same to be filed and preserved in or copied in a book to be kept by him for the purpose, and to be called the army register book, and such book shall be deemed to be a certified copy of the register book within the meaning of the Acts relating to the registration of births and deaths in England, Scotland, and Ireland respectively

3. Whereas under the directions of Her Majesty, or of one of Her Majesty's Principal Secretaries of State, or the Commander-in-Chief or other lawful authority, various documents, such as registers, muster rolls, and pay lists have been kept, showing the deaths and births which have occurred and the marriages, which have been solemnized among officers and soldiers of Her Majesty's land forces and their families

Provision as to existing documents evidencing deaths, marriages, and births among officers and soldiers of the army, and their families

And whereas it is expedient to make further provision respecting the said documents: Be it therefore enacted as follows

Where any of such documents, or any certified extracts thereof made under the direction of one of Her Majesty's Principal Secretaries of State, have either before or after the passing of this Act been transmitted to the Registrar General of Births and Deaths in England, such document, or extracts shall be deemed to be in the legal custody of the said Registrar General, and shall be admissible in evidence, and a copy of any such document or extract of, or any part thereof, if purporting to be certified to be a true copy under the seal of the register office of the Registrar General, shall be admissible in evidence of such document, extract, or part

Saving as to births,  
death, and mar-  
riages in the United  
Kingdom

4. Nothing in this Act shall apply to any deaths, marriages, or births which occur in the United Kingdom, except where the same occurred before the commencement of this Act.

5 [Rep as to U.K. 57 & 58 Vict, c. 56 (S L R.) Omitted as being spent.]

# THE FOREIGN MARRIAGE ACT. 1892.

(55 AND 56. VICT., C. 23)

*An Act to consolidate Enactments relating to the Marriage of British Subjects outside the United Kingdom.*

[27th June, 1892.]

1. All marriages between parties of whom one at least is a British subject solemnized in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law.

Validity of marriages solemnized abroad in manner provided by Act

2. In every case of a marriage intended to be solemnized under this Act, one of the parties intending marriage shall sign a notice stating the name, surname, profession, condition and residence of each of the parties, and whether each of the parties is or is not a minor, and give the notice to the marriage officer within whose district both of the parties have had their residence not less than one week then next preceding and the notice shall state that they have so resided

Notice to marriage officer of intended marriage.

3. (1) The marriage officer shall file every such notice, and keep it with the archives of his office, and shall also, on payment of the proper fee, forthwith enter in a book of notices to be kept by him for the purpose, and post up in some conspicuous place in his office, a true copy of every such notice, and shall keep the same so posted up during fourteen consecutive days before the marriage is solemnized under the notice.

Filing in registry and posting up of notice.

(2) The said book and copy posted up shall be open at all reasonable times, without fee, to the inspection of any person

Requirement of like consent to marriage as in England, and power to forbid marriage.

4 (1) The like consent shall be required to a marriage under this Act as is required by law to marriages solemnized in England.

(2) Every person whose consent to a marriage is so required may, at any time before the solemnization thereof under this Act, forbid it by writing the word "forbidden" opposite to the entry of the intended marriage in the book of notices, and by subscribing thereto his name and residence, and the character by reason of which he is authorised to forbid the marriage, and if a marriage is so forbidden the notice shall be void, and the intended marriage shall not be solemnized under that notice.

5. (1) Any person may on payment of the proper fee enter with the marriage officer a caveat signed by him or on his behalf, and stating his residence and the ground of his objection against the solemnization of the marriage of any person named therein, and thereupon the marriage of that person shall not be solemnized until either the marriage officer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the solemnization of the marriage, or the caveat is withdrawn by the person entering it.

Caveat against marriages may be lodged with marriage officer.



(2) In a case of doubt the marriage officer may transmit a copy of the caveat, with such statement respecting it as he thinks fit, to a Secretary of State, who shall refer the same to the Registrar-General, and the Registrar-General shall give his decision thereon in writing to the Secretary of State, who shall communicate it to the marriage officer.

(3) If the marriage officer refuses to solemnize or to allow to be solemnized in his presence the marriage of any person requiring it to be solemnized, that person may appeal to a Secretary of State, who shall give the marriage officer his decision thereon.

(4) The marriage officer shall forthwith inform the parties of and shall conform to any decision given by the Registrar-General or Secretary of State

When marriage not solemnized within three months a new notice required.

6. Where a marriage is not solemnized within three months next after the latest of the following dates—

- (a) the date on which the notice for it has been given to and entered by the marriage officer under this Act, or
- (b) if on a caveat being entered a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State, then the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnized, the notice shall be void, and the intended marriage shall not be solemnized under that notice.

7. Before a marriage is solemnized under this Act, each of the parties intending marriage shall appear before the marriage officer, and make, Oath before marriage. and subscribe in a book kept by the officer for the purpose, an oath—

- (a) that he or she believes that there is not any impediment to the marriage by reason of kindred or alliance, or otherwise, and
- (b) that both of the parties have for three weeks immediately preceding had their usual residence within the district of the marriage officer, and
- (c) where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent to the marriage is required by law has been obtained thereto, or as the case may be, that there is no person having authority to give such consent.

Solemnization of marriage at office in presence of marriage officer and two witnesses.

8 (1) After the expiration of fourteen days after the notice of an intended marriage has been entered under this Act, then, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has not been forbidden in manner provided by this Act, the marriage may be solemnized under this Act.

(2) Every such marriage shall be solemnized at the official house of the marriage officer, with open doors, between the hours of eight in the forenoon, and three in the afternoon, in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit adopt, or may, where the parties so desire be solemnized by the marriage officer.

(3) Where such marriage is not solemnized according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties shall declare,

"I solemnly declare that I know not of any lawful impediment why I A.B. [or C.D.] may not be joined in matrimony to C.D. [or A.B.]."

And each of the parties shall say to the other,

"I call upon these persons here present to witness that I, A.B. [or C.D.] take thee, C.D. [or A.B.] to be my lawful wedded wife [or husband]."

Marriage fees to  
marriage officer and  
registration of mar-  
riages.

9 (1) The marriage officer shall be entitled, for every marriage solemnized under this Act by him or in his presence, to have from the parties married the proper fee.

(2) He shall forthwith register in duplicate every such marriage in two marriage register books, which shall be furnished to him from time to time for that purpose by the Registrar-General (through a Secretary of State), according to the form provided by law for the registration of marriages in England, or as near to that form as the difference of the circumstances admits.

(3) The entry in each book of every such marriage shall be signed by the marriage officer, by the person solemnizing the marriage, if other than the marriage officer, by both the parties married, and by two witnesses of the marriage.

(4) All such entries shall be made in regular order from the beginning to the end of each book, and the number of the entry in each duplicate shall be the same.

(5) The marriage officer by whom or in whose presence a marriage is solemnized under this Act may ask of the parties to be married the several particulars required to be registered touching the marriage.

10. (1) In January in every year every marriage officer shall make and send to a Secretary of State, to be transmitted by him to the Registrar-General, a copy, certified by him to be a true copy, of all the entries of marriages during the preceding year in the register-book kept by him, and if there has been no such entry, a certificate of that fact, and every such copy shall be certified, and certificate given, under his hand and official seal.

(2) The marriage officer shall keep the duplicate marriage register-books safely until they are filled, and then send one of them to a Secretary of State, to be transmitted by him to the Registrar-General.

Marriage officer:  
and their districts.

11. (1) For the purposes of this Act the following officers shall be marriage officers, that is to say —

(a) Any officer authorised in that behalf by a Secretary of State by authority in writing under his hand (in this Act referred to as a marriage warrant), and

(b) Any officer who under the marriage regulations herein after mentioned is authorised to act as marriage officer without any marriage warrant, and the district of a marriage officer shall be the area within which the duties of his office are exercisable, or any such less area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations.

(2) Any marriage warrant of a Secretary of State may authorize to be a marriage officer—

(a) a British ambassador residing in a foreign country to the government of which he is accredited and also any officer prescribed as an officer for solemnizing marriages in the official house of such ambassador;

(b) the holder of the office of British consul in any foreign country or place specified in the warrant, and

(c) a governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident, and this Act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorized by the warrant, and in such application shall not be limited to places outside Her Majesty's dominions.

(3) If a marriage warrant refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer.

(4) A Secretary of State may, by warrant under his hand, vary or revoke any marriage warrant previously issued under this Act

(5) Where a marriage officer has no seal of his office, any reference in this Act to the official seal shall be construed to refer to any seal ordinarily used by him, if authenticated by his signature with his official name and description.

**Marriages on board Her Majesty's ships on foreign stations**      12 A marriage under this Act may be solemnized on board one of Her Majesty's ships on a foreign station, and with respect to such marriage—

(a) subject to the marriage regulations a marriage warrant of a Secretary of State may authorise the commanding officer of the ship to be a marriage officer,

(b) the provisions of this Act shall apply with the prescribed modifications.

13. (1) After a marriage has been solemnized under this Act it shall not be necessary, in support of the marriage, to give any proof of the residence for the time required by or in pursuance of this Act of either of the parties previous to the marriage, or of the consent of any person whose consent thereto is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage

(2) Where a marriage purports to have been solemnized and registered under this Act in the official house of a British ambassador or consul, or on board one of Her Majesty's ships, it shall not be necessary, in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnized and registered, nor shall any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or of any prohibitions or restrictions under the marriage regulations or otherwise, be given in any legal proceeding touching the validity of the marriage.

14. If a marriage is solemnized under this Act by means of any wilfully false notice signed, or oath made by either party to the marriage, as to any matter for which a notice, or oath, is by this Act required, the Attorney General may sue for the forfeiture of all estate and interest in any property in England accruing to the offending party by the marriage, and the proceedings thereupon, and the consequences thereof, shall be the same as are provided by law in the like case with regard to marriages solemnized in England according to the rites of the Church of England.

**Punishment of false oath or notice**

15 If a person—

(a) knowingly and wilfully makes a false oath or signs a false notice, under this Act, for the purpose of procuring a marriage, or

- (b) forbids a marriage under this Act by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false,

such person shall suffer the penalties of perjury, and may be tried in any county in England and dealt with in the same manner in all respects as if the offence had been committed in that county.

16. (1) Any book, notice, or document directed by this Act to be kept by the marriage officer or in the archives of his office, shall be of such Evidence. a public nature as to be admissible in evidence on its mere production from the custody of the officer.

(2) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul shall be conclusive.

17. All the provisions and penalties of the Marriage Registration Acts, relating to any registrar or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto) as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts.

18. Subject to the marriage regulations, a British consul, or person authorised to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnized in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnized, and thereupon this Act shall apply as if the marriage had been registered in pursuance of this Act, except that nothing in this Act shall affect the validity of the marriage so solemnized.

Power to refuse solemnization of marriage where marriage inconsistent with international law. 19. A marriage officer shall not be required to solemnize a marriage, or to allow a marriage to be solemnized in his presence, if in his opinion the solemnization thereof would be inconsistent with international law or the comity of nations.

Provided that any person requiring his marriage to be solemnized shall, if the officer refuses to solemnize it or allow it to be solemnized in his presence, have the right of appeal to the Secretary of State given by this Act.

20. The proper fee under this Act shall be such fee as may for the time being be fixed under the Consular Salaries and Fees Act, 1891, and the fee so fixed as respects a consul shall be the fee which may be taken by any marriage officer, and the provisions relating to the levying, application, and remission of and accounting for fees under that Act shall apply to the same when taken by any marriage officer who is not a consul.

Power to make marriage regulations. 21. (1) Her Majesty the Queen in Council may make regulations (in this Act referred to as the marriage regulations)—

- (a) Prohibiting or restricting the exercise by marriage officers of their powers under this Act in cases where the exercise of those powers appears to Her Majesty to be inconsistent with international law or the comity of nations or in places where sufficient facilities appear to Her Majesty to exist without

the exercise of those powers, for the solemnization of marriages to which a British subject is a party, and

- (b) Determining what offices, chapels, or other places are, for the purposes of marriages under this Act, to be deemed to be part of the official house or the office of a marriage officer, and
- (c) Modifying in special cases or classes of cases the requirements of this Act as to residence and notice, so far as such modification appears to Her Majesty to be consistent with the observance of due precautions against clandestine marriages, and
- (d) Prescribing the forms to be used under this Act; and
- (e) Adapting this Act to marriages on board one of Her Majesty's ships, and to marriages by or before a governor, high commissioner, resident, or other officer, and authorising the appointment of a person to act under this Act in the place of a high commissioner or resident, and
- (f) Determining who is to be the marriage officer for the purpose of a marriage in the official house of a British ambassador, or on board one of Her Majesty's ships, whether such officer is described in the regulations or named in pursuance thereof and authorising such officer to act without any marriage warrant, and
- (g) Determining the conditions under which and the mode in which marriages solemnized in accordance with the local law of a foreign country may be registered under this Act, and
- (h) Making such provisions as seem necessary or proper for carrying into effect this Act or any marriage regulations, and
- (i) Varying or revoking any marriage regulations previously made.

(2) All regulations purporting to be made in pursuance of this section may be made either generally or with reference to any particular case or class of cases, and shall be published under the authority of Her Majesty's Stationery Office, and laid before both Houses of Parliament, and deemed to be within the powers of this Act, and shall while in force have effect as if enacted by this Act.

(3) Any marriage regulations which dispense for any reason, whether residence out of the district or otherwise with the requirements of this Act, as to residence and notice, may require as a condition or consequence of the dispensation, the production of such notice, certificate, or document, and the taking of such oath, and may authorise the publication or grant of such notice, certificate, or document, and the charge of such fees as may be prescribed by the regulations, and the provisions of this Act, including those enacting punishments with reference to any false notice or oath, shall apply as if the said notice, certificate, or document were a notice, and such oath were an oath within the meaning of those provisions.

22. It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all

forms required by law.

23. Nothing in this Act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal family

Validity of marriages solemnized within British lines

Saving.

## Definitions.

24. In this Act, unless the context otherwise requires,—

The expression "Registrar General" means the Registrar-General of Births, Deaths, and Marriages in England.

The expression "Attorney General" means Her Majesty's Attorney General, or if there is no such Attorney General, or the Attorney General is unable or incompetent to act, Her Majesty's Solicitor General, for England.

The expression "the Marriage Registration Acts" means the Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter eighty-six, intituled "An act for registering births, deaths, and marriages in England" and the enactments amending the same.

The expression "official house of a marriage officer" means, subject to the provisions of any marriage regulations, the office at which the business of such officer is transacted, and the official house of residence of such officer, and, in the case of any officer, who is an officer for solemnizing marriages in the official house of an ambassador, means the official house of the ambassador.

The expression "consul" means a consul-general, consul, vice-consul, pro consul, or consular agent.

The expression "ambassador" includes a minister and a charge d'affaires.

The expression "prescribed" means prescribed by marriage regulations under this Act.

## Commencement of Act.

25. This Act shall come into operation on the first day of January next after the passing thereof.

## Repeal and savings

26. (1) The Acts specified in the schedule to this Act are hereby repealed to the extent in the third column of that Schedule mentioned.

## Provided that—

- (a) any Order in Council in force under any Act so repealed shall continue in force as if made in pursuance of this Act, and
- (b) any proceedings taken with reference to a marriage, any register-book kept, and any warrant issued in pursuance of the Acts hereby repealed, shall have effect as if taken, kept, and issued in pursuance of this Act, and
- (c) The fees which can be taken in pursuance of the Acts hereby repealed may continue to be taken in like manner as if fixed in pursuance of the Consular Salaries and Fees Act, 1891 and may be altered accordingly, and
- (d) The forms prescribed by or in pursuance of the Acts hereby repealed may continue to be used as if prescribed by an Order in Council under this Act.

(2) Every marriage in fact solemnized and registered by or before a British consul or other marriage officer in intended pursuance of any Act hereby repealed shall, notwithstanding such repeal or any defect in the authority of the consul or the solemnization of the marriage elsewhere than at the consulate, be as valid as if the said Act had not been repealed, and the marriage had been solemnized at the consulate by or before a duly authorised consul.

Provided that this enactment shall not render valid any marriage declared invalid before the passing of this Act by any competent Court, or render valid any marriage either of the parties to which has, before the passing of this Act, lawfully intermarried with any other person.

## Short title.

27. This Act may be cited as the Foreign Marriage Act, 1892.

## SCHEDULE.

*Enactments Repealed.*

Session and Chapter.	Title.	Extent of Repeal.
4 Geo. 4 c. 91.	An Act to relieve His Majesty's subjects from all doubt concerning the validity of certain marriages solemnized abroad.	The whole Act, so far as unrepealed.
12 & 13 Vict., c. 68.	The Consular Marriage Act, 1849.	The whole Act.
31 & 32 Vict., c. 61.	The Consular Marriage Act, 1868	The whole Act.
33 & 34 Vict., c. 14.	The Naturalization Act, 1870.	In section eleven, the words, "and of the marriages of persons married at any of Her Majesty's embassies or legations."
53 & 54 Vict., c. 47.	The Marriage Act, 1890.	The whole Act.
54 & 55 Vict., c. 17.	The Foreign Marriage Act 1891	The whole Act.

# THE MERCHANT SHIPPING ACT, 1894. (57 AND 58 VICT., C. 60.)

*An Act to consolidate Enactments relating to Merchant Shipping.*

[25th August, 1894.]

\* \* \* \* \*

Entries required in official log-book      S. 240. The master of a ship for which an official log is required shall enter or cause to be entered in the official log-book the following matters (that is to say) \* \* \*

(6) Every marriage taking place on board, with the names and ages of the parties :

\* \* \* \* \*

Lists of the crew.      S. 253 (1) The master—

(a) of a foreign-going ship whose crew is discharged in the United Kingdom, in whatever part of Her Majesty's dominions the ship is registered ; and

(b) of a home-trade ship, \* \* \*

(viii) any marriage which takes place on board with the date thereof, and the names and ages of the parties

\* \* \* \* \*





## APPENDIX II.

### DIVORCE COURT RULES.

**N.B.**—The following Rules and Regulations made under the English Matrimonial Acts have been given here, as the Indian Courts are also guided by those Rules and Regulations in matters of Practice and procedure. (See S. 7 of the Divorce Act IV of 1869).

## RULES AND REGULATIONS.

Made under the provisions of 20 & 21 Vict. c. 85, 23 & 24 Vict. c. 144, 32 & 33 Vict. c. 62, 38 & 39 Vict. c. 77.

*Rules and Regulations — 26th December, 1865*

All rules and regulations heretofore made and issued for Her Majesty's Court for Divorce and Matrimonial Causes shall be revoked on and after the 11th January, 1866, except so far as concerns any matters or things done in accordance with them prior to the said day.

The following rules and regulations shall take effect in Her Majesty's Court for Divorce and Matrimonial Causes on and after 11th January, 1866

### Petition

1. Proceedings before the Court for Divorce and Matrimonial Causes shall be commenced by filing a petition. A form of petition is given in Appendix C, No. 1 and No. 111.

2. Every petition shall be accompanied by an affidavit made by the petitioner, verifying the facts of which he or she has personal cognizance, and deposing as to belief in the truth of the other facts alleged in the petition, and such affidavits shall be filed with the petition.

See also Rule 175.

3. In cases where the petitioner is seeking a decree of nullity of marriage, or of judicial separation, or of dissolution of marriage, or a decree in a suit of jactitation of marriage, the petitioner's affidavit, filed with his or her petition shall further state that no collusion or connivance exists between the petitioner and the other party to the marriage or alleged marriage.

### Co-respondents.

4. Upon husband filing a petition for dissolution of marriage on the ground of adultery the alleged adulterers shall be made co-respondents in the cause, unless the judge ordinary shall otherwise direct.

5. Application for such direction is to be made to the judge ordinary on motion founded on affidavit.

6. If the names of the alleged adulterers or either of them should be unknown to the petitioner at the time of filing his petition, the same must be supplied as soon as known, and application must be made forthwith to one of the registrars to amend the petition by inserting such name therein, and the registrar to whom the application is made shall give his directions as to such amendment, and such further directions as he may think fit as to service of the amended petition.

7. The term "respondent" where the same is hereinafter used shall include all co-respondents so far as the same is applicable to them

#### **Citation.**

8. Every petitioner who files a petition and affidavit shall forthwith extract a citation, under seal of the Court, for service on each respondent in the cause.

9. Every citation shall be written or printed on parchment, and the party extracting the same, or his or her proctor, solicitor, or attorney, shall take it, together with a præcipe, to the registry, and there deposit the præcipe and get the citation signed, and sealed. The address given in the præcipe must be within three miles of the General Post Office.

#### **Service**

10. Citations are to be served personally when that can be done.

11. Service of a citation shall be effected by personally delivering a true copy of the citation to the party cited, and producing the original, if required.

12. To every person served with a citation, shall be delivered, together with the copy of the citation, a certified copy of the petition under seal of the court.

13. In cases where personal service cannot be effected, application may be made by motion to the judge ordinary, or to the registrars in his absence, to substitute some other mode of service.

14. After service has been effected, the citation, with a certificate of service endorsed thereon, shall be forthwith returned into and filed in the registry

15. When it is ordered that a citation shall be advertised, the newspapers containing the advertisements are filed in the registry with the citation.

16. The above rules, so far as they relate to the service of citations, are to apply to the service of all other instruments requiring personal service.

17. Before a petitioner can proceed, after having extracted a citation, an appearance must have been entered by or on behalf of the respondents, or it must be shown by affidavit, filed in the registry, that they have been duly cited, and have not appeared

18. An affidavit of service of a citation must be substantially in the form given in Appendix C, No 5, (Forms are omitted herein), and the citation referred to in the affidavit must be annexed to such affidavit, and marked by the person before whom the same is sworn.

#### **Appearance.**

19. All appearances to citations are to be entered in the registry in a book provided for that purpose.

20. An appearance may be entered at any time before a proceeding has been taken in default, or afterwards, as hereinafter directed, or by leave of the judge ordinary, or of the registrars in his absence, to be applied for by motion founded on affidavit.

See also Rule 185

21. Every entry of an appearance shall be accompanied by an address, within three miles of the General Post Office

22. If a party cited wishes to raise any question as to the jurisdiction of the Court, he or she must enter an appearance under protest, and within eight days file in the registry his or her act on petition in extension of such protest, and on the same day deliver a copy thereof to the petitioner. After the entry of an absolute appearance to the citation a party cited cannot raise any objection as to jurisdiction.

See also Rules 185 to 192, inclusive.

**Intervenors.**

23. Application for leave to intervene in any cause must be made to the judge ordinary by motion, supported by affidavit.

24. Every party intervening must join in the proceedings at the stage in which he finds them, unless it is otherwise ordered by the judge ordinary.

**Suits in forma pauperis.**

25. Any person desirous of prosecuting a suit in *forma pauperis* is to lay a case before counsel, and obtain an opinion that he or she has reasonable grounds for proceeding.

26. No person shall be admitted to prosecute a suit in *forma pauperis* without the order of the judge ordinary, and to obtain such order the case laid before counsel and his opinion thereon, with an affidavit of the party or of his or her proctor, solicitor, or attorney, that the said case contains a full and true statement of all the material facts, to the best of his or her knowledge and belief, and an affidavit of the party applying as to his or her income by means of living, and that he or she is not worth £25, after payment of his or her just debts, save and except his or her wearing apparel, shall be produced at the time such application is made.

See also Rules 209 to 211

27. Where a husband admitted to sue as a pauper neglects to proceed in a cause, he may be called upon by summons to show cause why he should not pay costs, though he has not been dispaupered, and why all further proceedings should not be stayed until such costs be paid.

**Answer**

28. Each respondent who has entered an appearance may within twenty-one days after service of citation on him or her file in the registry an answer to the petition—A form of answer is given in Appendix C, No. 7.

See also Rule 186

29. Each respondent shall on the day he or she file an answer, deliver a copy thereof to the petitioner, or to his or her proctor, solicitor, or attorney.

30. Every answer which contains matter other than a simple denial of the facts stated in the petition, shall be accompanied by an affidavit made by the respondent, verifying such other or additional matter, so far as he or she has personal cognizance thereof, and deposing as to his or her belief in the truth of the rest of such other or additional matter, and such affidavit shall be filed with the answer.

31. In cases involving a decree of nullity of marriage or of judicial separation, or of dissolution of marriage, or a decree in a suit of justification of marriage, the respondent who is husband or wife of the petitioner shall, in the affidavit filed with the answer, further state that there is not any collusion or connivance between the deponent and the petitioner.

**Further Pleadings**

32. Within fourteen days from the filing and delivery of the answer the petitioner may file a reply thereto, and the same period shall be allowed for filing and further pleading by the way of rejoinder or any subsequent pleading.

33. A copy of every reply and subsequent pleading shall on the day the same is filed be delivered to the opposite parties, or to their proctor, solicitor, or attorney.

**General Rules as to Pleadings**

34. Either party desiring to alter or amend any pleading must apply by motion to the Court for permission to do so, unless the alteration or amendment be merely

verbal, or in the nature of a clerical error, in which case it may be made by order of the judge ordinary, or of one of the registrars in his absence, obtained on summons.

35. When a petition, answer, or other pleading has been ordered to be altered or amended, the time for filing and delivering a copy of the next pleading shall be reckoned from the time of the order having been complied with.

36. A copy of every pleading showing the alterations and amendments made therein shall be delivered to the opposite parties on the day such alterations and amendments are made in the pleadings filed in the registry, and the opposite parties, if they have already pleaded in answer thereto, shall be at liberty to amend such answer within four days, or such further time as may be allowed for the purpose.

37. If either party in the cause fail to file or deliver a copy of the answer, reply, or other pleading, or to alter or amend the same, or to deliver a copy of any altered or amended pleading, within the time allowed for the purpose, the party to whom the copy of such answer, reply, or other pleading, or altered or amended pleading, ought to have been delivered, shall not be bound to receive it, and such answer, reply, or other pleading shall not be filed, or be treated or considered as having been filed, or be altered or amended, unless by order of the judge ordinary, or of one of the registrars, to be obtained on summons. The expense of obtaining such order shall fall on the party applying for it, unless the judge ordinary or registrar shall otherwise direct.

38. Applications for further particulars of matters pleaded are to be made to the judge ordinary, or to one of the registrars in his absence, by summons, and not by motion.

See also Rules 181 to 184, and Rule 187.

#### **Service of Pleadings, &c.**

39. It shall be sufficient to leave all pleadings and other instruments, personal service of which is not expressly required by these rules and regulations, at the respective addresses furnished by or on behalf of the several parties to the cause.

See also Rule 114.

#### **Mode of trial.**

40. When the pleadings on being concluded have raised any questions of fact, the petitioner, within fourteen days from the filing of the last pleading, or at the expiration of that time, on the next day appointed for hearing motions in this Court, or in case the petitioner should fail to do so at such time, either of the respondents on whose behalf such questions have been raised, may apply to the judge ordinary by motion to direct the truth of such questions of fact to be tried by a special or common jury.

See also Rules 205 and 206.

#### **Questions of Fact for the Jury.**

41. Whenever the judge ordinary directs the issues of fact in a cause to be tried by a jury, the questions of fact raised by the pleadings are to be briefly stated in writing by the petitioner, and settled by one of the registrars—A form is given in Appendix C, No. 8.

42. Should the petitioner fail to prepare and deposit the questions for settlement in the registry within fourteen days after the judge ordinary has directed the mode of trial, either of the respondents on whose behalf such questions have been raised shall be at liberty to do so.

43. After the questions have been settled by the registrar, the party, who has deposited the same shall deliver a copy thereof as settled to each of the other parties to be heard on the trial of the cause, and either of such parties shall be at liberty to apply to the judge ordinary, by summons within eight days, or at the expiration of that time on the next day appointed for hearing summonses in this Court, to alter or amend the same, and his decision shall be final.

**Setting-down the cause for trial or hearing.**

44. In cases to be tried by a jury, the petitioner, after the expiration of eight days from the delivery of copies of the questions for the jury to the opposite parties, or from alteration or amendment of the same, in pursuance of the order of the Judge ordinary, shall file such questions as finally settled in the registry, and at the same time set down the cause as ready for trial, and on the same day give notice of his having done so to each party for whom an appearance has been entered.

See also Rule 206

45. In cases to be heard without a jury, the petitioner shall, after obtaining directions as to the mode of hearing, set the cause down for hearing, and on the same day give notice of his having done so to each party in the cause for whom an appearance has been entered.

See also Rules 205 and 206. •

46. If the petitioner fail to file the questions for the jury, or to set down the cause for trial or hearing, or to give due notice thereof, for the space of one month, after directions have been given as to the mode in which the cause shall be tried or heard, either of the respondents entitled to be heard at such trial or hearing may file the questions for the jury, and set the cause down for trial or hearing, and shall on the same time give notice of his having done so to the petitioner, and to each of the other parties to the cause for whom an appearance has been entered

47. A copy of every notice of the cause being set down for trial or hearing shall be filed in the registry, and the cause shall come on in its turn, unless the Judge ordinary shall otherwise direct.

**Trial or Hearing**

48. No cause shall be called on for trial or hearing until after the expiration of ten days from the day when the same has been set down for trial or hearing, and notice thereof has been given, save with the consent of all parties to the suit

49. The registrar shall enter in the Court-book the finding of the jury and the decree of the Court, and shall sign the same

50. Either of the respondents in the cause, after entering an appearance, without filing an answer to the petition in the principal cause, may be heard in respect of any question as to costs, and a respondent, who is husband or wife of the petitioner, may be heard also in respect to any question as to custody of children, but a respondent who may be so heard is not at liberty to bring in affidavits touching matters in issue in the principal cause, and no such affidavits can be read or made use of as evidence in the cause.

**Evidence taken by Affidavit**

51. When the Judge ordinary has directed that all or any of the facts set forth in the pleadings be proved by affidavits, such affidavits shall be filed in the registry within eight days from the time when such direction was given, unless the Judge ordinary shall otherwise direct

See also Rule 188.

52. Counter-affidavits as to any facts to be proved by affidavit may be filed within eight days from the filing of the affidavits which they are intended to answer

53. Copies of all such affidavits and counter-affidavits shall on the day the same are filed be delivered to the other parties to be heard on the trial or hearing of the cause, or to their proctors, solicitors, or attorneys.

54. Affidavits in reply to such counter-affidavits cannot be filed without permission of the Judge ordinary or of the registrars in his absence

55. Application for an order for the attendance of a deponent for the purpose of being cross-examined in open Court shall be made to the Judge ordinary, on summons.

#### **Proceedings by Petition**

56. Any party to a cause who has entered an appearance may apply on summons to the Judge ordinary, or in his absence to the registrars, to be heard on his petition touching any collateral question which may arise in a suit.

57. The party to whom leave has been given to be heard on his petition shall within eight days file his act on petition in the registry, and on the same day deliver a copy thereof to such parties in the cause as are required to answer thereto.

58. Each party to whom a copy of an act on petition is delivered shall within eight days after receiving the same file his or her answer thereto in the registry, and on the same day deliver a copy thereof to the opposite party, and the same course shall be pursued with respect to the reply, rejoinder, etc., until the act on petition is concluded.

59. A form of act on petition, answer, and conclusion is given in Appendix C, No. 9. (The forms are omitted.)

60. Each party to the act on petition shall within eight days from that on which the last statement in answer is filed, file in the registry such affidavit and other proofs as may be necessary in support of their several averments.

61. After the time for filing affidavits and proofs has expired, the party filing the act on petition is to set down the petition for hearing in the same manner as a cause, and in the event of his failing to do so within a month any party who has filed an answer thereto may set the same down for hearing, and the petition will be heard in its turn with other causes to be heard by the Judge ordinary without a jury.

#### **New Trial and Hearing.**

62. An application for a new trial of the issues of fact tried by a jury or for a rehearing of a cause shall be made to a Divisional Court of the Probate, Divorce, and Admiralty Division, and shall be by notice of motion filed in the registry, stating the grounds of the application, and whether all or part only of the verdict, or findings, or decree is complained of, and such notice of motion shall be filed and served upon the other parties in the cause, or their solicitors, within eight days after the trial or hearing, and the motion shall be made eight days after service of the notice of motion, if a Divisional Court shall be then sitting, or otherwise on the first day appointed for a sitting of the Divisional Court after the expiration of the eight days, and the time of the vacations shall not be reckoned in the computation of time for serving such notice of motion.

62-A. The notice of motion may be amended at any time by leave of the Court or a Judge on such terms as the Court or Judge may think fit.

#### **Divisional Court — Order LIX, Rule 4a, S. C. R**

Appeals from orders made under section 4 of the Matrimonial Causes Act, 1878, shall be heard by a Divisional Court of the Probate, Divorce, and Admiralty Division. Rules 7, 8, 10, 11, 12, and 16 of this order shall apply to such appeals, the words "Divorce Registry" being deemed to be substituted in Rule 11 for the words "Crown Office Department of the Central Office."

7. On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power to draw all inferences of fact which might have been drawn in the Court below, and to give any judgment and make any order which ought to have been made. No such motion shall succeed on the ground merely

of misdirection or improper reception or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned in the Court below.

8. On any motion by way of appeal from an inferior Court, the Court to which any such appeal may be brought shall have power, if the notes of the Judge of such inferior Court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such Judge which the Court may deem sufficient.

10. Every such appeal shall be by notice of motion, and no rule nisi or order to show cause shall be necessary. The notice of motion shall state the grounds of the appeal, and whether all or part only of the judgment, order, or finding is complained of. The notice of motion shall be an eight days' notice, and shall be served on every party directly affected by the appeal entered.

11. Every appeal shall be entered at the Crown Office Department of the Central Office, and the entry shall be made by lodging a copy of the notice.

12. The notice of motion shall be served and the appeal entered within twenty-one days from the date of the judgment, order, or finding complained of, such period shall be calculated from the time at which the judgment or order is signed, entered, or otherwise perfected, or from the time at which the finding or any refusal is made or given.

16. The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the Court shall think just, to ensure the determination on the merits of the real question in controversy between the parties.

#### **Petition for reversal of Decree of Judicial separation.**

63. A petition to the Court for the reversal of a decree of judicial separation must set out the grounds on which the petitioner relies.

64. Before such a petition can be filed, an appearance on behalf of the party praying for a reversal of the decree of judicial separation must be entered in the cause in which the decree has been pronounced.

65. A certified copy of such a petition, under seal of the Court, shall be delivered personally to the party in the cause in whose favour the decree has been made, who may within fourteen days file an answer thereto in the registry, and shall on the day on which the answer is filed deliver a copy thereof to the other party in the cause or to his or her proctor, solicitor, or attorney.

66. All subsequent pleadings and proceedings arising from such petition and answer shall be filed and carried on in the same manner as before directed in respect of an original petition for judicial separation, and answer thereto, so far as such directions are applicable.

#### **Demurrer.**

67. All demurrers are to be set down for hearing in the same manner as causes, and will come on in their turn with other causes to be heard by the Judge ordinary without a jury, unless the Judge ordinary shall direct otherwise.

#### **Intervention of the King's Proctor.**

68. The King's proctor, shall, within fourteen days after he has obtained leave to intervene in any cause, enter an appearance and plead to the petition, and on the day he files his plea in the registry shall deliver a copy thereof to the petitioner, or to his proctor, solicitor, or attorney.



69. All subsequent pleadings and proceedings in respect to the King's proctor's intervention in a cause shall be filed and carried on in the same manner as before directed in respect of the pleadings and proceedings of the original parties to the cause. See also Rule 202

### Showing cause against a Decree.

70. Any person wishing to show cause against making absolute a decree *nisi* for dissolution of a marriage shall enter an appearance in the cause in which such decree *nisi* has been pronounced

71. Every such person shall at the time of entering an appearance, or within four days thereafter, file affidavits setting forth the facts upon which he relies

72. Upon the same day on which such person files his affidavits he shall deliver a copy of the same to the party in the cause in whose favour the decree *nisi* has been pronounced

73. The party in the cause in whose favour the decree *nisi* has been pronounced may, within eight days after delivery of the affidavits, file affidavits in answer, and shall, upon the day such affidavits are filed, deliver a copy thereof to the person showing cause against the decree being made absolute

74. The person showing cause against the decree *nisi* being made absolute may within eight days file affidavits in reply, and shall upon the same day deliver copies thereof to the party supporting the decree *nisi*

75. No affidavits are to be filed in rejoinder to the affidavits in reply without permission of the Judge ordinary or of one of the registrars in his absence

76. The questions raised on such affidavits shall be argued in such manner and at such time as the Judge ordinary may on application by motion direct, and if he thinks fit to direct any controverted questions of fact to be tried by a jury, the same shall be settled and tried in the same manner and subject to the same rules as any other issue tried in this Court

Rules 50 to 76 not applicable to the King's proctor See Rule 202.

### Appeals to the full Court

77. An appeal to the full Court from a decision of the Judge ordinary must be asserted in writing and the instrument of appeal filed in the registry within the time allowed by law for appealing from such decision, and on the same day on which the appeal is filed, notice thereof, and a copy of the appeal shall be delivered to each respondent in the appeal, or to his or her proctor, solicitor, or attorney — A form of instrument of appeal is given in Appendix C, No. 11

78. The appellant within ten days after filing his instrument of appeal, or within such further time as may be allowed by the Judge ordinary, or by the registrars in his absence, shall file in the registry his case in support of the appeal in triplicate, and on the same day deliver a copy thereof to each respondent in the appeal, or to his proctor, solicitor, or attorney, who, within ten days from the time of such filing and delivery or from such further time as may be allowed for the purpose by the Judge ordinary, or the registrars in his absence, shall be at liberty to file in the registry a case against the appeal, also in triplicate, and the respondent shall on the same day deliver a copy thereof to the appellant or to his proctor, solicitor, or attorney

79. After the expiration of ten days from the time when the respondent has filed his case, or, if he has filed none, from the time allowed him for the purpose, the appeal shall stand for hearing at the next sittings of the full Court, and will be called on in its turn, unless otherwise directed

But see now S.J.A. 1881, c. 68, s. 9.

**Decree absolute.**

80. All applications to make absolute a decree nisi for dissolution of marriage must be made to the Court by motion. In support of such applications it must be shown by affidavit filed with the case for motion that search has been made in the proper books at the registry up to within two days of the affidavit being filed, and that at such time no person had obtained leave to intervene in the cause, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute, and in case leave to intervene had been obtained, or appearance entered, or affidavits filed on behalf of any such person, it must be shown by affidavit what proceedings if any, had been taken thereon, but it shall not be necessary to file a copy of the decree nisi.

See Rules 194 and 207.

**Alimony.**

81. The wife, being the petitioner in a cause, may file her petition for alimony pending suit at any time after the citation has been duly served on the husband, or after order made by the Judge ordinary to dispense with such service, provided the factum of marriage between the parties is established by affidavit previously filed.

82. The wife, being the respondent in a cause, after having entered an appearance, may also file her petition for alimony pending suit.

83. A form of petition for alimony is given in Appendix C, No. 13. (Forms are omitted.)

84. The husband shall, within eight days after the filing and delivery of a petition for alimony, file his answer thereto upon oath.

85. The husband, being respondent in the cause, must enter an appearance before he can file an answer to a petition for alimony.

86. The wife, if not satisfied with the husband's answer, may object to the same as insufficient, and apply to the Judge ordinary on motion to order him to give a further and fuller answer, or to order his attendance on the hearing of the petition for the purpose of being examined thereon.

See also Rule 149.

87. In case the answer of the husband alleges that the wife has property of her own, she may (within eight days) file a reply on oath to that allegation, but the husband is not at liberty to file a rejoinder to such reply without permission of the Judge ordinary, or of one of the registrars in his absence.

88. A copy of every petition for alimony, answer and reply, must be delivered to the opposite party, or to his or her proctor, solicitor, or attorney, on the day the same is filed.

89. After the husband has filed his answer to the petition for alimony (subject to any order as to costs), or, if no answer is filed, at the expiration of the time allowed for filing an answer, the wife may proceed to examine witnesses in support of her petition, and apply by motion for an allotment of alimony pending suit, notice of the motion, and of the intention to examine witnesses, being given to the husband, or to his proctor, solicitor, or attorney, four days previously to the motion being heard, and the witnesses examined, unless the Judge ordinary shall dispense with such notice.

See also Rules 191 and 192.

90. No affidavits can be read or made use of as evidence in support of or in opposition to the averments contained in a petition for alimony, or in an answer to such a petition, or in a reply, except such as may be required by the Judge ordinary or by one of the registrars.

91. A wife who has obtained a final decree of judicial separation in her favour, and has previously thereto filed her petition for alimony pending suit, on such decree being affirmed on appeal to the full Court, or after the expiration of the time for appealing against the decree, if no appeal be then pending, may apply to the Judge ordinary by motion for an allotment of permanent alimony, provided that she shall, eight days at least before making such application, give notice thereof to the husband, or to his proctor, solicitor, or attorney.

See also Rule 190.

92. A wife may at any time after alimony has been allotted to her, whether alimony pending suit or permanent alimony, file her petition for an increase of the alimony allotted by reason of the increased faculties of the husband, or the husband may file a petition for a diminution of the alimony allotted by reason of reduced faculties, and the course of proceeding in such cases shall be the same as required by these rules and regulations in respect of the original petition for alimony, and the allotment thereof, so far as the same are applicable.

93. Permanent alimony shall, unless otherwise ordered, commence and be computed from the date of the final decree of the Judge ordinary, or of the full Court, on appeal, as the case may be.

94. Alimony pending suit, and also permanent alimony, shall be paid to the wife, or to some person or persons to be nominated in writing by her, and approved of by the Court, as trustee or trustees on her behalf.

#### **Maintenance and Settlements.**

95. Applications to the Court to exercise the authority given by sections 32 and 45 of 20 and 21 Vict. c. 85, and by section 5 of 22 and 23 Vict. c. 61, are to be made in a separate petition, which must, unless by leave of the Judge, be filed as soon as by the said statutes such applications can be made, or within one month thereafter.

96. In cases of application for maintenance under section 32 of 20 and 21 Vict. c. 85, such petition, may be filed as soon as a decree nisi has been pronounced, but not before.

97. A certified copy of such petition, under seal of the Court, shall be personally served on the husband or wife (as the case may be), and on the person or persons who may have any legal or beneficial interest in the property in respect of which the application is made, unless the Judge ordinary on motion shall direct any other mode of service, or dispense with service of the same on them or either of them.

98. The husband or wife (as the case may be), and the other person or persons (if any) who are served with such petition, within fourteen days after service, may file his, her or their answer on oath to the said petition, and shall on the same day deliver a copy thereof to the opposite party, or to his proctor, solicitor, or attorney.

99. Any person served with the petition, not being a party to the principal cause, must enter an appearance before he or she can file an answer thereto.

100. Within fourteen days from the filing the answer, the opposite party may file a reply thereto, and the same period shall be allowed for filing any further pleading by way of rejoinder.

101. Such pleadings, when completed, shall in the first instance be referred to one of the registrars, who shall investigate the averments therein contained, in the presence of the parties, their proctors, solicitors, or attorneys, and who for that purpose shall be at liberty to require the production of any documents referred to in such pleadings, or to call for any affidavits, and shall report in writing to the Court the result of his investigation, and any special circumstances to be taken into consideration with reference to the prayer of the petition.

See also Rule 204.

102. The report of the registrar shall be filed in the registry by the husband or wife, on whose behalf the petition has been filed, who shall give notice thereof to the other parties heard by the registrar; and either of the parties, within fourteen days after such notice has been given, if the Judge ordinary be then sitting to hear motions, otherwise on the first day appointed for motions after the expiration of fourteen days, may be heard by the Judge ordinary on motion in objection to the registrar's report, or may apply on motion for a decree or order to confirm the same, and to carry out the prayer of the petition.

103. The costs of a wife of and arising from the said petition or answer shall not be allowed on taxation of costs against the husband before the final decree in the principal cause, without direction of the Judge ordinary.

#### **Custody of and Access to Children.**

104. Before the trial or hearing of a cause a husband or wife who are parties to it may apply for an order with respect to the custody, maintenance, or education of or for access to children, issue of their marriage, to the Judge ordinary, by motion founded on affidavit.

See also Rules 195, 212.

#### **Guardians to Minors.**

105. A minor above the age of seven years may elect any one or more of his or her next of kin, or next friends, as guardian, for the purpose of proceeding on his or her behalf as petitioner, respondent, or intervenor in a cause—The form of an instrument of election is given in Appendix C, No. 11.

106. The necessary instrument of election must be filed in the registry before the guardian elected can be permitted to extract a citation or to enter an appearance on behalf of the minor.

107. When a minor shall elect some person or persons other than his or her next of kin, as guardian for the purposes of a suit or when an infant (under the age of seven years) becomes a party to a suit, application, founded on affidavit, is to be made to one of the registrars, who will assign a guardian to the minor or infant for such suit.

108. It shall not be necessary for a minor who, as an alleged adulterer, is made a co-respondent in a suit, to elect a guardian or to have a guardian assigned to him for the purpose of conducting his defence.

#### **Subpœnas**

109. Every *subpœna* shall be written or printed on parchment, and may include the names of any number of witnesses. The party issuing the same, or his or her proctor, solicitor, or attorney, shall take it, together with a *procure* to the registry, and there get it signed and sealed, and there deposit the principle.

See also Rule 180.

#### **Writs of Attachment and other Writs**

110. Applications for writs of attachment, and also for writs of *fiere facias* and of sequestration, must be made to the Judge ordinary by motion in Court.

See also Rules 179 and 203

111. Such writs, when ordered to issue, are to be prepared by the party at whose instance the order has been obtained, and taken to the registry, with an office copy of the order, and, when approved, and signed by one of the registrars, shall be sealed with the seal of the court, and it shall not be necessary for the Judge ordinary or for other Judges of the Court to sign such writs.

112. Any person in custody under a writ of attachment may apply for his or her discharge to the Judge ordinary if the Court be then sitting, if not, then to one of the registrars, who, for good cause shown, shall have power to order such discharge.

●  
**Notices.**

113. All notices required by these rules and regulations, or by the practice of the Court, shall be in writing, and signed by the party, or by his or her proctor, solicitor, or attorney.

**Service of Notices, Etc**

114. It shall be sufficient to leave all notices and copies of pleadings and other instruments which by these rules and regulations are required to be given or delivered to the opposite parties in the cause, or to their proctors, solicitors, or attorneys, and personal service of which is not expressly required at the address furnished as aforesaid by the petitioner and respondent respectively.

See also Rule 39.

115. When it is necessary to give notice of any motion to be made to the Court, such notice shall be served on the opposite parties who have entered an appearance four clear days previously to the hearing of such motion, and a copy of the notice so served shall be filed in the registry with the case for motion, but no proof of the service of the notice will be required, unless by direction of the Judge ordinary.

116. If an order be obtained on motion without due notice to the opposite parties, such order will be rescinded on the application of the parties upon whom the notice should have been served, and the expense of and arising from the rescinding of such order shall fall on the party who obtained it, unless the Judge ordinary shall otherwise direct.

117. When it is necessary to serve personally any order or decree of the Court, the original order or decree or an office copy thereof, under seal of the Court, must be produced to the party served, and annexed to the affidavit of service marked as an exhibit by the commissioner or other person before whom the affidavit is sworn.

**Office Copies, Extracts, Etc**

118. The registrars of the principal registry of the Court of Probate are to have the custody of all pleadings and other documents now or hereafter to be brought in or filed, and of all entries of orders and decrees made in any matter or suit depending in the Court for Divorce and Matrimonial causes, and all rules and orders, and fees payable in respect of searches for and inspection of copies of and extracts from and attendance with books and documents in the registry of the Court of Probate, shall extend to such pleadings and other documents brought in or filed, and all entries of orders and decrees made in the Court for Divorce and Matrimonial causes, save that the length of copies and extracts shall in all cases be computed at the rate of 72 words per folio.

119. Office copies or extracts furnished from the registry of the Court of Probate will not be collated with the originals from which the same are copied, unless specially required. Every copy so required to be examined shall be certified under the hand of one of the principal registrars of the Court of Probate to be an examined copy.

120. The seal of the Court will not be affixed to any copy which is not certified to be an examined copy.

**Time fixed by these Rules.**

121. The Judge ordinary shall in every case in which a time is fixed by these rules and regulations for the performance of any act, or for any proceeding in default, have power to extend the same to such time and with such qualifications and restrictions and on such terms as to him may seem fit.

122. To prevent the time limited for the performance of any act, or for any proceeding in default, from expiring before application can be made to the Judge ordinary for an extension thereof, any one of the registrars may, upon reasonable cause being shown, extend the time, provided that such time shall in no case be extended beyond the day upon which the Judge ordinary shall next sit in chambers.

See also Rules 181 to 184

123. The time fixed by these rules and regulations for the performance of any act, or for any proceeding in a cause, shall in all cases be exclusive of Sundays, Christmas Day, and Good Friday.

#### Protection orders

124 Applications on the part of a wife deserted by her husband for an order to protect her earnings and property, acquired since the commencement of such desertion, shall be made in writing to the Judge ordinary in chambers, and supported by affidavit.

See also Rule 197

125. Applications for the discharge of any order made to protect the earnings and property of a wife are to be made to the Judge ordinary by motion, and supported by affidavit. Notice of such motion, and copies of any affidavit or other document to be read or used in support thereof, must be personally served on the wife eight clear days before the motion is heard.

#### Bond not required

On a decree of judicial separation being pronounced, it shall not be necessary for either party to enter into a bond conditioned against marrying again.

#### Change of Proctor, Solicitor, or Attorney.

127 & 128. Any party to a cause shall be at liberty to change his or her solicitor without an order for that purpose upon notice of such change, containing an address for service of pleadings and other instruments within three miles of the General Post Office being filed in the registry, but until such notice is filed and a copy thereof served on the other parties in the cause the former solicitor shall be considered the solicitor of the party.

See also Rules 181 to 184

#### Order for the immediate Examination of a Witness Rules 7 and 8, R S C , October 1884

7. In determining the place and time at which an examination shall be taken, the examiner shall have regard to the convenience of the witnesses or persons to be examined and all the circumstances of the case, and he shall proceed with such examination at the place and time appointed, and subject to such adjournments as he shall think necessary or just continue the same *de die in diem*.

8 Upon the completion of an examination taken before an examiner of the Court, he shall endorse the original depositions with a note, authenticated by his signature, certifying the number of hours or days (as the case may be) exclusively employed thereupon, and the fees received in respect thereof.

•129 Application for an order for the immediate examination of a witness who is within the jurisdiction of the Court is to be made to the Judge ordinary, or to the registrars in his absence, by summons, or, if on behalf of a petitioner proceeding in default of appearance of the parties cited in the cause, without summons before one of the registrars, who will direct the order to issue, or refer the application to the Judge ordinary as he may think fit.

See also Rules 181 to 184.

130. Such witness shall be examined *viva voce*, unless otherwise directed, before a person to be agreed upon by the parties in the cause, or to be nominated by the Judge ordinary or by the registrars to whom the application for the order is made.

131. The parties entitled to cross-examine the witness to be examined under such an order shall have four clear days' notice of the time and place appointed for the examination, unless the Judge ordinary or the registrars to whom the application is made for the order shall direct a shorter notice to be given.

#### **Commissions and Requisitions for the Examination of Witnesses.**

132. Application for a commission or requisition to examine witnesses who are out of the jurisdiction of the Court is to be made by summons, or if on behalf of a petitioner proceeding in default of appearance without summons, before one of the registrars, who will order such commission or requisition to issue, or refer the application to the judge ordinary, as he may think fit.

133. A commission or requisition for examination of witnesses may be addressed to any person to be nominated and agreed upon by the parties in the cause, and approved of by the registrar, or for want of agreement to be nominated by the registrar to whom the application is made.

134. The commission or requisition is to be drawn up and prepared by the party applying for the same, and a copy thereof shall be delivered to the parties entitled to cross-examine the witnesses to be examined thereunder two clear days before such commission or requisition shall issue, under seal of the Court and they or either of them may apply to one of the registrars by summons to alter or amend the commission or requisition, or to insert any special provision therein, and the registrar shall make an order on such application, or refer the matter to the Judge ordinary.

135. Any of the parties to the cause may apply to one of the registrars by summons for leave to join in a commission or requisition, and to examine witnesses thereunder; and the registrar to whom the application is made may direct the necessary alterations to be made in the commission or requisition for that purpose, and settle the same, or refer the application to the Judge ordinary.

136. After the issuing of a summons to show cause why a party to the cause should not have leave to join in a commission or requisition, such commission or requisition shall not issue under seal without the direction of one of the registrars.

137. In case a husband or wife shall apply for and obtain an order or a commission or requisition for the examination of witnesses, the wife shall be at liberty, without any special order for that purpose, to apply by summons to one of the registrars to ascertain and report to the Court what is a sufficient sum of money to be paid or secured to the wife to cover her expenses in attending at the examination of such witnesses in pursuance of such order, or in virtue of such commission or requisition, and such sum of money shall be paid or secured before such order or such commission or requisition shall issue from the registry, unless the Judge ordinary or one of the registrars in his absence shall otherwise direct.

See also Rule 198.

#### **Affidavits.**

138. Every affidavit is to be drawn in the first person, and the addition and true place of abode of every deponent is to be inserted therein.

139. In every affidavit made by two or more deponents the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents is taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the above-named deponents.

140. No affidavit having, in the jurat or body thereof, any interlineation, alteration, or erasure shall, without leave of the Court or of one of the registrars, be filed or made use of in any matrimonial cause or matter unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure unless the words or figures appearing at the time of taking the affidavit, to be written on the erasure are rewritten and signed or initialed in the margin of the affidavit by the officer taking it.

141. Where an affidavit is made by any person who is blind, or who, from his or her signature or otherwise, appears to be illiterate, the registrar, commissioner, or other authority before whom such affidavit is made is to state in the jurat that the affidavit was read in the presence of the party making the same, and that such party seemed perfectly to understand the same, and also made his or her mark, or wrote his or her signature thereto, in the presence of the registrar, commissioner, or other authority before whom the affidavit was made.

142. No affidavit is to be deemed sufficient which has been sworn before the party on whose behalf the same is offered, or before his or her proctor, solicitor, or attorney, or before a partner or clerk of his or her proctor, solicitor, or attorney.

143. Proctors, solicitors, and attorneys, and their clerks respectively, if acting for any other proctor, solicitor, or attorney, shall be subject to the rules and regulations in respect of taking affidavits which are applicable to those in whose stead they are acting.

144. No affidavit can be read or used unless the proper stamps to denote the fees payable on filing the same are delivered with such affidavit.

145. Where a special time is fixed for filing affidavits, no affidavit filed after that time shall be used unless by leave of the Judge ordinary.

146. The above rules and regulations in respect to affidavits shall, as far as the same are applicable, be observed in respect to affirmations and declarations to be read or used in the Court for Divorce and Matrimonial causes.

### Cases for Motion

147. Cases for motion are to set forth the style and object of, and the names and descriptions of the parties to, the cause or proceeding before the Court, the proceedings already had in the cause, and the date of the same, the prayer of the party on whose behalf the motion is made, and briefly, the circumstances on which it is founded.

148. If the cases tendered are deficient in any of the above particulars, the same shall not be received in the registry without permission of one of the registrars.

149. On depositing the case in the registry, and giving notice of the motion, the affidavits in support of the motion and all original documents referred to in such affidavits, or to be referred to by counsel on the hearing of the motion must be also left in the registry, or in case such affidavits or documents have been already filed or deposited in the registry, the same must be searched for, looked up, and deposited with the proper clerk, in order to their being sent with the case to the Judge ordinary.

150. Copies of any affidavit or documents to be read or used in support of a motion are to be delivered to the opposite parties to the suit who are entitled to be heard in opposition thereto.



**Taxing Bills of Costs.**

151. All bills of costs are referred to the registrars of the principal registry of the Court of Probate for taxation, and may be taxed by them, without any special order for that purpose. Such bills are to be filed in the registry.

See also Rule 177.

152. Notice of the time appointed for taxation will be forwarded to the party filing the bill, at the address furnished by such party.

153. The party who has obtained an appointment to tax a bill of costs shall give the other party or parties to be heard on the taxation thereof at least one clear day's notice of such appointment, and shall at or before the same time deliver to him or them a copy of the bill to be taxed.

154. When an appointment has been made by a registrar of the Court of Probate for taxing any bill of costs, and any parties to be heard on the taxation do not attend at the time appointed, the registrar may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit that the parties not in attendance had due notice of the time appointed.

155. The bill of costs of any proctor, solicitor, or attorney will be taxed on his application as against his client, after sufficient notice given to the person or persons liable for the payment thereof, or on the application of such person or persons, after sufficient notice given to the practitioner.

156. The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill, but if more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on the taxation thereof, no costs incurred in such taxation shall be allowed as part of such bill.

See also Rule 200.

157. If an order for payment of costs is required, the same may be obtained by summons, on the amount of such costs being certified by the registrar.

See also Rules 178, 179 and 201.

**Wife's Costs—As amended 14th July, 1875.**

158. After directions given as to the mode of hearing or trial of a cause, or in an earlier stage of a cause by order of the Judge ordinary, or of the registrars, to be obtained on summons, a wife who is petitioner, or has entered an appearance as respondent in a cause, may file her bill or bills of costs for taxation as against her husband, and the registrar to whom such bills of costs are referred for taxation shall, when directions as to the mode of hearing or trial have been given, ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband to cover the costs of the wife of and incidental to the hearing of the cause, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the registrar, provided that in case the husband should, by reason of his wife having separate property, or for other reasons, dispute her right to recover any costs pending suit against him, the registrar may suspend the order to pay the wife's taxed costs, or to pay or secure the sum ascertained to be sufficient to cover her costs of and incidental to the hearing of the cause, for such length of time as shall seem to him necessary to enable the husband to obtain the decision of the Court as to his liability.

159. When on the hearing or trial of a cause the decision of the Judge ordinary or the verdict of the jury is against the wife, no costs of the wife of and incidental to such

hearing or trial shall be allowed as against the husband, except such as shall be applied for, and ordered to be allowed by the Judge ordinary, at the time of such hearing or trial.

See also Rule 201

### Summonses.

160. A summons may be taken out by any person in any matter or suit depending in the Court for Divorce and Matrimonial Causes, provided there is no rule or practice requiring a different mode of proceeding.

161. The name of the cause or matter, and of the agent taking out the summons, is to be entered in the summons book, and a true copy of the summons is to be served on the party summoned one clear day at least before the summons is returnable, and before 7 o'clock p m. On Saturdays the copy of the summons is to be served before 2 o'clock p m.

162. On the day and at the hour named in the summons the party taking out the same is to present himself with the original summons at the Judge's chambers, or elsewhere appointed for hearing the same.

163. Both parties will be heard by the Judge ordinary, who will make such order as he may think fit, and a minute of such order will be made by one of the registrars in the summons book.

See also Rules 181 to 184

164. If the party summoned do not appear after the lapse of half an hour from the time named in the summons, the party taking out the summons shall be at liberty to go before the Judge ordinary, who will thereupon make such order as he may think fit.

165. An attendance on behalf of the party summoned for the space of half an hour, if the party taking out the summons do not during such time appear, will be deemed sufficient, and bar the party taking out the summons from the right to go before the Judge ordinary on that occasion.

166. If a formal order is desired, the same may be had on the application of either party, and for that purpose the original summons, or the copy served on the party summoned, must be filed in the registry. An order will thereupon be drawn up, and delivered to the person filing such summons or copy.

167. If a summons is brought to the registry, with consent to an order endorsed thereon, signed by the party summoned or by his proctor, solicitor, or attorney, an order will be drawn up without the necessity of going before the Judge ordinary, provided that the order sought is in the opinion of the registrar one which, under the circumstances, would be made by the Judge ordinary.

168. The same rules and regulations shall, so far as applicable, be observed in respect to summonses which may be heard and disposed of by the registrars.

### Payment of Money out of Court

169. Persons applying for payment of money out of Court are to bring into the registry a notice in writing setting forth the day on which the money applied for was paid into the registry, the minute entered in the Court books on receiving the same, the date and particulars of the order for payment to the applicant. In case the money applied for be in payment of costs, the notice must also set forth the date of filing the bill for taxation, and of the registrar's certificate.

170. The above notice must be deposited in the registry two clear days at least before the money is paid out, and is, in that interval, to be examined by one of the clerks of the registry with the original entries in the Court books, and the bills of costs referred to in it, and certified by such clerk to be correct.

**Registries and Officers.**

172. The registry of the Court for Divorce and Matrimonial Causes, and the clerks employed therein, shall be subject to and under the control of the registrars of the principal registry of the Court of Probate.

173. The record keepers, the sealer, and other officers of the principal registry of the Court of Probate, shall discharge the same or similar duties in the Court for Divorce and Matrimonial Causes, and in the registry thereof, as they discharge in the Court of Probate and the principal registry thereof.

**Proceedings under "The Legitimacy Declaration Act, 1858."**

174. The above rules and regulations, so far as the same may be applicable, shall extend to applications and proceedings under "The Legitimacy Declaration Act, 1858."

**Additional Rules—30th January, 1869. Restitution of Conjugal Rights**

175. The affidavit filed with the petition, as required by Rule 2, shall further state sufficient facts to satisfy one of the registrars that a written demand for cohabitation and restitution of conjugal rights has been made by the petitioner upon the party to be cited, and, that after a reasonable opportunity for compliance therewith such cohabitation and restitution of conjugal rights have been withheld.

176. At any time after the commencement of proceedings for restitution of conjugal rights the respondent may apply by summons to the Judge, or to the registrar in his absence, for an order to stay the proceedings in the cause by reason that he or she is willing to resume or to return to cohabitation with the petitioner.

**As to Costs.**

177. In all cases in which the Court at the hearing of a cause condemns any party to the suit in costs, the proctor, solicitor, or attorney, of the party to whom such costs are to be paid may forthwith file his bill of costs in the registry, and obtain an appointment for the taxation, provided that such taxation shall not take place before the time allowed for moving for a new trial or rehearing shall have expired, or, in case a rule nisi should have been granted, until the rule is disposed of, unless the Judge ordinary shall, for cause shown, direct a more speedy taxation.

178. Upon the registrar's certificate of costs being signed, he shall at once issue an order of the Court for payment of the amount within seven days.

See also Rules from 151 to 158, and 201.

179. This order shall be served on the proctor, solicitor, or attorney of the party liable, or if it is desired to enforce the order by attachment on the party himself, and if the costs be not paid within the seven days a writ of *fiery facias* or writ of sequestration shall be issued as of course in the registry, upon an affidavit of service of the order and non-payment.

See also Rules 110, 111 and 203.

**As to Subpœnas.**

180. The issuing of fresh subpœnas in each term shall be abolished, and it shall not be necessary to serve more than one subpœna upon any witness.

**Additional and Amended Rules—23rd Feb., 1875.**

181. All summonses heretofore heard by the registrars of the principal registry of the Court of Probate in the absence of the Judge ordinary shall hereafter be heard before one or more of the registrars at the principal registry of that Court during the period appointed for the sittings of the Court at Westminster, as well as in the Judge's absence.

182. All rules and regulations in respect to summonses now heard before the Judge ordinary in chambers at Westminster shall, so far as the same are applicable, be observed in respect of the summonses heard before one or more of the registrars at the principal registry.

See Rules from 160 to 168.

183. The registrar before whom the summons is heard will direct such order to issue as he shall think fit, or refer the matter at once to the Judge ordinary.

184. Any person heard on the summons objecting to the order so issued under the direction of the registrars may, subject to any order as to costs, apply to the Judge ordinary on summons to rescind or vary the same.

#### Additional Rules—14th July, 1875. Appearance

185. Application for leave to enter an appearance after a proceeding has been taken in default heretofore made to the Judge ordinary on motion in pursuance of Rule 20 shall hereafter be made by summons before one of the registrars.

See also Rule 20.

#### Answer

186. In case the time allowed for entry of appearance to a citation should be more than eight days after service thereof, a respondent who has entered an appearance may, within 14 days from the expiration of the time allowed for the entry of appearance, file in the registry an answer to the petition.

See also Rule 28.

#### General Rule as to Pleadings.

187. Either of the parties before the Court desiring to alter or amend a pleading may apply by summons to one of the registrars for an order for that purpose.

See also Rule 34.

#### Evidence taken by Affidavit

188. In an undefended cause when directions have been given that all or any of the facts set forth in the petition be proved by affidavits, such affidavits may be filed in the registry at any time up to 10 clear days before the cause is heard.

See also Rule 51.

#### Alimony.

189. Application for an order for a further and fuller answer to a petition for alimony, heretofore made to the Judge ordinary on motion in pursuance of Rule 86, shall hereafter be made by summons before one of the registrars.

See Rule 86.

190. A wife who has obtained a final decree of judicial separation, on such decree being affirmed on appeal, or after the expiration of the time for appealing against the decree if no appeal be then pending, may apply to the Court by petition for an allotment of permanent alimony though no alimony shall have been allotted to her pending suit, and the rules from 84 to 88, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, relating to petitions for alimony pending suit as varied by these and other additional rules and regulations shall, so far as the same are applicable, be observed in respect to the proceedings upon such petitions for permanent alimony.

See also Rules 84 to 88 and 91 and 92.

191. All applications for an allotment of alimony pending suit, and for an allotment of permanent alimony heretofore made to the Court by motion in pursuance of Rules 89 and 91, shall hereafter be referred to one of the registrars at the principal registry, who shall investigate the averments in the petition for alimony, answer,

and reply, in the presence of the parties, their proctor, solicitors, or attorneys, and who, if he think fit, shall be at liberty to require the attendance of the husband for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses, and to require the production of any documents or to call for affidavits, and shall direct such order to issue as he shall think fit or refer the application, or any question arising out of it, to the Judge ordinary for his decision.

See Rules 89 and 91.

192. Any person heard on the reference as to alimony before one of the registrars, objecting to the order issued under his direction, may (subject to any order as to costs), apply to the Judge ordinary on summons to rescind or vary the same.

### **Dismissal of Petition.**

193. When an order has been made for the dismissal of a petition on payment of costs, the cause will not be removed from the list of causes in the Court books without an order of one of the registrars, to obtain which it must be shown to his satisfaction the costs have been paid.

### **Decree Absolute**

194. In case application by motion to make absolute a decree nisi for the dissolution of a marriage should from any cause be deferred beyond six days from the time when the affidavit required by Rule 80 is filed with the case for motion it must be shown by further affidavit that search has been made in the proper books up to within six clear days of the motion for decree absolute being heard, and that at such time no person had obtained leave to intervene, and that no appearance had been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree nisi being made absolute, and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of any such person, it must also be shown by such further affidavit what proceedings, if any, have been taken thereon.

See also Rules 80 and 207.

### **Custody, Maintenance, and Education of Children**

195. Rules from 97 to 102, both inclusive, of the rules and regulations for this Court, bearing date 26th December, 1865, shall, so far as the same are applicable, be observed in respect to application by petition, after a final decree in a cause for orders and provision with respect to the custody, maintenance, and education of children, the marriage of whose parents was the subject of the decree under the authority given to the Court by 22 and 23 Vict., cap. 61, S. 4.

### **Persons of Unsound Mind**

196. A committee duly appointed of a person found by inquisition to be of unsound mind may take out a citation and prosecute a suit on behalf of such person as a petitioner, or enter an appearance, intervene, or proceed with the defence on behalf of such person as a respondent, but if no committee should have been adopted, application is to be made to one of the registrars, who will assign a guardian to the person of unsound mind, for the purpose of prosecuting, intervening in, or defending the suit on his or her behalf, provided that if the opposite party is already before the Court when the application for the assignment of a guardian is made he or she shall be served with notice by summons of such application.

### **Protection Orders.**

197. In the affidavit in support of an application on the part of a wife deserted by her husband for an order to protect her earnings and property acquired since the

commencement of such desertion, the applicant must state whether she has any knowledge of the residence of her husband, and if he is known to be residing within the jurisdiction of the Court, he must be served personally with a summons to show cause why such order should not be made.

See also Rule 124.

#### **Commission and Requisition for Examination of Witnesses**

198. The registrar to whom a commission or requisition for examination of witnesses is referred for settlement, on application on behalf of the wife, may proceed at once and without summons to ascertain what is a sufficient sum of money to be paid or secured to her to cover her expenses in attending at the examination of such witnesses, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed in such order.

See also Rule 137

#### **Costs**

199. The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry of a Court of Probate, and shall not be delivered out or be sued upon without the order of the Court.

200. If more than one-sixth of the amount of any bill of costs taxed as between practitioner and client is disallowed on taxation thereof, the party on whose application the bill is taxed shall be at liberty to deduct the costs incurred by him in the taxation from the amount of the bill as taxed, if so much remains due, otherwise the same shall be paid by the practitioner to the person on whose application the bill is taxed.

See also Rule 156

201. The order for payment of costs of suit in which a respondent or co-respondent had been condemned by a decree nisi shall, if applied for before the decree nisi is made absolute, direct the payment thereof into the registry of the Court of Probate, and such costs shall not be paid out of the said registry to the party entitled to receive them under the decree nisi until the decree absolute has been obtained, but a wife who is unsuccessful in a cause, and who at the hearing of the cause has, in pursuance of Rule 159, obtained an order of the Judge ordinary that her costs of and incidental to the hearing or trial of the cause shall be allowed against her husband to the extent of the sum paid or secured by him to cover such costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

See also Rules 157, 178, and 179

#### **Additional Rules—17th April, 1877. Showing Cause against a Decree 'Nisi'**

202. When the Queen's Proctor desires to show cause against making absolute a decree nisi for dissolution or nullity of marriage, he shall enter an appearance in the cause in which such decree nisi has been pronounced, and shall within fourteen days after entering appearance file his plea in the registry, setting forth the grounds upon which he desires to show cause as aforesaid, and on the day he files his plea in the registry, shall deliver a copy thereof to the person in whose favour such decree has been pronounced, or to his or her solicitor, and all subsequent pleadings and proceedings in respect to such plea shall be filed and carried on in the same manner as directed by the existing Rules and Regulations Nos 62 and 69, in regard to the plea of the Queen's Proctor, filed after obtaining leave to intervene in a cause, and the existing Rules and Regulations from No 70 to No 76, both inclusive, shall no longer be applicable to the Queen's Proctor on his showing cause as aforesaid, save as far as regards any proceedings already commenced in pursuance of the said rules and regulations.

See Rules 63 and 69.

**Writs of ' Fieri Facias ' and other Writs.**

203. In default of payment of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *fieri facias*, or writ of sequestration, or writ of *elegit* shall be issued as of course in the registry upon an affidavit of service of the order and non-payment.

See also Rules 110, 111, and 179.

**Maintenance and Settlements.**

204. The registrar to whom pleadings are referred for investigation under Rule 101, shall if he thinks fit, be at liberty to require the attendance of the husband or wife for the purpose of being examined or cross-examined, and to take the oral evidence of witnesses in the same manner as on a reference for an allotment of alimony.

**Additional and Amended Rules—July, 1880. Mode of Hearing or Trial.**

205. It shall not be necessary in any case to apply to the Court by motion for directions as to the mode of hearing or trial of a cause. When the pleadings are concluded, the parties to a cause may proceed in all respects as though upon the day of filing the last pleading a special direction had been given by the Court as to the mode of hearing or trial to the effect following

1st In cases in which damages are not claimed that the cause be heard by oral evidence before the Court itself, without a jury

2nd. In cases in which damages are claimed that the cause be tried before the Court with a common jury

And any party to a cause may apply by summons for a direction that the cause may be heard or tried otherwise than is hereby provided.

See Rules 40 and 45.

206. Before a cause is set down for hearing or trial the pleadings and proceedings in the cause shall be referred to one of the registrars, who shall certify that the same are correct and in order, and the registrar to whom the same are referred shall cause any irregularity in such pleadings or proceedings to be corrected or refer any question arising therefrom to the court for its direction, any party to the cause objecting to such direction of the registrar may (subject to any order as to costs) apply to the court on summons to rescind or vary the same

**Decree absolute.**

207. Application to make absolute a decree nisi for dissolution or nullity of a marriage need not hereafter be made to the Court by motion as directed by Rules 80 and 194, but it shall be sufficient compliance with the said rules to file in the registry, with the affidavit or affidavits therein required a notice in writing setting forth that application is made for such decree absolute, which will thereupon be pronounced in open court at a time appointed for that purpose

See Rules 80 and 194

**Suits in Forma Pauperis**

208. Applications for leave to prosecute or defend a suit *in forma pauperis* may hereafter be made to one of the registrars, who will make such order thereon as he may see fit or refer the application to the court.

209 The affidavit required by Rule 26, if application is made by a wife to prosecute a suit against her husband *in forma pauperis*, shall state to the best of her knowledge and belief the amount of income or means of living of her husband.

See also Rules 25 and 26.

210. When a husband has been admitted to prosecute a suit against his wife *in forma pauperis*, the wife may apply for an order that she be at liberty to proceed with her defence *in forma pauperis* on production of an affidavit that she has no separate property exceeding £ 25 in value after payment of her just debts.

211. When a wife has been permitted to prosecute a suit against her husband *in forma pauperis*, the husband may apply for leave to proceed with his defence *in forma pauperis* on production of an affidavit as to his income or means of living, and showing that besides his wearing apparel he is not worth £ 25 after payment of his just debts.

#### Access to Children

212. Application on behalf of a husband or wife, parties to a cause, for access to the children of their marriage may hereafter be made by summons before one of the registrars, who shall direct such order to issue as he thinks fit, subject to appeal to the court by either party dissatisfied with the order as authorised by Rule 184.

See also Rules 104 and 184.

#### The Greek Marriages Act, 1884.

213. In pursuance of the provisions of the Act of Parliament, 47 and 48 Vict. c. 20, S. 1, whereby it was enacted that any petition to the Probate and Matrimonial Division of Her Majesty's High Court of Justice under the said Act should be accompanied by such affidavit verifying the same as the said Court might from time to time direct

Now I, the Right Honourable Sir James Hannen, Knight, the President of the said Division, do hereby direct that the affidavit verifying a petition under the said Act shall be in the form and to the effect required by Rule 2 of the Rules and Regulations for Her Majesty's Court for Divorce and Matrimonial Causes, bearing date 26th December, 1865.

#### Additional Rules and Regulations—4th August, 1885

##### Maintenance and Settlements

214. All applications to the court to exercise the authority given by Ss. 2, 3, and 6 of the Matrimonial Causes Act, 1884 (47 and 48 Vict. c. 68), are to be made in a petition, which may be filed as soon as by the said statute such applications can be made, or at any time thereafter.

215. Rules 97 to 102, both inclusive, of the Rules and Regulations for this Court, bearing date 26th December, 1865, and Rule 195 of the additional Rules, bearing date 11th July 1875, and Rule 204 of the additional Rules, bearing date 17th April, 1877, shall, so far as the same are applicable, be observed in respect to applications by petition to exercise the authority given by Ss. 2, 3, and 6 of the Matrimonial Causes Act, 1884.

#### Additional Rules and Regulations—18th December, 1885.

216. In divorce and matrimonial causes solicitors shall be entitled to charge, and be allowed the fees set forth in the column headed "Lower Scale" in Appendix N, annexed to the Rules of the Supreme Court, 1883, so far as the same are applicable to such causes.

217. The fees set forth in the column headed "Higher Scale" in the said Appendix N, so far as the same are applicable may be allowed either generally in any divorce or matrimonial cause, or as to the costs of any particular application made or business done therein if on special grounds arising out of the nature or importance or the difficulty or urgency of the case, the court or a judge, shall at the trial or hearing of any application therein, whether the cause shall or shall not be brought to trial or hearing or to further consideration (as the case may be), so order, or if the taxing registrar, under directions given to him for that purpose by the court or a judge, should think that such allowance ought to be so made upon such special grounds as aforesaid.



218. Upon any reference to the taxing registrar to tax a bill of costs of a solicitor for the purpose of ascertaining the amount due to such solicitor in respect thereof, if such bill shall include charges for business done in any divorce or matrimonial cause, the taxing registrar may allow the fees set forth in the column "Higher Scale" in the said Appendix N, so far as the same are applicable in respect of such cause, or in respect of any particular application made or business done thereon, if, on such special grounds as in the last proceeding rule mentioned, he shall think that such allowance ought to be so made.

**Previous Proceedings—August 20th, 1904**

219. In all proceedings before the Court for Divorce and Matrimonial Causes the petition shall state whether or not there have been any, and, if so, what proceedings previous thereto, with reference to the marriage in the Divorce Division of the High Court by or on behalf of either of the parties to the marriage.

**Description and Domicile—July 8th, 1905.**

220. In all proceedings before the Court (Divorce) the petition shall state the description of the husband and the place of residence and the domicile of the parties to the marriage at the time of the institution of the suit.

## APPENDIX III.

**N B.**—The following Acts of the Indian Legislature though no longer Law have been given below, as they show the previous stages of the corresponding modern enactments, and also as many persons living at present were married under these old and repealed enactments.

### MARRIAGE (BY REGISTRARS) ACT, 1852. (ACT V OF 1852).

*[Passed on the 16th January, 1852]*

This Act is repealed by Act XV of 1872.

Whereas by an Act passed in the Session of Parliament holden in the Fourteenth and Fifteenth years of the reign of Her present Majesty entitled, "An Act for Marriages in India," it was enacted (among other things) that it should be lawful for the Governor-General of India in Council, from time to time, by Laws and Regulations not inconsistent with the provisions of the said Act of Parliament, to be made in the manner, and subject to the provisions by law required in respect of Laws and Regulations made by the said Governor-General of India, in Council, to provide for the inspection and publication of Notices of Marriage given under the said Act of Parliament, for the Custody and protection from Injury of Marriage Register Books, for appeals from and references in case of doubt by Marriage Registrars, in relation to Marriages forbidden or Protests entered under the said Act of Parliament, for fixing the hours between which Marriages might be solemnized under the said Act of Parliament, for appointing the Officers to whom Certificates were to be transmitted by the Marriage Registrars, and generally for giving effect to the provisions of the said Act of Parliament, it is hereby enacted as follows.

I. In every case of Marriage intended to be solemnized in India, after the First day of February next, under the provisions of the said Act of Parliament one of the parties shall give notice in writing, in the form of Schedule (A) to this Act annexed, or to the like effect, to any Marriage Registrar of the District within which the parties shall have dwelt for not less than five days, the next preceding, or, if the parties dwell in different Districts, shall give the like Notice to a Marriage Registrar of each District, and shall state therein the name, and surname, and the profession or condition of each of the parties intending marriage the dwelling place of each of them, and the time, not being less than five days, during which each has dwelt therein and the Church, Chapel, or other building in which the marriage is to be solemnized, provided that if either party shall have dwelt in the place stated in the Notice during more than one Calendar month, it may be stated therein that he or she hath dwelt there one month and upwards.

II. The Marriage Registrar shall file all such Notices, and keep them with the Records of his Office and shall also forthwith enter a true copy of all such Notices fairly into a book to be for that purpose furnished to him by the Government, to be called the "Marriage Notice Book," and the marriage notice book shall be open, at all reasonable times, without fee, to all persons desirous of inspecting the same.

### III The Marriage Registrars, or Registrar of all Districts in the British Territories in India, shall respectively publish all such Notices of marriage,

Publication of Notices. given in their respective Districts by causing a copy of such Notices to be affixed in some conspicuous place in their respective offices, or, where such Registrars are Ministers of the Christian Religion, ordained or otherwise set apart to the Ministry of the Christian Religion, such Notices shall be affixed in some conspicuous place in the Church or Chapel or place of worship in which such Ministers respectively officiate. When one of the parties intending marriage (not being a widow or widower) is under twenty-one years of age, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the Notice of such marriage, send, or cause to be sent, by the Post or otherwise, a copy of such Notice to all the other Marriage Registrars (if any) in the same District, who shall likewise affix the same in some conspicuous place in their own offices or Chapels as aforesaid.

IV Where by the oath or declaration required by the Sixth Section of the said Act of Parliament, it appears that one of the parties intending marriage (not being a widow or widower) is under twenty-one years of age, the Marriage Registrar shall not issue his certificate under the provisions of the Second Section of the said Act of Parliament until the expiration of fourteen days after the entry of such Notice of Marriage.

V When one of the parties intending marriage (not being a widow or widower) is under twenty-one years of age, and both parties intending marriage are at the time resident in any of the Towns of Calcutta, Madras, or Bombay, and are desirous of being married in less than fourteen days after the entry of such Notice as aforesaid, it shall be competent for both parties intending marriage to apply by petition to the Supreme Court of such Town, or any Judge thereof, for an order upon the Marriage Registrar to whom the Notice of Marriage has been given, directing him to issue his Certificate at some time before the expiration of the said fourteen days required by Section IV of this Act. And it shall be competent to the said Supreme Court, or any Judge thereof, on sufficient cause being shown in then or his discretion, to make an order upon such Marriage Registrar directing him to issue his certificate, at any time to be mentioned in the said order, before the expiration of the said fourteen days required by Section IV, and the said Marriage Registrar, on receipt of the said order, shall proceed to issue his certificate in accordance therewith.

VI The certificate to be issued by the Marriage Registrar, under the provisions of the Second Section of the said Act of Parliament, may be in the form of Schedule B to this Act annexed, or to the like effect, and the Government of each Presidency or place shall furnish to every Marriage Registrar a sufficient number of Forms of Certificate.

VII. When any Native Christian about to be married, applies for or tenders a Notice of Marriage, or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Native Christian understands the English language, and if he does not, the said Marriage Registrar shall translate such Notice or Certificate or both of them, as the case may be, or shall cause the same to be translated, to such Native Christian, in the language of such Native Christian, or the said Marriage Registrar shall otherwise ascertain whether such Native Christian is cognizant of the property and effect of the said Notice and Certificate.

VIII. Any person authorized in that behalf may forbid the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such Certificate, the word "forbidden" opposite to the entry of the Notice of such intended marriage in the Marriage Notice Book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorised, and the said word "forbidden," so written and subscribed as aforesaid, shall be deemed a protest, within the meaning of the seventh Section of the said Act of Parliament.

IX. In all cases where a Marriage Registrar, acting under the provisions of the fourth section of the said Act of Parliament, shall not be satisfied that the person forbidding the issue of the Certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, which may in all cases be on unstamped paper, where the district of such Registrar is within any of the towns of Calcutta, Madras, and Bombay, to the Supreme Court of Judicature in the Presidency or place within which such district is comprised, or if such district be not within any of the said Towns, then to the Judge of the Zillah or District within which the same is comprised, and the said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same, and the said Supreme Court, or any Judge thereof, or such Judge of the Zillah or District, shall be empowered to examine into the allegations of the petition and the circumstances of the case in a summary way, and if upon such examination it shall appear that the person forbidding the issue of such Certificate is not authorized by law so to do, such Supreme Court, or any Judge thereof, or such Judge of the Zillah or District shall declare that the person forbidding the issue of such Certificate is not authorized as aforesaid, and that then and in such case such Certificate shall be issued and the like Proceedings may be had under the said Act of Parliament in relation to such marriage, as if the issue of such Certificate had not been forbidden by such person. And in all cases where a Marriage Registrar, appointed to act within the Territories of any Native Prince or State in alliance with the East India Company, acting under the provisions of the sixth Section of the said Act of Parliament, shall not be satisfied that the person forbidding the issue of the Certificate is not authorized by law so to do, the said Marriage-Registrar shall transmit a statement of all the circumstances of the case, together with all documents and papers relating thereto, to the Governor-General of India in Council, and if it shall appear to the said Governor-General of India in Council, that the person forbidding the issue of such Certificate is not authorized by law so to do, the said Governor-General of India in Council shall declare that the party forbidding the issue of such certificate is not authorized as aforesaid, and that then and in such case such Certificate shall be issued, and the like proceedings may be had under the said Act of Parliament in relation to such Marriage, as if the issue of such Certificate had been forbidden by such person.

X. In all cases whatsoever where the Marriage Registrar resident in the Territories of any native Prince or State in alliance with the East India Company has refused to issue his Certificate, it shall be lawful for either of the parties intending Marriage to apply by petition to the Governor-General of India in Council, and the said Governor-General of India in Council shall be empowered to examine the allegations of Petition, in a summary way, and shall decide thereon, and the decision of the said Governor-General of India in Council shall be final, and the Marriage Registrar, to whom the application was originally made, shall proceed in accordance therewith.

**XI. Every Marriage solemnized under the provisions of the said Act of Parliament**  
**Hours of Marriages.** shall be so solemnized between the hours of six in the morning and seven in the evening

**XII. When any Native Christian is married under the provisions of the said Act**  
**Declarations made at the Marriage to be translated to Native Christians.** of Parliament, the party solemnizing the said Marriage shall ascertain whether such Native Christian understands the English language, and if he does not, the party solemnizing the said marriage shall, at the time of the solemnization thereof, translate, or cause to be translated, to such Native Christian, in the language of such Native Christian both the declarations made at such Marriage, in pursuance of Section IX of the said Act of Parliament

**XIII. After any Marriage has been solemnized under the said Act of Parliament,**  
**Proofs as to Notice, Certificate or Hours of Marriage, &c., not necessary to establish Marriage** it shall not be necessary, in support of such marriage to give any proof in respect of the Notice of Marriage, or the Certificate, or the translation thereof respectively, or in respect of the hours between which any marriage may be solemnized, or in respect to the said translations of the said declarations in Section IX of the said Act of Parliament contained, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage

**XIV. Every Marriage Registrar who shall knowingly and wilfully issue any Certificate for Marriage after the expiration of three Calendar months**  
**Penalties.** after the Notice shall have been entered by him as aforesaid, or who shall knowingly and wilfully issue, without the order of a competent Court authorizing him so to do, any Certificate for Marriage where one of the parties intending Marriage (not being a widower or widow) is under twenty-one years of age before the expiration of fourteen days after the entry of such Notice, or any Certificate the issue of which shall have been forbidden as aforesaid by any person authorized to forbid the issue thereof, shall be guilty of felony. And every person who shall knowingly and wilfully solemnize any Marriage under the provisions of the said Act of Parliament in the absence of a Registrar of the District in which such Marriage is solemnized, or who shall knowingly and wilfully solemnize any Marriage where one of the parties to such Marriage (not being a widower or widow) is under twenty-one years of age within fourteen days after the entry of the Notice of Marriage, no order for the issue of a Certificate in less than fourteen days having been made by a competent Court, shall be guilty of felony

**XV. The Marriage Registrars in the Territories of any Native Prince or State in alliance with the East India Company,**  
**Certificates of Marriages in Allied Native States to be transmitted to Secretary, &c.** shall transmit the Certificates mentioned and referred to in the twelfth Section of the said Act of Parliament to the Secretary for the Foreign Department of the Government of India.

**XVI. Every person who shall knowingly and wilfully make any false oath or declaration, or sign any false Notice or Certificate, required by**  
**Punishment for making false oath or declaration** the said Act of Parliament or this Act, for the purpose of procuring any Marriage, and every person who shall forbid the issue of a Marriage Registrar's Certificate, by falsely representing himself or herself to be a person whose consent to such Marriage is required by law, knowing such representation to be false, shall on conviction, suffer the penalties of Perjury.

**Limitation of Prosecution.**

**XVII. Every prosecution under this Act shall be commenced within the space of two years after the offence committed.**

**XVIII.** The Governor-General of India in Council may appoint any Covenanted or Uncovenanted Servant of the Company, being a Christian, or any Minister of the Christian Religion, ordained or otherwise set apart to the Ministry of the Christian religion, according to the usage of the persuasion to which he may belong, to be a Marriage Registrar in any District, to be assigned by the Governor-General of India in Council, in any place within the Territories of any Native Prince or State in alliance with the East India Company. And the said Marriage Registrar shall be entitled to receive the following fees, that is to say for receiving each Notice of Marriage, one Rupee, for publishing each Notice of Marriage, two Rupees, for the issuing of each Certificate, five Rupees, for every Marriage forbidden or Protest entered, ten Rupees, and for registering each Marriage, three Rupees, and all such fees shall be accounted for and paid over by the Marriage Registrar to the Government Treasury, as in the said Act of Parliament mentioned. Provided always, that in any case in which it shall appear to the satisfaction of the Marriage Registrar, that the parties intending Marriage or Married, under the provisions of the said Act of Parliament, are in indigent circumstances, it shall and may be lawful for the said Marriage Registrar, in his discretion, to remit some part, but not more than three-fourths, of the said fees respectively, and in each and every such case of remission of fees, the Marriage Registrar shall report the circumstances thereof, and the grounds on which the remission is made for the information of the Governor-General of India in Council.

**XIX.** It shall be lawful for the Government of each Presidency or place to pay any one Marriage Registrar of Calcutta, Madras, and Bombay, or of any other District where a considerable number of persons likely to avail themselves of this Act are resident, such salary as they shall think fit not exceeding the sum of Company's Rs. 50 per month.

**XX.** When there is only one Marriage Registrar in a District, and such Registrar is absent from such District, or ill, or in case of the death of the only Marriage Registrar in a District, or of any temporary vacancy in such office, the Magistrate of such District shall act as, and be, Marriage Registrar thereof during such absence, illness, or temporary vacancy as aforesaid.

**XXI.** Every Marriage-Registrar, or other person who shall have the custody, for the time being of the Register of Marriages under this Act, shall at all reasonable times allow searches to be made of any Register Book in his custody, and shall give a copy, certified under his hand, of any entry or entries in the same, on the payment of the fees hereinafter mentioned (that is to say), for every search extending over the period of not more than one year, the sum of one Rupee and four annas additional for every additional year, and the sum of one Rupee for every single Certificate, and all such fees, shall be accounted for and paid over by the Marriage Registrar to the Government Treasury.

**XXII.** Every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such Register Book, or the counterfoil Certificates thereof, or any part of certified copy thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of such Register Book, or of such counterfoil Certificates, or of certified copies thereof, or shall wilfully insert, or cause to be inserted, in any Register Book, or counterfoil copy or certified copy thereof, any false entry of any Marriage, or shall wilfully give any false Certificate, or shall certify any writing to be a

copy or extract of any Register Book or counterfoil copy thereof, knowing the same Register Book or counterfoil copy to be false in any part thereof, shall be guilty of felony.

XXIII. Any person charged with the duty of registering any Marriage, who shall discover any error to have been committed in the form or substance of any such entry, may, within one calendar month next after the discovery of such error, in the presence of the parties married, or, in case of their death or absence, in the presence of two other credible witnesses, who shall respectively attest the same, correct the erroneous entry according to the truth of the case, by entry in the margin without any alteration of the original entry, and shall sign the marginal entry, and add thereunto the day of the month and year when such correction shall be made, and he shall make the like marginal entry, attested in the like manner, in the counterfoil certificate thereof to be made by him as in the said Act of Parliament mentioned, and in case such counterfoil Certificate shall have been already transmitted to the Secretary of Government of the Presidency or Place within which he resides, he shall make and transmit in like manner a separate counterfoil Certificate of the original erroneous entry, and of the marginal correction therein made

XXIV. Nothing in this Act contained shall be construed to extend to the Registration of Marriages which may be solemnized in India by persons in Holy Orders, or under the provisions of the Act of the 58th year of King George the Third, Chapter 84, or, to the Registration of any Marriage solemnized between any two persons professing the Jewish religion, and nothing herein contained, shall affect the right of any Officiating Minister to receive the fees now usually paid for the performance or registration of any Marriage

XXV. All petitions presented in pursuance of Section V of the said Act of Parliament, may be so presented on unstamped paper

XXVI. This Act shall commence and take effect from and after the first day of February, 1852.

**SCHEDULE A.**

### Notice of Marriage.

To Mr John Cox, a Registrar of the District of Calcutta, in Bengal.

I hereby give you Notice, that a Marriage is intended to be had, within three Calendar Months from the date hereof, between me and the other party herein named and described.

Name	Condition.
Martha Green.	James Smith.
Spinster	Widower
	Carpenter.
Minor	Of Full age
20. Hising's Street	16, Chive Street
Mother than month	24 Days
	Length of Residence
	Church Chapel, place of worship, or building in which Marriage is to be solemnized
	District in which the other Party resides, when the Parties dwell in different Districts.

Witness my hand this Sixth day of May, One Thousand Eight Hundred and Fifty two.

(Signed) *James Smith.*

(The *Italics* in this Schedule to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the Parties lives in another District )



## SCHEDULE B

*Registrar's Certificate.*

I, *John Cox*, a Registrar of the District of *Calcutta*, in *Bengal*, do hereby certify that on the 6th day of May, Notice was duly entered in my Marriage Notice Book of the said District, of the Marriage intended between the parties therein named and described, delivered under the hand of *James Smith*, one of the Parties (that is to say):

<i>Name.</i>	<i>Condition.</i>	<i>Rank or Profession.</i>	<i>Age</i>	<i>Dwelling place</i>	<i>Length of Residence</i>	<i>Church, Chapel, place of worship, or building in which the Marriage is to be solemnized</i>	<i>District in which the other Party resides, when Parties dwell in different Districts.</i>
<i>Martha Green.</i>	<i>James Smith.</i>						
<i>Spinster</i>	<i>Widower.</i>	<i>Carpenter</i>	<i>Of Full age</i>	<i>16, Clive Street</i>	<i>23 Days</i>	<i>Union Chapel, Dhurruntollah</i>	
<i>Minor.</i>				<i>20, Hastings Street</i>	<i>More than a month</i>		

Date of Notice entered *6th May, 1852*  
 Date of Certificate given *20th May, 1852.*

The issue of this Certificate has not been forbidden by any Person authorized to forbid the issue thereof.

Witness my hand this *Twentieth* day of *May*, *One Thousand Eight Hundred and Fifty-two.*

(Signed) *John Cox,*  
 Registrar

This Certificate will be void, unless the Marriage is solemnized on or before the *6th* day of *August, 1852.*

(The *Italics* in this Schedule to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the Parties lives in another District.)

# MARRIAGE OF CHRISTIANS ACT, 1864.

## (ACT XXV OF 1864.)

• *This Act is repealed by Act V of 1865.*

Whereas it is expedient to provide further for the solemnization of marriages in India of persons professing the Christian Religion, it is enacted as follows

Preamble

### PART I.

*As to the persons by whom Marriage may be solemnized.*

Marriage between persons professing the Christian Religion to be solemnized according to the provisions of this Act.

I. From and after the first day of July, 1864, no marriage between persons, one of whom is a person, or both of whom are persons, professing the Christian Religion, shall be solemnized, except in accordance with the provisions hereafter stated in this Act

By whom to be solemnized.

II Marriages may be solemnized in India—

*1st* By any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rite, ceremonies, and customs, of the Church of which such person is a Minister

*2nd.* By any clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies, and customs, of the Church of Scotland

*3rd* By, or in the presence of, a Marriage Registrar under the provisions of the Statute 14 and 15 Vic., cap 40, or of Act V of 1852 (for giving effect to the provisions of an Act of Parliament passed in the 15th year of the reign of Her present Majesty, instituted an Act for Marriages in India) of the Governor-General of India in Council

*4th* By any Minister of Religion who, under the provisions of this Act, has obtained a license to solemnize marriages

*5th* By any person who, with respect to marriages between Native Christians, shall have received under the provisions of Part V of this Act, a license to grant certificates of marriage

III. From and after the first day of July, 1864, the declaration and certificate required by the Statute 58 Geo III., cap 84 and Act XXIV of 1860 (for the solemnization of Marriages in India by ordained Ministers of the Church of Scotland), of the Governor-General of India in Council, shall be no longer required.

IV From and after the first day of July, 1864, the Governor-General of India in Council, the Governors of Madras and Bombay in Council, and the Lieutenant-Governors of Bengal, the North-Western Provinces, and the Punjab, shall have authority to grant licenses to Ministers of Religion, to solemnize marriages within the territories subject to such Governor-General, Governors, and Lieutenant-Governors respectively.

Marriages solemnized otherwise than according to this Act to be void

V From and after the first day of July, 1864, all marriages solemnized in India otherwise than in accordance with the provisions of Sections I and II of this Act, shall be null and void.

VI. All marriages solemnized in India before the first day of July, 1864, by persons who have not received episcopal ordination, or who have not otherwise received express authority to solemnize such marriages under Acts of Parliament, or Acts of the Governor-General of India in Council, if not otherwise invalid, shall be deemed valid to all intents and purposes.

## PART II.

### *As to the mode of solemnizing Marriages under this Act.*

Notice of intended marriage to whom to be given. Form of notice

VII. In every case of intended marriage between persons, one or both of whom shall be a person or persons professing the Christian Religion, otherwise than—

*1st*—Under the provisions of the Statute 14 and 15 Vic, cap 40, or of the said Act V of 1852, of the Governor-General of India in Council, or

*2nd*—By a Clergyman of the Church of England according to the rites, rules, ceremonies, and customs, of that Church, or

*3rd*—By a Clergyman of the Church of Scotland according to the rites, rules, ceremonies, and customs, of that Church, or

*4th*.—By a person who has received a license to grant certificates of marriage between Native Christians under the provisions of Part V of this Act.

One of the parties shall give notice in writing according to the form prescribed by the Schedule A to this Act annexed or to the like effect, to the Minister of Religion whom he shall desire to solemnize the said marriage, and shall state therein the name or names, and the profession or condition, of each of the parties intending marriage, the dwelling place of each of them, and the time (not being less than four days) during which each has dwelt there, and the Church, Chapel, or other

*Proviso* place of, or generally used for, public worship, or the private dwelling in which the marriage is to be solemnized

Provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein, that he or she has dwelt there one month and upwards. Provided also that at any place or Station where there is a Church or Chapel, or other building generally used for public worship, no Clergyman of the Church of England shall solemnize a marriage in a private dwelling or in any place except in such Church, or Chapel, or other building generally used for public worship, unless he has received a special license authorizing him to do so from and under the hand and seal of the Bishop of the Diocese, or from the Commissary of such Bishop. For such special license the Registrar of the Diocese shall be entitled to charge such additional fee as the Bishop of the Diocese may sanction.

VIII. The Minister of Religion to whom such notice shall have been delivered, if he shall be entitled to officiate in the Church, Chapel, or place of or, generally used for, public worship, in which it is intended to solemnize the said marriage, shall publish every notice of marriage received by him, by causing the same to be published and affixed in some conspicuous part of the said Church, Chapel, or place of or generally used for, public worship, in which it is intended that the said marriage shall be solemnized. If such Minister of Religion shall not be entitled to officiate as a Minister in such Church, or Chapel, or place of, or generally used for, public worship, he shall at his option either return the said notice to the person delivering the same to him, or shall deliver the same to some other Minister entitled to officiate in such place of worship, who shall thereupon cause the same to be so published and affixed in the said Church, Chapel, or place of, or generally used for, public worship.

IX. If it be intended that the marriage shall be solemnized not in Church, Chapel, or other place of, or generally used for, public worship, but in a private dwelling, the Minister of Religion receiving the notice prescribed in Section VII, shall forward it to the Marriage Registrar of the District, who shall affix the same to some conspicuous place in his own office.

X. When one of the parties intending marriage (not being a widow or widower) is under twenty one years of age, every Minister as aforesaid who shall receive such notice and who shall not forthwith return such notice to the party delivering the same under Section VIII, shall, within twenty-four hours after the receipt by him thereof, send or cause to be sent by the post, or otherwise, a copy of such notice, to the Marriage Registrar of the District.

XI. The Marriage Registrar of the District on receiving any such notice shall affix the same to some conspicuous place in his own office.

XII. If there be more Marriage Registrars than one in any District, the Local Government shall appoint one of such Registrars to be Senior Marriage Registrar, and such notice as aforesaid shall be sent to such Senior Marriage Registrar, who, on receiving the same, shall, besides affixing it in the manner laid down in the last preceding Section, send or cause to be sent a copy of such notice to all the other Marriage Registrars in the same District, who shall likewise affix the same in their own Offices or Churches, Chapels, or places of worship as aforesaid.

XIII. Any Minister of Religion who shall consent or intend to solemnize any such Marriage as aforesaid on being required so to do by or on behalf of the party by whom the notice was given, and upon one of the parties intending marriage making such declaration as is hereinafter required, shall issue under his hand a certificate of such notice having been given and of such declaration having been made provided no lawful impediment according to the law of England be shown to the satisfaction of such minister why such certificate should not issue, and the issue of such certificate shall not have been sooner forbidden in the manner hereinafter mentioned, by any person authorized in that behalf.

XIV. When by such declaration it appears, or when it is otherwise known to such Minister of Religion, that one of the parties intending marriage, not being a widow or widower, is under twenty one years of age, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of such notice of marriage.

XV. Before any such certificate as aforesaid shall be issued by any such Minister, one of the parties intending marriage shall appear personally before such Minister, and shall make a solemn declaration that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage, and when either or each of the parties, not being a widow or widower, is under the age of twenty-one years, that the consent of the person whose consent to such marriage is required by law has been obtained thereto or that there is no person resident in India having authority to give such consent, as the case may be.

**XVI.** The father, if living, of any party under twenty-one years of age, such party not being a widower or widow, or if the father be dead, the guardian or guardians of the person of the party so under age lawfully appointed, or one of them, and in case there be no such guardian then the mother of such party shall have authority to give consent to the marriage of such party, and such consent is hereby required for the marriage of such party so under age, unless there be no person authorized to give such consent resident in India

**XVII.** Every person whose consent to a marriage is required as aforesaid, is hereby authorised to prohibit the issue of the certificate by any Minister as aforesaid, at any time before the issue of such certificates by notice in writing to such Minister, subscribed by the person authorised as aforesaid, with his name and place of abode, and his or her character in respect of either of the parties, by reason of which he or she is so authorised

**XVIII.** If any such notice prohibiting the marriage shall be received by such Minister as aforesaid, he shall not issue his certificate, and shall not solemnize the said marriage until he shall have examined into the matter of the said prohibition, and shall be satisfied that the person prohibiting the said marriage is not authorized by law so to do, or until the notice of the said prohibition be withdrawn by the person who gave the same

**XIX.** When any Native Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister, such Minister shall, before issuing such certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, and if not, shall translate or cause to be translated the said notice or certificate to such Native Christian in the language of such Native Christian, or in some language which he understands

**XX.** The certificate to be issued by such Minister as aforesaid, may be in the form prescribed by the Schedule B to this Act annexed, or to the like effect

**XXI.** After the issue of the certificate by such Minister of Religion, marriage may be solemnized between and by the parties therein described according to such form or ceremony as such Minister shall see fit to adopt. Provided that it be solemnized in the presence of at least two witnesses

**XXII.** Whenever a marriage is not solemnized within two calendar months after the date of the certificate which shall have been issued by such Minister as aforesaid, such certificate and all other proceedings thereon shall be void, and no person shall proceed to solemnize the said marriage until new notice shall have been given and certificate thereof issued in the manner aforesaid

**XXIII.** Provided that whenever any marriage has been solemnized by a Minister of Religion in accordance with the provisions of Part I, of this Act, it shall not be necessary in support of such marriage to give any proof in respect of the dwelling of the parties, or of the consent of any person whose consent is thereunto required by law, or of the notice of marriage, or of the certificate of the translation thereof respectively, or in respect of the hours between which the same may have

been solemnized; nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage

### PART III

#### *Time for solemnizing Marriages*

XXIV. Every marriage solemnized in India from and after the first day of July, 1864, by any person who has received episcopal ordination, or by any Clergyman of the Church of Scotland, or by any Minister licensed under this Act to solemnize marriages, shall be solemnized between the hours of six in the morning and seven in the evening. But the provisions of this section shall not apply to a Clergyman solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening, from and under the hand and seal of the Bishop of the Diocese or from his Commissary. For such special license the Registrar of the Diocese shall be entitled to charge such additional fee as the Bishop of the Diocese may sanction.

### PART IV

#### *As to the Registration of Marriages in India*

XXV. All marriages solemnized in India from and after the First day of July, 1864, between persons both or one of whom shall profess the Christian Religion, except marriage solemnized under the said Statute 14 and 15 Vic, cap 40 and the said Act V of 1852 of the Governor-General of India in Council, shall be registered in the manner hereinafter prescribed. Provided that no omission or defect in such registration shall invalidate any marriage not otherwise invalid.

Proviso.

XXVI to XXXIX. Obsolete.

These provisions not to apply to Registers or certificates of certain marriages solemnized by Marriage Registrars.

XL. Nothing contained in this part of this Act shall apply to the Register or certificate of any marriage solemnized under the said Statute 14 and 15 Vic, cap 40, or the said Act V of 1852 of the Governor-General of India in Council.

### PART V

#### *As to the Marriage of certain Native Christians.*

XLI. And whereas it is expedient to make provision for the marriage of certain Native Christians to whom the provisions of the said Statute 14 and 15 Vic, cap 40, and the said Act V of 1852 of the Governor-General of India in Council are found not to be suitable, it shall be lawful for the Local Government of any Presidency or place, or the Chief Commissioner of any Province, to issue a license to any person, authorizing him to grant certificates of marriage between Native Christians, being converts from any religion in India.

XLII. It shall not be a necessary preliminary to the grant of a certificate by any person licensed under the last preceding Section, that any notice of marriage should have been given by either of the parties to such marriage, or that any certificate should have been issued of any notice having been given under the provisions of the said Act V of 1852 of the Governor-General of India in Council, or otherwise, and every marriage between Native

Christians as aforesaid applying for a certificate under this part of this Act, shall be certified under this part of this Act if the following conditions be fulfilled, and not otherwise —

1. The age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years.

2. The man and the woman shall not stand to each other within the prohibited degrees of consanguinity or affinity.

3. Neither of the parties intending to be married shall have a wife or husband still living.

4. In the presence of the person so licensed and of at least two witnesses, each of the parties shall say to the other—

“ I call upon these persons here present to witness that I, A B, in the presence of Almighty God, do take thee, C D, to be my lawful wedded wife (*or husband*);” or words to the like effect.

5. That such declaration be made between the hours of six in the morning and seven in the evening.

XLIII. When in respect to any marriage falling under this part of this Act, the conditions prescribed in the last preceding Section shall have been fulfilled, it shall be the duty of the person licensed as aforesaid, in whose presence the said declaration shall have been made, to grant a certificate of such marriage on the application of either of the parties to such marriage on the payment of a fee of four annas. Such certificate shall be signed by such licensed person, and shall be received as conclusive evidence of such marriage, having been performed, in any suit touching the validity of such marriage, and no evidence to prove the contrary shall be received in any such suit.

#### XLIV, XLV. Superseded.

Marriages performed under the provisions of Section XLII to be valid.

XLVI All marriages performed between Native Christians as aforesaid, in accordance with the provisions of Section XLII of this Act, shall be good and valid to all intents and purposes.

XLVII A Register Book of all marriages of which certificates shall be granted under Section XLIII of this Act, shall be kept by the person granting such certificates in his own vernacular language. Such Register Book shall be kept according to such form as the Local Government shall from time to time prescribe, and true extracts therefrom, duly authenticated, shall be deposited at such places and at such times as the Local Government shall direct.

XLVIII. Every person licensed under this Act to grant certificates of marriage, and who shall have the custody of a Marriage Register Book under the last preceding Section, shall at all reasonable times allow search to be made in such Book in his custody, and shall give a copy certified under his hand of any entry or entries in the same on the payment of the fees hereinafter mentioned that is to say—for every search extending over a period not exceeding two years the sum of eight annas, and two annas additional for every additional year.

#### XLIX to end and Schedules. Obsolete and superseded.

[Repealed by Act V 1865, which came into operation, 1st May, 1865. Parts possibly affecting any question of the validity of any marriage are retained, the rest, not being of use for reference, and being superseded, are suppressed.]

# THE INDIAN MARRIAGE ACT. 1865.

## (ACT V OF 1865.)

*This Act is repealed (except as to Straits Settlements), by  
Act XI of 1872*

### Not in force in British India

Whereas it is expedient to provide further for the solemnization of marriages in India of persons professing the Christian Religion, it is enacted as follows

*Preliminary.*  
Short Title. 1 This Act may be cited as "The Indian Marriage Act, 1865."

II. This Act shall extend to all Territories that are or shall become vested in Her Majesty or her successors by the Statute 21 and 22 Vic. cap. 106 entitled "An Act for the better Government of India," and shall commence and come into operation on the First day of May 1865.

III From and after the commencement of this Act, Act XXV of 1864 (*to provide further for the solemnization of marriages in India for persons professing the Christian Religion*) is repealed except as to the recovery and application of any penalty for any offence which shall have been committed before such commencement

Interpretation clause.

IV. In this Act, unless there is something repugnant in the subject or context—

"Church of England"

"Church of England" and "Anglican" mean and apply to the United Church of England and Ireland as by law established

"Anglican"

"Church of Scotland"

"Church of Scotland" means the Church of Scotland as by law established

"Church of Rome"  
"Roman Catholic."

"Church of Rome" and "Roman Catholic" mean, and apply to the Church which regards the Pope of Rome as its spiritual head

"Church."

"Church" shall include any Chapel or other building generally used for public Christian worship.

"Minor."

"Minor" means a person who has not completed the age of twenty-one years.

"Native Christians."

"Native Christians" includes the Christian descendants of Natives of India converted to Christianity as well as such converts.

"Section."

"Section" means a Section of this Act.

"Month"

"Month" and "Year" respectively means month and year reckoned according to the British Calendar

"Year"

"Local Government."

And, in any part of British India in which this Act shall operate, "Local Government" shall mean the person authorized to administer Executive Government in such part.



## PART I.

*As to the person by whom Marriage may be solemnized*

Marriage between Christians to be solemnized according to the provisions of this Act.

V. From and after the commencement of this Act no marriage between persons, one or both of whom shall profess the Christian Religion, shall be solemnized, unless in accordance with the provisions of the next following Section

By whom to be solemnized.

VI. Marriages may be solemnized in India—

1. By any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which such person is a Minister

2. By any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland.

3. By, or in the presence of, a Marriage Registrar under the provisions of the Statutes 14 and 15 Vic., cap. 10, or of Act V of 1852 (*for giving effect to the provisions of an Act of Parliament passed in the 15th year of the reign of Her present Majesty intitled an Act for Marriages in India*) of the Governor-General of India in Council.

4. By any Minister of Religion who, under the provisions of this Act, has obtained a license to solemnize marriages

5. By any person who, with respect to marriages between Native Christians, shall have received, under the provisions of Part V of this Act, a license to grant certificates of marriage.

VII. From and after the commencement of this Act, the declaration and certificate required by the Statute 54 Geo. III., cap. 84 and Act XXIV of 1860 (*for the solemnization of marriages in India by ordained Ministers of the Church of Scotland*) of the Governor-General of India in Council, shall be no longer required.

VIII. From and after the commencement of this Act the Governor-General of India in Council, the Governors of Madras and Bombay in Council, the Governor of the Settlement of Prince of Wales' Island, Singapore and Malacca, and the Lieutenant-Governors of Bengal, the North-Western Provinces and the Punjab, shall have authority to grant licenses to Ministers of Religion, to solemnize marriages within the Territories under the immediate administration of such Governor-General or subject to such Governors and Lieutenant-Governors respectively, and to revoke such licenses, whether they shall have been granted before or shall be granted after the passing of this Act

Marriages solemnized otherwise than according to this Act to be void.

IX. From and after the commencement of this Act, all marriages which shall be solemnized in India otherwise than in accordance with the provisions of the Fifth and Sixth Section shall be null and void

X. All marriages which shall have been solemnized in India before the commencement of this Act by persons who have not received episcopal ordination, or who have not otherwise received express authority to solemnize such marriages under Acts of Parliament or Acts of the Governor-General of India in Council, shall, if not otherwise invalid, be deemed valid to all intents and purposes.

Marriages solemnized before 1st May, 1865, by certain persons to be deemed valid.

## PART II.

*As to the mode of solemnizing Marriages under this Act.*

**Notice of intended marriage.** XI. In every case of intended marriage between persons one or both of whom shall profess the Christian Religion, otherwise than—

(i) Under the provisions of the said Statute 14 and 15 Vic., cap 40, or of the said Act V of 1852, or

(ii) By a Clergyman who has received episcopal ordination, according to the rites, rules, ceremonies and customs of the Church to which he belongs, or

(iii) By a Clergyman of the Church of Scotland, according to the rites, rules, ceremonies and customs of that Church, or

(iv) By a person who has received a license to grant certificates of marriage between Native Christians under the provisions of Part V of this Act—

One of the persons intending marriage shall give notice in writing, according to the form contained in the Schedule A to this Act annexed, or to the like effect, to the Minister of Religion whom he or she shall desire to solemnize the marriage, and shall state therein the name or names, and the profession or condition, of each of the persons intending marriage, the dwelling place of each of them, and the time (not being less than four days) during which each has dwelt there, and the Church or private dwelling in which the marriage is to be solemnized. Provided that if either of such persons shall have dwelt in the place stated in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards. Provided also that at any place or Station where there is a Church, no Clergyman of the Church of England shall solemnize a marriage in a private dwelling or in any place except in such Church, unless he shall have received a special license authorizing him to do so from and under the hand and seal of the Anglican Bishop of the Diocese, or from the Commissary of such Bishop. For such special license the Registrar of the Diocese shall be entitled to charge such additional fee as the said Bishop may sanction.

**Publication of such notice.** XII. The Minister of Religion to whom such notice shall have been delivered, if he shall be entitled to officiate in a Church in which it is intended to solemnize the said marriage, shall publish every notice of marriage received by him by causing the same to be published and affixed in some conspicuous part of the said Church. If such Minister of Religion shall not be entitled to officiate as a Minister in such Church, he shall at his option either return the said notice to the person delivering the same to him, or shall deliver the same to some other Minister entitled to officiate therein, who shall thereupon cause the same to be so published and affixed as aforesaid.

**Notice of intended marriage in private dwelling.** XIII. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in the XI Section, shall forward it to the Marriage Registrar of the District, who shall affix the same to some conspicuous place in his own office.

**Notice when one of the persons intending marriage is a minor.** XIV. When one of the persons intending marriage (not being a widow or widower) is a Minor, every such Minister as aforesaid who shall receive such notice, and who shall not forthwith return it to the person delivering the same under the XII Section, shall, within twenty-four hours after the receipt by him thereof, send or cause to be sent by the Post, or otherwise, a copy of such notice to the Marriage Registrar of the District.

**Publication of such notice.** XV. The Marriage Registrar of the District on receiving any such notice shall affix the same to some conspicuous place in his own Office.

**Appointment of Senior Marriage Registrar.** XVI. If there be more Marriage Registrars than one in any District, the Local Government shall appoint one of such Registrars to be Senior Marriage Registrar, and such notice as aforesaid shall be sent to such Senior Marriage Registrar, who, on receiving the same, shall, besides affixing it in the manner laid down in the last preceding Section, cause a copy thereof, to be sent to each of the other Marriage Registrars in the same District, who shall likewise affix the same in their own Offices or Churches, as aforesaid.

**Issue of certificate of notice given and declaration made** XVII. Any Minister of Religion who shall consent or intend to solemnize any such marriage as aforesaid, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making such declaration as is hereinafter required, shall issue under his hand a certificate of such notice having been given and of such declaration having been made provided that no lawful impediment according to the law of England be shewn to the satisfaction of such Minister why such certificate should not issue, and the issue of such certificate shall not have been sooner forbidden in the manner hereinafter mentioned, by any person authorized in that behalf.

**In case of minority certificate not to issue until fourteen days after receipt of notice.** XVIII. When by such declaration it appears, or when it is otherwise known to such Minister of religion that either of the persons intending marriage, not being a widower or widow, is a minor, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of such notice of marriage.

**Declaration to be made before issue of certificate** XIX. Before any such certificate as aforesaid shall be issued by any such Minister, one of the persons intending marriage shall appear personally before such Minister, and shall make a solemn declaration that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage, and when either or both of the parties, not being a widower or widow, is or are a minor or minors, that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is or are no person or persons resident in India having authority to give such consent, as the case may be.

**Consent of parent or guardian when necessary.** XX. The father, if living, of any minor not being a widower or widow, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, shall have authority to give consent to the minor's marriage, and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

**What person may prohibit issue of certificate by notice.** XXI. Every person whose consent to a marriage is required as aforesaid, is hereby authorized to prohibit the issue of the certificate by any Minister as aforesaid, at any time before the issue of such certificate, by notice in writing to such Minister subscribed by the person so authorized with his name and place of abode, and his or her position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

**XXII.** If any such notice prohibiting the marriage shall be received by such Minister as aforesaid, he shall not issue his certificate and shall not solemnize the said marriage until he shall have examined into the matter of the said prohibition, and shall be satisfied that the person prohibiting the marriage is not authorized by law so to do, or until the said notice be withdrawn by the person who gave it

**XXIII.** When any Native Christian about to be married shall take a notice of marriage to a Minister of Religion, or shall apply for a certificate from such Minister under the XVII Section, such Minister shall, before issuing such certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and if not, shall translate or cause to be translated such notice or certificate to such Native Christian into his language, or into some language which he understands

**XXIV.** The certificate to be issued by such Minister as aforesaid, may be in the Form of certificate, form contained in the Schedule B to this Act annexed, or to the like effect

**XXV.** After the issue of the certificate by such Minister of Religion, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister shall think fit to adopt provided that the marriage be solemnized in the presence of at least two witnesses

**XXVI.** Whenever a marriage is not solemnized within two months after the date of the certificate which shall have been issued by such Minister as aforesaid, such certificate and all other proceedings thereon shall be void and no persons shall proceed to solemnize the said marriage until new notice shall have been given and a certificate thereof issued in the manner aforesaid

**XXVII.** Provided that whenever any marriage has been solemnized by a Minister of religion in accordance with the provisions of Part I of this Act, it shall not be necessary in support of such marriage to give any proof in respect of the dwelling of the persons married, or of the consent of any person whose consent to such marriage is required by law, or of the notice of marriage, or of the certificate or the translation thereof respectively, or in respect of the hours between which the same may have been solemnized, nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage.

### PART III

#### *As to the time for solemnizing marriages.*

**XXVIII.** Every marriage solemnized in India from and after the commencement of this Act by any person who has received episcopal ordination, or by any Clergyman of the Church of Scotland, or by any Minister licensed under this Act to solemnize marriages, shall be solemnized between the hours of six in the morning and seven in the evening, provided that this Section shall not apply to a Clergyman of the Church of England solemnizing a marriage under a special license permitting him to do so at any hour other than between six in the morning and seven in the evening, from and under the hand and the seal of the Anglican Bishop of the Diocese or his Commissary, and it is hereby declared that

for such special licence the Registrar of the Diocese shall be entitled to charge such additional fee as such Bishop may sanction provided also that this Section shall not apply to a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he shall have received a general or special licence in that behalf from the Roman Catholic Bishop of Diocese or Vicariate in which such marriage shall so be solemnized, or from such person as the same Bishop shall have authorized to grant such licence.

#### PART IV.

##### *As to the registration of marriages in India.*

XXIX All marriages solemnized in India from and after the commencement of this Act between persons, both or one of whom shall profess the Christian religion except marriages solemnized under the said Statute 14 and 15 Vic, cap 40, and the said Act V of 1852, shall be registered in the manner hereinafter prescribed, provided that no omission or defect in such registration shall invalidate any marriage not otherwise invalid.

##### *Proviso.*

Registration of marriages solemnized by a Clergyman of the Church of England

XXX. Every marriage solemnized by a Clergyman of the Church of England shall be registered by the Clergyman solemnizing the same in the register of marriages of the station or district in which the marriage shall be solemnized, according to the form contained in the Schedule C to this Act annexed.

XXXI. Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by the signature of such Clergyman, of the entries in the register of marriages solemnized at or in any station or district at which such Clergyman, shall have any spiritual charge, to the Registrar of the Archdeaconry to which he shall be subject or within the limits of which such station or district shall be situated. Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July, to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be transmitted by such Clergyman within two weeks from the expiration of each of the quarters above specified. The said Registrar upon receiving the same shall transmit one duplicate to the Secretary to the Local Government.

XXXII Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed in that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage shall be solemnized; and such person shall forward quarterly to the Secretary to the Local Government, returns of the entries of all marriages registered by him during the three months next preceeding.

XXXIII Every marriage solemnized by a Clergyman of the Church of Scotland shall be registered by the Clergyman solemnizing the same in a register of marriages to be kept by him for the station or District in which the marriage shall be solemnized, in the form prescribed in the thirtieth Section for marriages solemnized by Clergymen of the Church of England, and such Clergyman shall forward quarterly to the Secretary to Government, through the

Senior Chaplain of the Church of Scotland in the Territory subject to the Local Government, returns similar to those prescribed in the thirty-first Section for Clergymen of the Church of England of all marriages solemnized by him

XXXIV. After the solemnization of any marriage under this Act by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England nor of the Church of Rome, or

Marriages solemnized by certain persons to be entered in a register book and also in a certificate.

by any Minister of Religion licensed under this Act to solemnize marriages, the person solemnizing the same shall forthwith register such marriage in duplicate—that is to say, in a Marriage Register Book to be kept by him for that purpose, according to the form contained in the Schedule D to this Act annexed, and

also in a certificate attached to the Marriage Register Book as counterfoil

XXXV The entry of such marriage in both the certificate and Marriage Register

Such entries to be signed and attested.

Book shall be signed by the person by whom the said marriage has been solemnized, and also by the persons married, and shall

be attested by two credible witnesses who were present at the solemnization of the marriage, and every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the Marriage Register Book

XXXVI The person solemnizing the said marriage shall forthwith separate the certificate from the Marriage Register Book, and transmit it

Such certificate to be forwarded to Marriage Registrar, copied, and transmitted to Government.

within one month from the time of the solemnization of such marriage to the Marriage Registrar of the District in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall cause such certificate to be copied into a book to be kept by him for that purpose, and shall transmit all the certificates which he

shall have received during the month, with such number and signature or initials added thereto as are hereinafter required, to the Secretary to the Local Government, together with the certificates from his own Marriage Register Book which he shall transmit under the Twelfth Section of the said Statute, 14 and 15 Vic., cap 40, but distinct therefrom

XXXVII Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate

Copies of certificates to be entered and numbered

as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which each certificate

was received by the said Marriage Registrar

Registrar to add number of entry of copy to the certificate, and send same to Government

XXXVIII The Marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall at the end of every month transmit the same to the Secretary to Local Government

XXXIX. The person solemnizing any such marriage as is provided for in part V of this Act, shall keep safely the said Register Book until the

Custody and disposal of Register Book of Marriages solemnized under Part V of this Act

same shall be filled, or if he shall leave the District in which he solemnized the marriage before the said book is filled, shall make over the same to the person who shall succeed to his duties in the said District who shall keep safely the same, and shall make therein the entries by the Act required to be made

in respect of any marriage solemnized by him within the said District, and the person

having the control of the book at the time when it shall be filled, shall send the same to the Marriage Registrar of the District, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the Secretary to the Local Government to be kept by him with the records of his office.

**XL** The Secretary to the Local Government shall, at the end of every quarter in each year, select from the certificates of marriages forwarded to him during such quarter, the certificates of the marriages of which the Governor-General of India in Council may desire that evidence shall be transmitted to England, and forward the same certificates signed by him to the Secretary of State for India, for the purpose of being delivered to the Registrar General of Births, Deaths and Marriages

Transmission of certificates of certain marriages to Secretary of State for India.

**XLI** Any person charged with the duty of registering any marriage, who shall discover any error to have been committed in the form or substance of any such entry, may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses who shall respectively attest the same, correct the erroneous entry according to the truth of the case, by entry in the margin without any alteration of the original entry, and shall sign the marginal entry, and thereunto the day of the month and year when such correction shall be made, and such person shall make the like marginal entry, attested in the like manner, in the certificate thereof, and in case such certificate shall have been already transmitted to the Secretary to Local Government, such person shall make and transmit in like manner a separate certificate of the original erroneous entry, and of the marginal correction therein made

Correction of errors.

**XLII** Every person solemnizing a marriage under this Act, and hereby required to register the same, and every Marriage Registrar or Secretary to a Local Government who shall have the custody for the time being any Register of Marriages, or of any certificate or copies of certificate under this Act shall at all reasonable times allow searches to be made of any Marriage Register Book, or of any certificate, or duplicate, or copies of certificate in his custody, and shall give a copy under his hand of any entry or entries in the same on the payment of the fees hereinafter mentioned, that is, for every search extending over a period of not more than one year, the sum of one Rupee, and four annas additional for every additional year and the sum of one Rupee for every single certificate

Searches may be made and copies of certificates given

**XLIII** All fees received under the provisions under this Act by a Marriage Registrar or Secretary shall be accounted for and paid over by him to Government, and all fees received by a person solemnizing a marriage, not being a Marriage Registrar, may be retained by such person.

Appropriation of fees.

**XLIV.** Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any Marriage Register or certificate or duplicate certificate required to be kept or delivered under this Act, of any entry of a marriage in such Register, or of any such certificate or duplicate certificate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate, or duplicate copy, or of any entry therein respectively, or of such copy.

Certified copy of entry in Marriage Register, &c to be received as evidence of marriage without further proof

These provisions not to apply to registers or certificates of certain marriages solemnized by Marriage Registrars.

Marriage Registrars to be Christians and may be appointed *ex officio*.

XLV. Nothing contained in this part shall apply to the register or certificate of any marriage solemnized under the said Statute 11 and 15 Vic., cap. 40, or the said Act V of 1852.

XLVI. Every Marriage Registrar hereafter appointed under the provisions of the said Act V of 1852, shall be a Christian, and may be so appointed either by name or as holding any office for the time being.

#### PART V.

##### *As to the marriage of Native Christians.*

XLVII. And whereas it is expedient to make provision for the marriage of Native

Power to license persons to grant certificates of marriage between Native Christians

Christians to whom the provisions of the said Statute 11 and 15 Vic., cap. 40, and the said Act V of 1852, are found not to be suitable, it is further enacted that it shall be lawful for the Local Government, or the Chief Commissioner of any Province, to issue a license to any person being a Christian, either by name or as holding any office for the time being, authorizing him to grant certificates of marriage between Native Christians. Any such license may be revoked by the Government or Chief Commissioner by whom it was granted, and every such grant or revocation shall be notified in the official Gazette.

XLVIII. It shall not be a necessary preliminary to the grant of a certificate by any person licensed under the last preceding Section, that any notice of marriage should have been given by either of the parties to such marriage, or that any certificate should have been issued of any notice having been given under the provisions of the said Act V of 1852, or otherwise, and every marriage

between Native Christians as aforesaid, applying for a certificate under this part of this Act, shall be solemnized under this part of this Act, if the following conditions be fulfilled, and not otherwise —

1. The age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years.

2. The man and the woman shall not stand to each other within the prohibited degrees of consanguinity or affinity.

3. Neither of the persons intending to be married shall have a wife or husband still living.

4. In the presence of the person so licensed and of at least two credible witnesses, each of the parties shall say to the other — “I call upon these persons here present to witness that I, A B, in the presence of Almighty God and in the name of our Lord Jesus Christ, do take thee, C D, to be my lawful wedded wife (or husband),” or words to the like effect.

5. Such declaration shall be made between the hour of six in the morning and seven in the evening.

XLIX. When, in respect to any marriage falling under this part of this Act, the conditions prescribed in the last preceding Section shall have been fulfilled, it shall be the duty of the person licensed as aforesaid, in whose presence the said declaration shall have been made, to grant a certificate of such marriage on the application of either of the parties to such marriage on the payment

On marriage (the conditions having been fulfilled), licensed person to grant a certificate thereof.

of a fee of four annas. Such certificate shall be signed by such



licensed person, and shall be received in any suit touching the validity of such marriage, as conclusive evidence of the same marriage having been performed, and no evidence to the contrary shall be received in any such suit

**Marriages performed under the provisions of Section 48 to be valid.**

L. All marriages performed between Native Christians as aforesaid, in accordance with the provisions of the forty-eighth Section, shall be valid

LI. A Register Book of all marriages of which certificates shall be granted under the forty-eighth Section, shall be kept by the person granting such certificates in his own vernacular language. Such Register Book shall be kept according to such form as the Local Government or Chief Commissioner shall from time to time prescribe, and true extracts therefrom duly authenticated shall be deposited at such place, and at such times as the Local Government or Chief Commissioner shall direct

LII. Every person licensed under this Act to grant certificates of marriage, and who shall have the custody of a Marriage Register Book under the last preceding Section, shall at all reasonable times allow search to be made in such Book in his custody, and shall give a copy certified under his hand of any entry or entries in the same on the payment of the fees hereinafter mentioned that is to say—for every search extending over a period not exceeding two years the sum of eight annas, and two annas additional for every additional year

**Part V not to apply to Roman Catholics.**

LIII. This part of this Act shall not apply to marriages between Roman Catholics. But nothing herein contained shall be construed to invalidate any marriage contracted between Roman Catholics under the provisions of Part V of the said No. XXV of 1861

## PART VI

### *As to penalties*

LIV. Whoever intentionally makes any false oath or declaration, or signs any false notice or certificate required by the said Statute 11 and 15 Vic cap 10, or the said Act V of 1852, or by this Act, for the purpose of procuring any marriage, shall be guilty of the offence described in the CXVIII Section of the Indian Penal Code, and on conviction shall be liable to the punishment prescribed in that Section

**Punishment for forbidding the issue by a Marriage Registrar of a certificate by false representation.**

LV. Whoever forbids the issue by a Marriage Registrar of a certificate by falsely representing himself or herself to be a person whose consent to the marriage is required by law, knowing such representation to be false, shall be guilty of the offence described in the CV Section of the Indian Penal Code, and shall on conviction be liable to the punishment prescribed in that Section.

LVI. Whoever, not being authorized under the sixth Section to solemnize a marriage shall, from and after the commencement of this Act, in the absence of a Marriage Registrar of the District in which such marriage is solemnized, knowingly and wilfully solemnize a marriage between persons, one or both of whom shall profess the Christian religion, shall be punished with imprisonment of

her description, as defined in the Indian Penal Code, which may extend to ten years, and shall also be liable to fine, or in lieu of a sentence of imprisonment for seven years or upwards, to transportation for a term of not less than seven years and not exceeding ten years, or if the offender be an European or an American, to penal servitude according to the provisions of Act XXIV of 1855 *(to substitute penal servitude for the punishment of transportation in respect of European and American convicts, and to amend the law relating to the removal of such convicts)*.

**LVII.** Whoever shall, from and after the commencement of this Act, knowingly and wilfully solemnize a marriage between persons, one or both of whom shall be a person or persons professing the Christian religion, at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to three years, and shall also be liable to fine.

**LVIII.** The provisions of the last preceding Section shall not apply to marriages solemnized under special licenses granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Chaplain of the Church of Rome, when he shall have received the general or special license in that behalf mentioned in the XXVIII Section.

**LIX.** Any Minister of Religion licensed to solemnize marriages under this Act, who shall, within fourteen days after the receipt by him of notice of such marriage, knowingly and wilfully solemnize a marriage when one of the parties to such marriage, not being a widow or widower, is a minor, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to three years, and shall also be liable to fine. But the provisions of this Section shall not apply to marriages solemnized between Native Christians under the provisions of Part V of this Act.

**LX.** Whoever, being a Marriage Registrar appointed under the provisions of the said Act V of 1852, shall knowingly and wilfully issue any certificate for marriage, or solemnize any marriage under the same Act without publishing or affixing in some conspicuous place the notice of such marriage as directed by such Act, or after expiration of two months after a certificate in respect of a marriage shall have been issued by him, shall solemnize such marriage, or shall without an order of a competent Court authorizing him to do so, solemnize any marriage when one of the persons intending marriage (not being a widow or widower) is a minor, before the expiration of fourteen days after the receipt of such notice as is required by the same Act, or without sending or causing to be sent by the post or otherwise a copy of such notice of marriage to the Senior Marriage Registrar of the District, if there be more Marriage Registrars of the District than one, and if he himself be not the Senior Marriage Registrar, or shall issue any certificate, the issue of which shall have been prohibited as in this Act provided by any person authorized to prohibit the issue thereof, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to five years, and shall also be liable to fine.

**LXI.** Whoever, being a person authorized under the provisions of this Act to solemnize a marriage, and not being a Clergyman of the Church of England solemnizing a marriage after due publication of banns or under a license from the Anglican Bishop of the Diocese or Surrogate duly authorized in that behalf, or not being the Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of that Church, or not being the Clergyman of the Church of Rome solemnizing a marriage according to the rites, rules, ceremonies and customs of that Church, shall knowingly and wilfully issue any certificate for marriage under this Act, or solemnize any marriage between such persons as aforesaid, without publishing or causing to be affixed the note of such marriage as directed in Part II, of this Act, or after the expiration of two months, after the certificate shall have been issued by him, or shall knowingly or wilfully issue any certificate for marriage, or solemnize a marriage between such persons, when one of the persons intending marriage, not being a widower or widow, is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending or causing to be sent by the post or otherwise a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the District, or shall knowingly and wilfully issue any certificate, the issue of such shall have been forbidden under this Act by any person authorized to forbid the issue, or shall knowingly or wilfully solemnize any marriage which shall have been forbidden by any person authorized to forbid the same, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to four years, and shall also be liable to fine

**LXII.** Whoever, not being licensed to grant a certificate of marriage under Part V of the Act, shall grant such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to five years, and shall also be liable to fine

**LXIII.** Whoever shall wilfully destroy or injure or cause to be destroyed or injured any such Register Book, or any part thereof, or any such authenticated extract therefrom as aforesaid, or shall wilfully insert or cause to be inserted any false entry in any such Register Book or authenticated extract, shall be punished with imprisonment of either description, as defined in the Indian Penal Code, for a term which may extend to seven years, and shall also be liable to fine.

**LXIV.** Persons tried for offences punishable under this Act shall be tried under the provisions of the Code of Criminal Procedure by the Court of Session as defined in the same Code provided that no European British subject shall be liable to be tried for any offence punishable under this Act except before a Judge of the High Court. In every case, in which an European British subject shall be charged before a Justice of the Peace or Magistrate at any place beyond the local limits of the ordinary original Civil jurisdiction of the High Court with any offence under this Act, such charge shall be investigated, and the committal and trial for such offence shall be made and held, according to the rules by which the Criminal Procedure of the High Court may from time to time be regulated

Code of Criminal Procedure applicable to investigations and committals under this Act.

Supreme Court of Straits' Settlement to try and punish offences under this Act

LXV. Except as provided in the last preceding Section, the provisions of the Code of Criminal Procedure shall apply to the investigation and committal in all cases of charges under this Act provided that a summons shall ordinarily come in the first instance, and that all offences punishable under this Act shall be bailable.

LXVI. The Supreme Court of Judicature in the Settlement of Prince of Wales' Island, Singapore and Malacca shall have power to try offences punishable under this Act and committed within the limits of such Settlement.

The charge for any such offence shall be investigated and the committals shall be made under the procedure by which such Court shall from time to time be regulated. The penalties (if any) imposed on persons charged with such shall correspond as nearly as may be with the penalties which might have been imposed on such persons had the Indian Penal Code been then in force in the said Settlement.

Extended by Act XXII, 1866, to the Hyderabad Assigned Districts, and the Cantonments of Secunderabad, Tumulgherry, and Aurumabad, so far only as regards Christian British subjects.

#### SCHEDULE A—(See Section II)

##### Notice of Marriage.

To the Reverend John Brown, a Minister of the Free Church of Scotland, at Calcutta

I hereby give you notice, that a marriage is intended to be had, within the calendar months from the date hereof between me and the other party herein named and described (that is to say)—

Names.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of Residence.	Church, Chapel, or place of worship, in which the marriage is to be solemnized.	District in which the other party resides when the parties dwell in different Districts.
Martha Green.	James Smith.	Widower.	Carpenter.	Of full age.	20, Hastings Street	Free Church of Scotland (Church Calcutta).	
Spinster.					More than a month		

Witness my hand, this sixth day of July, One thousand eight hundred and sixty-five.

(Signed) JAMES SMITH

(The *Italics* in this Schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another District).

## SCHEDULE B —(See Section 24).

## Registrar's Certificate.

I, the Reverend John Brown, Minister of the Free Church of Scotland at Calcutta, in Bengal, do hereby certify, that on the sixth day of July, 1865, notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of James Smith, one of the parties (that is to say)—

REGISTRAR'S DISTRICT.	WITNESSES.	Condition.	Rank or profession.	Age.	Dwelling place.	Length of Residence.	Church, Chapel, or place of worship, in which the marriage is to be solemnized.	District in which the other party resides, when the parties dwell in different Districts.
Calcutta	Spinster.	Widower.	Carpenter.	Of full age.	20, Hastings Street.	More than a month.	Free Church of Scotland Church, Calcutta	
	Minor.							

and that the declaration required by section nineteen of "The Indian Marriage Act, 1865," has been duly made by the said (James Smith)

Date of notice entered sixth July, 1865

Date of certificate given twentieth July 1865.

The issue of this Certificate has not been prohibited by any person authorized to forbid the issue thereof

Witness my hand, this Twentieth day of July, One thousand eight hundred and sixty five.

(Signed.) JOHN BROWN,  
Minister of the Free Church of Scotland

This certificate will be void unless the marriage is solemnized on or before the twentieth day of September, 1865.

(The *Italics* in the Schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another District).



## SCHEDULE D.

## MARRIAGE REGISTER BOOK

Number	When married			Name of parties		Age	Condition	Rank or Profession	Residence at the time of marriage.	Father's name and surname
	Day	Month	Year	Christian	Surname					
1	26th	July	1865	James	White	28 years	Widower	Carpenter	Agra	Wm. White.
				Martha	Duncan	17 years	Spinster		Agra	John Duncan
<p>Married in the <i>Free Church of Scotland Church, Agra.</i> John Young, Minister of the <i>Free Church of Scotland.</i></p> <p>This marriage was solemnized between us ... (James White) ... in the presence of us ... (Martha Duncan) ..</p> <p>(John Smith. ... (John Green.</p>										

(See Section 34.)

## CERTIFICATE OF MARRIAGE.

Number.	When married.		Names of Parties		Age.	Condition.	Rank or Profession.	Residence at the time of marriage.	Father's name and surname.
	Day.	Month. Year	Christian	Surname.					
1	26th ...	July ... 1865	James	White	26 years	Widower	Carpenter...	Agra ...	Wm. White.
			Martha	Duncan	17 years	Spinster	... ..	Agra ..	John Duncan

Married in the *Free Church of Scotland Church, Agra*  
*John Young, Minister of the Free Church of Scotland.*

This marriage was solemnized between us .. { James White } in the presence of us  
 ... { Martha Duncan } { John Smith.  
 ... { John Green



# ENGLISH LAW—FINES. AND COMMON RECOVERIES.

## ACT XXXI OF 1854.

III. Every married woman who, either alone or jointly with her husband, is pos-

**A married woman, with her husband's concurrence, empowered to dispose of her estate by deed acknowledged, &c.**

essed of or entitled to any estate or interest in or any power to be exercised over any lands or hereditaments, which, but for the passing of this Act, she might have disposed of or extinguished by levying a fine, or suffering a recovery, or by joining in either of such assurances, shall have power by deed, to be acknowledged by her as hereinafter mentioned, to dispose of, release, surrender, or extinguish any such estate, interest, or power, as fully and effectually as if she were an unmarried woman

**Provision to apply to money subject to be invested in lands.**

IV. The provisions of the last two preceding Sections shall, so far as circumstances will admit, apply to money subject to be invested in lands or other hereditaments.

V No deed to be executed by a married woman under the provisions hereinbefore

**Execution of deeds by married woman.**

contained shall, so far as regards the interest of such married woman, be valid or effectual, unless her husband concur therein nor unless the deed be acknowledged in manner hereinafter prescribed before a Judge of one of Her Majesty's Supreme Courts or before a Judge or other covenanted officer of the East India Company exercising civil jurisdiction in the place wherein such deed shall be acknowledged or before some Commissioner appointed either specially for the occasion, or appointed as a permanent Commissioner by one of Her Majesty's said Courts to take such acknowledgments.

VI. If the husband of any married woman, desirous of enlarging, passing, or

**If husband be lunatic, &c., Court may direct acknowledgment by deed without his concurrence, saving right of the husband, &c**

destroying any estate, interest, or power, by a deed to be acknowledged by her under this Act, shall be a lunatic, idiot, or of unsound mind, whether he shall have been found such by inquisition or not, or from any other cause shall be incapable of executing a deed, or if his residence shall not be known, or if he shall be in prison, or living apart from his wife either by mutual consent, or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatever, it shall be lawful for any of Her Majesty's said Courts, by an order to be made in a summary way upon the application of such married woman, and upon such evidence as to the Court shall seem meet, to dispense with the concurrence of her husband in the deed so to be acknowledged, and any deed to be executed or acknowledged by her in pursuance of such order shall (but without prejudice to the rights of her husband as then existing, independently of this Act) be as valid and effectual as if he had concurred therein.

VII. It shall be lawful for any of Her Majesty's said Courts to appoint, by its

**Supreme Courts may appoint, for the purpose of taking such acknowledgment, permanent or special Commissioners.**

orders, under the seal of the Court, to be published in the Government Gazette, or otherwise as the Court shall direct, permanent Commissioners, either by name or office, and to appoint, from time to time, under special Commissions, Special Commissioners, any one of whom shall be authorized and empowered, unless the Act is directed to be done before more than one, to take the acknowledgment of any deed by any married woman,

who, by reason of her place of residence, or ill health, or other sufficient cause, shall

be unable to make such acknowledgment before one of the Judges or other officers described in the preceding Section.

VIII. Every such Judge, Officer, or Commissioner as aforesaid, before he shall receive the acknowledgment by any married woman of any deed to be acknowledged by her under this Act, shall examine her apart from her husband, touching her knowledge of such deed, and shall ascertain whether she understands its object, and freely and voluntarily consents to the same, and unless she appears to understand its object, and freely and voluntarily to consent to such deed, he shall not permit her to acknowledge the same, and in such case, such deed, so far as relates to the execution thereof by such married woman, shall be void.

IX. Every Judge, Officer, or Commissioner, taking such acknowledgment under this Act, shall, at the time of taking the same, sign a memorandum to be endorsed on or written at the foot or in the margin of such deed, which memorandum shall be to the following effect, namely "This deed marked ( ) was this day produced before me and acknowledged by—therein named, to be her act and deed, previous to which acknowledgment the said was examined by me separately and apart from her husband, touching her knowledge, of the contents of the said deed and her consent thereto, and appeared to understand the same, and declared the same to be freely and voluntarily executed by her."

Deed of married woman to take effect from time of acknowledgment

X. Every deed executed by a married woman and hereby required to be acknowledged, shall, so far as regards the interest of such married woman, take effect only from the time of the acknowledgment thereof.

XI It shall not be necessary for any person producing a deed so acknowledged in any Court of Justice, to prove the hand-writing or authority of the Judge or other Officer, or the Commissioner taking such acknowledgment, but if such memorandum purports to have been in substance regularly made and signed, the deed shall be presumed to have been duly acknowledged by the party, until the contrary is shown.



## APPENDIX IV.

### COSTS.

#### (1) Code of Civil Procedure to apply to proceedings under Divorce Act.

Subject to the provisions contained in the Divorce Act (IV of 1861) all proceedings under that Act between party and party shall be regulated by the Code of Civil Procedure. See S. 45 of the Divorce Act

#### (2) Provision as to costs in the Code of Civil Procedure

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of, and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

Where the Court directs that any costs shall not follow the event of the Court shall state its reasons in writing.

The Court may give interest on costs at any rate not exceeding six per cent. per annum and such interest shall be added to the costs and shall be recoverable as such." See Code of Civil Procedure, 1908, S. 35

#### (3) Power to order adulterer to pay costs

Under S. 35 of the Divorce Act (IV of 1861) Courts have — See S. 35 of Act IV of 1861

#### (4) General rule in that costs are in the discretion of Court —Extent of discretion.

(a) No hard-and-fast rule can be laid down as to costs in Court. See the Friedeberg, 10 P. D. 112, and the Judgments of the L. J. J. in *Badische Anilin v. Lerunstein*, 29 C. D. p. 419

(b) Thus, (i) the Court may order the costs to be paid by the parties in definite proportions

(ii) It may order one party to pay to the other a fixed sum in lieu of taxed costs. *Wilmutt v. Barber*, 17 C. D. p. 774, *Mayer of Bradford v. Pickles*, (1894) S. Ch. 53

(iii) Or it may even make a successful plaintiff pay the whole costs of the other side. *Harris v. Petherick*, 1 Q. B. D. 611, *Fane v. Fane*, 13 C. D. 225

(c) Where a plaintiff has no cause of action the defendant cannot be made to pay the whole costs of the action. *Dicks v. Yates*, 18 C. D. 76, see also, *Poster v. G. W. Ry. Co.*, 8 Q. B. D. 515

#### (5) Discretion to be exercised judicially

(a) Though the discretion conferred is very wide, it is a judicial discretion, and must be exercised on fixed principles. *Cooper v. Whittingham*, 15 C. D. 501, *Jones v. Cwrling*, 13 Q. B. D. p. 265

(b) Thus where a party successfully enforces a legal right, and in no way misconducts himself, then he is entitled to costs as of right. *Cooper v. Whittingham*, 15 C. D. 501, *Jones v. Cwrling*, 13 Q. B. D. p. 265,

**Costs—(Continued).**

*Upmann v. Forester*, 24 O.D. 231; *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756 (C.A.); see too, *The Swansea v. The Condor*, 4 P.D. p. 120, *The Monkseaton*, 14 P.D. 51.

(c) The fact, however, that plaintiff brought his action without previous communication with the defendant, does not disentitle him to his costs if he succeeds *Goodhart v. Hyett*, 25 C.D. 142; *Wittman v. Oppenheim*, 27 C.D. 260; *Ruskin v. Robinson*, 2 Times Rep. 18.

(d) Where there are no materials on which the Judge can exercise his discretion, he is not justified in depriving a successful party of his costs. *Civil Service Co-operative Society v. General Steam Navigation Co.*, (1903) 2 K.B. 756 (C.A.) See that case distinguished in *Leckhampton Quarries Co. v. Cheltenham*, R.D.C. ('05) 49 Sol. Jo. 618.

(e) As to how far the Court may regard the behaviour of the parties external to the conduct of the suit itself. See *Harnett v. Wise*, 5 Ex. D. 307; *Estcourt v. Estcourt Hop Essence Co.*, L.R., 10 Ch. 276, *King & Co. v. Gullard & Co.*, (1905) 2 Ch. 7 (C.A.), *Edison-Bell, & Co. v. Smith*, ('05) 119 L.T. Jo. 106.

**(6) Costs on settled principles - Costs according to discretion of Court—Difference—Appeal—English Law.**

(a) In many classes of cases the Courts award costs on settled principles. J.A. 1873, S. 49, see, also, 1 M.I.A. 470, 3 M.H.C. 279 (280), 12 C. 179.

(b) But it is always in the discretion of the Court to depart from the rule where the circumstances of the particular case require it J.A. 1873, S. 49. See, also, 1 M.I.A. 470, 3 M.H.C. 279 (280), 12 C. 179.

(c) The distinction between costs awarded according to a general rule, and costs awarded in the exercise of a discretion on particular facts is important, because an appeal lies from an order awarding costs on a wrong principle, but no appeal lies from the exercise of an erroneous discretion on particular facts J.A. 1873, S. 49 See, also, 1 M.I.A. 470, 2 M.H.C. 279 (280), 12 C. 179.

**(7) Difference between this Act and the English Acts as to Court's power to award costs.**

Act IV of 1869, which deals about Divorce, contains no exhaustive provisions giving the Court a general power over costs, such as that conferred on the English Court by S. 51 of 20 & 21 Vict., c. 85, but the omission is probably only due to the fact that the power is fully given by the Code of Civil Procedure, by which all proceedings under Act IV of 1869 are, subject to the provisions of the Act itself, to be regulated. See Macrae on Divorce, 1871, p. 150. See, also, S. 45 of the Divorce Act (IV of 1869). See, also, S. 35 of the Divorce Act (IV of 1869).

**(8) Principles of English Law to be followed in the matter of awarding costs.**

The Courts administering the Divorce Act are directed to act and give relief on principles and rules similar to those on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. See Macrae on Divorce, 1871, p. 150 See S. 7 of the Divorce Act (IV of 1869), 19 B. 293.

**(9) Husband's liability for wife's costs.**

(a) It has been the rule in England, and it has been followed in this country also, that a wife should not be precluded by want of means from

**Costs—(Continued).**

establishing her case either as Petitioner or Respondent, and it was usual for the wife to apply pending the hearing that the husband should make a deposit or give security for the estimated costs that might be incurred by his wife. 7 C.W.N. 565 (566).

- (b) In a case, where there were pending a suit by the wife for judicial separation and a suit by her husband for divorce, it was held that the wife, whose property was retained by her husband, was entitled to her costs. 29 C. 619.
- (c) In a suit for divorce instituted by a husband against his wife, the Court has a discretion to make the husband pay the wife's costs already incurred, and to give security for her future costs. 19 B. 293 (296).
- (d) Such relief will not be granted by the Indian Courts, unless special circumstances are shown calling for it. 9 M. 12 (13).
- (e) A wife, with out property of her own, seeking a divorce, is entitled to have provision made by her husband for the payment of her costs in the suit. 9 M. 12 (13).
- (f) Rule 158 (as amended 14th July, 1875) of the English Rules and Regulations in divorce cases which govern the practice of the Court in England, ought, having regard to section 7 of the Indian Divorce Act IV of 1869, to govern the practice of Indian Courts. 19 B. 293.
- (g) The husband, in a suit for dissolution of a marriage, will be required (following the English rule) to deposit in Court the necessary costs of the wife, where she has not got separate property sufficient for her support and for the costs of suit. 14 C. 580.

**(10) Extent of husband's liability.**

(i) NOT LIMITED TO ESTIMATED COSTS FOR WHICH SECURITY WAS GIVEN.

- (a) The husband's liability extends not merely to the estimated costs for which he has already given security, but to all costs actually incurred by the wife. *Flower v. Flower*, L.R., 3 P. 132, 42 L.J., P. & M. 45, see, also, *Hall v. Hall*, 1891, p. 302, *Robertson v. Robertson* and F. 6 P.D. 119, *Jones v. Jones*, L.R., 2 P. 333, 41 L.J., P. & M. 21, 53.

- (b) At one time in England, it was held, that, under rule 159 of the English Divorce Court Rules, the discretion of the Judge to allow costs at the hearing to the wife was limited to the amount for which the security had been given or deposit made by the husband, but in *Robertson v. Robertson*, L.R., 6 P.D. 119, it was decided that, where the wife was allowed costs, and where there were no improper proceedings taken on her behalf, she should be entitled to the actual costs incurred by her. 7 C.W.N. 565 (567).

(ii) HUSBAND MAY BE DIRECTED TO PAY COSTS EVEN THOUGH NO SECURITY HAS BEEN GIVEN.

"If an order can be made allowing costs in addition to the amount for which security has been given, there is no reason why in cases where no security has been given or deposit made, an order should not be passed directing the husband to pay all costs reasonably incurred by his wife." 7 C.W.N. 565 (567).

(iii) WIFE'S COSTS TO BE KEPT WITHIN NARROW LIMITS.

The costs of the respondent ought to be kept within the narrowest possible limit consistent with her being able to place her case fairly before the Court. No extravagances in the way of costs can be allowed against the petitioner. Per Fairan, J. in 19 Bom. 293 (296).

## Costs—(Continued).

## (11) Reason of the above rule as to husband's liability for wife's costs.

## (i) COMMON LAW RULE THAT GAVE THE HUSBAND A RIGHT TO WIFE'S PROPERTY.

- (a) The foundation of the practice which prevailed in the Ecclesiastical Court was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of her real estate, leaving her destitute of all means to conduct her case. *Per Pontifex, J.* in 5 C. 357 (362).
- (b) The principle on which the husband is, as a rule, liable for the wife's costs is, that the husband is presumed to have the whole of the wife's property, but on this presumption being rebutted by proof that the wife has separate property, *cessante ratione cessat lex* *Wells v. Wells*, 33 L J., P. & M. 72, *Holmes v. Holmes*, Poynter, 260.
- (c) But it is not sufficient to show that she has separate property sufficient for her own support, it must further be proved that she has enough also for the payment of her costs *Belcher v. Belcher*, 1 Curt. 444; *Wilson v. Wilson*, 2 Hagg. Colls. Rep., 203.

## (ii) WIFE BEING WHOLLY OCCUPIED IN HOUSEHOLD DUTIES, AND CONSEQUENTLY BEING UNABLE TO ACQUIRE ANY PROPERTY.

"Were the matter not concluded by authority, I should give effect to another consideration not referred to, that, inasmuch as the wife, in discharge of her duties as mistress of the household, is wholly occupied, it is impossible for her to acquire any property, and I should have thought that consideration might fairly be used to influence the Court in determining whether in cases such as these the wife might not be entitled to obtain the necessary costs from her husband apart from any question of right to her property." *Per Pigot, J.* in 23 C. 916, note.

## (iii) HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES.

The foundation of the rule is, that a wife can bind her husband for necessities, and a suit, brought with reasonable and probable cause, will be considered a necessity. See Argument of Council in 4 C. 260 (269)=3 C.L.R. 481, see, also, *Jones, v. Jones*, L.R. 2 P. & D. 331; *Brown v. Achroya*, 5 P. & B. 819 cited in argument in 4 C. 260 (269)=3 C.L.R. 484.

## (iv) WIFE'S POVERTY NOT TO BE A BAR TO JUSTICE BEING DONE.

- (a) It has been the rule in England that a wife should not be precluded by want of means from establishing her case as petitioner or respondent. 7 C.W.N. 565 (566)=30 C. 631 see, also, *Robertson v. Robertson*, L.R. 6 P.D. 119, *Otway v. Otway* (L.R. 13 P.D. 141 F).
- (b) And this rule has been followed in this country, 7 C.W.N. 565 (566)=30 C. 631.
- (c) In a case where it is shown that a wife has no means of her own she is not precluded from obtaining costs from her husband on the dismissal of her petition for divorce against him, simply because she had failed to apply pending the hearing that the husband should make a deposit or give security for her estimated costs. 7 C.W.N. 565=30 C. 631.

## (v) PROTECTION FOR WIFE'S SOLICITOR ACTING HONESTLY.

- (a) It is not just that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours, if he takes up a

## Costs—(Continued).

case which he honestly believes to be genuine, but which may after all turn out to be unfounded! See *Browne and Powles on Divorce*, cited in 19 B. 293 (295), 29 C. 619 (621)

- (b) "The reasons given for this rule are as follows: 'If the question of costs were a question solely between husband and wife, it would be reasonable that a husband who had successfully rebutted a charge brought against him by his wife should now be obliged to pay her costs. But unfortunately in the vast majority of cases the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing him she would be powerless, and however good a cause she might have for taking proceedings she would be unable to enforce her rights. Therefore it is necessary to take into consideration the position of the attorney, and provision is made for his payment by enabling the wife to call upon the husband to give security for the cost of the hearing to the amount that may be fixed by the registrar. The course was taken in this case, and the amount of security was fixed at £60, and the wife's attorney undertook the litigation on her behalf, in the anticipation that he would be allowed his costs out of that sum for which security had been given. By not allowing the costs, the Court would be depriving the attorney of that which he looked to, and had a right to look to, as his security in conducting the litigation on the wife's behalf. It is plain that the Court is not absolutely bound to give the wife her costs, but it would only be justified in refusing them in cases when it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is, when he had the means of seeing, before instituting the suit, that it was one which ought not to be instituted. When such a case arises, I will disallow the wife's costs, and thus cause the punishment to fall on the attorney... It would be in the highest degree prejudicial to the interests of the women who are litigants in this Court to cast upon the attorneys whom they consult the dangerous responsibility of coming to a conclusion in doubtful cases as to what is likely to be the finding of the Court upon the facts submitted to them. If I were to disallow these costs I should say in effect that the wife's attorney ought to have come to the conclusion that the charge of cruelty could not be made out. But the attorney ought not, I think, to be compelled to stake his chance of remuneration upon his judgment upon such a question.'" Per Hannen, J. in *Flower v. Flower*, L. R. 3 P. 132, 42 L. J. P. and M. 45.

- (c) "On principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate, so that, in the absence of a settlement (which, as we all know, is a comparatively modern introduction), she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence but also gave her alimony *pendente lite* so as to provide for her maintenance. Of course the husband may say 'it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs



**Costs—(Continued).**

of a false countercharge against myself of adultery or cruelty.' No doubt it is a hardship, but what would the wife have to say in answer? Suppose the wife had brought him £10,000, or £20,000, or £50,000, would not she have a right to say, 'You have taken all my property from me, and am I to be left defenceless and not able to meet your false charge of adultery?' Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband, and, therefore, it was quite right to secure him that payment by getting money paid into Court, and finally by payment of the proper costs incurred when the suit was heard. Now, as was observed by the learned judge in the case of *Flower v. Flower*, it is not the solicitor's fault if the wife is wrong. If he himself conducts the litigation properly, if he fairly investigates the charges and sees a reasonable foundation for a defence, he is not to lose his costs and the fair remuneration for his labour, because he is not successful. No solicitor would engage in the practice of the profession on the terms of not getting paid whenever he was unsuccessful; and, therefore, unless he himself has been guilty of misconduct, there is no reason for depriving him of his costs. It appears to me, therefore, that where the defence is fairly and reasonably conducted, the solicitor ought to be paid in full his costs, that is, his costs properly incurred.....I have given that what I believe to be the true view of the origin of the liability of the husband, but I am not obvious to the nobler view, if I may so express it, held in the House of Lords, that no gentleman, indeed, no man of right feeling, would wish that his wife should not have the means of fairly investigating and fairly defending herself against so odious a charge as that of adultery. Really, if there had not been, as I do believe there is, the common and pecuniary reason for fixing the husband with costs, I think that that reason ought to be sufficient to all right-minded men." Per Jessel, M. R. in *Robertson v. Robertson*, 6 P. D. 119.

**(12) Exceptions to the above.****(i) MISCONDUCT OF SOLICITOR.**

To the general rule as above laid down, there are two exceptions.

"If the wife's solicitor is guilty of misconduct,—if he either knowingly promotes a case which it must be clear to anybody has no foundation at all, so that he is countenancing improper litigation, or if he takes steps which are merely oppressive or obviously unnecessary, or if he crowds a case with absurd evidence, all these are reasons why, if he so misconducts himself, the costs of the wife should be disallowed either in whole or in part." *Ash v. Ash*, (1893), 222, *Wilson v. Wilson*, L.R. 2 p. 435, *Hough v. Hough*, 71 L.T. 703.

**(ii) WIFE POSSESSED OF SUFFICIENT SEPARATE PROPERTY.**

(a) A wife, who is possessed of sufficient separate property of her own, is not entitled to burden the husband with the costs of a suit in which she has been unsuccessful, even though security for her costs may have been given by him. *Heal v. Heal*, L.R., 1. P. 300; 36 L.J., P. & M. 62.

(b) In such a case, she may herself be condemned in costs. *Milne v. Milne and Flower*, L.R. 2 P. 202.

**Costs—(Continued).****(13) Application of the above rule.****(i) WHERE WIFE IS UNSUCCESSFUL.**

This rule as to the husband's liability for wife's costs holds good even if the wife be unsuccessful. 4 C. 260 (281) = 3 C.L.R. 484, *Jones v. Jones*, L.R. 2 P. and D. 331; cited in argument in 4 C. 260 (269).

**(ii) HUSBAND APPARENTLY UNABLE TO PAY COSTS.**

The Court would make an order for the taxation and payment of the wife's costs in a matrimonial suit against the husband, notwithstanding his apparent inability to pay them. *Ward v. Ward*, 1 S. & T. 484, 29 L.J. P. 17.

**(iii) GUILTY WIFE SUCCESSFUL IN COUNTER-CHARGES.**

In one case, where a guilty wife succeeded in establishing counter-charges against her husband, the Court gave her costs. *Caldecott v. Caldecott*, 29 L.T. 699.

**(iv) NEW TRIAL, COSTS ON.**

Where a new trial is granted on application of the wife, the Court will not usually impose upon her the terms of payment of costs, if she has no means, but the husband must pay the costs of both parties. *Nicholson v. Nicholson*, 3 S. & T. 211, 52 L.J.P. 127, 9 L.T. 118.

**(v) JURY DISAGREED—ABORTIVE TRIAL—FULL COSTS TO WIFE**

Where a jury disagreed, the Court gave the wife her full costs over and above the amount deposited in Court. *Hurley v. Hurley*, (1891) 367, 61 L.J. 14, 65 L.T. 252.

**(vi) COSTS OF APPEAL.**

The same rule holds good not only as to the costs of the lower Court, but also as to the reasonable costs of the appeal. 4 C. 260 (281), 3 C.L.R. 484; *Jones v. Jones*, L.R. 2 P. & D. 331 cited in argument in 4 C. 260 (269).

**(vii) WIFE POSSESSED OF SEPARATE PROPERTY.**

(a) "The rule has always been that an order as to costs pending the hearing ought not to be made against the husband if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance, the reason for the continuance of the rule, whatever may have been its origin, being that, it is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he takes up a case which he honestly believes to be genuine, but which may, after all, turn out to be unfounded" (Browne and Powells on Divorce, 5th Ed., p. 342) It is a rule of public policy, *Per Farren, J.* in 19 B. 293.

(b) "The relative incomes of husband and wife may be taken into account by the judge when exercising his discretion as to whether he will allow the wife her costs already incurred *pendente lite*, and he is not bound to refuse the application because the wife has separate property the amount of which is much more than sufficient for the payment of her costs." *Allen v. Allen*, (1854), P. 134, cited in 19 B. 293.

(c) The question whether the wife should or should not have her Cause depends upon the property which the wife may have. *Per Stephen, J.* in 29 C. 619, (621).

**Costs—(Continued).**

- (d) If it appears that the woman retains her property inspite of her marriage, she will not be entitled to her costs from her husband. *Per* Stephen, J., in 29 C. 619 (621).

**(14) Limits for the application of the rule.****(i) SUIT BROUGHT BY PARENT IN HIS OWN INTERESTS.**

As the presumption is only based on the rule of English law that a woman's property by marriage passes to her husband, it follows as a consequence, that, where the husband is not the petitioner, as in suits brought by a parent in his own interest to have the marriage of minors declared null and void, the wife's costs cannot before the hearing be taxed against the petitioner. *Wells v. Cottam and Wells*, 3 Sw. & Tr 364.

**(ii) DELAY AND DECISION AGAINST WIFE**

Again, if the wife delay her application for costs until after the trial, and the decision be against her, she cannot then have her costs, because the Court never awards costs to a party whose delinquency has been established. *Keats v. Keats and Montezuma*, 1 Sw. and Tr. 353, 28 L.J., P. and M. 57.

**(iii) WIFE'S SUIT MUST BE *bona fide***

The wife's costs when taxed *de die in diem* are generally payable to the wife or her attorney out of the fund in Court, but if the Court has reason to suspect that the suit has been instituted *mala fide*, it will order the sum deposited to be retained in the registry to abide the event of the hearing *Rogers v. Rogers*, 4 S. and T. 82, 31 L.J. P. and M. 87.

**(iv) WIFE FAILING IN FIRST SUIT—COSTS OF SECOND SUIT.**

If a wife brings a suit on one ground and fails, and she then brings a second suit seeking different relief and succeeds, her husband will only be condemned in one set of costs *Ditchfield v. Ditchfield*, (1869) L R 1 P. & D. 729, *Of Butler v. Butler* (1890), 15 P.D. 32, 126, C.A.

**(v) WIFE SHOULD BE WITHOUT PROPERTY OF HER OWN**

(a) A wife without property of her own seeking a divorce is entitled to have provision made by her husband for the payment of her costs in the suit. 9 M. 12 (5 C. 357, D.).

(b) Time is taken to consider this matter, because at first there was some difference in principle between giving this relief to a woman seeking a divorce, and doing so in the case where the woman is the defending party. Upon consideration there is no reason for any such distinction. The English Divorce Courts have always given it in both cases and the reason, *viz.*, that otherwise the wife will, as a rule, be unable to continue the proceedings applies equally to both cases. The rules passed by the Courts for divorce and matrimonial causes in England under the English Divorce Act provide for the taxation of costs of a wife, who is petitioner or respondent, before the hearing as a matter of course, and for the registrar's ordering the husband to pay or give security for the costs of, and incidental to, the hearing. 9 M. 12.

(c) If she has property, that property of course will be available for her costs, and in that case the Courts here would probably refuse to make any order that the husband pay her costs until the suit has been decided, as is done by the English Courts when the wife has separate property. But when the wife has no separate property, the same reason for the practice requiring her husband to provide for her costs namely, her inability otherwise to continue the proceedings still remains. 9 M. 12.

**Costs—(Continued)**

- (d) She is not certainly, unless she has property, in a position to meet her husband on equal terms, and is therefore, likely to be at a disadvantage, and this inequality between the contending parties is the reason for the practice in question. 9 M 12 (11)

**(15) Usual order for wife's costs, though charges frivolous.**

In a case of judicial separation the Court, whilst expressing a strong opinion that the wife's charges against her husband were of a trumpety character, refused to deprive her of the usual order, although she had a small separate estate, in the absence of any suggestion of improper conduct against her solicitor. *Mues v. Mues*, 65 L.T. 859.

**(16) No appeal as to costs.**

Where the Court has exercised its discretion as to costs, the Court of appeal is precluded from reviewing such decision. *Russell v Russell* (1892) 1 P 152, 61 L.J.P. 45, 66 L.T. 436.

**(17) Injunction.**

In this case, the husband against whom an order had been made for depositing his wife's costs became entitled to a legacy. The Court granted an injunction to restrain him from reviving the legacy until the orders as to costs were complied with. *Gillet v. Gillet*, 14 P.D. 158, 58 L.J.P. 81, 61 L.T. 401.

**(18) Payment of wife's costs after order for the husband to proceed in forma pauperis**

Where a petitioner obtained leave to proceed in forma pauperis some time after the proceedings had been commenced, and after an order had been made upon him for payment of his wife's costs up to a certain amount, the Court ordered all the proceedings to be stayed till the order had been complied with. *Joseph v. Joseph*, 11 Q.B. 76, 56 L.T. 236.

**(19) Husband dying pendente lite—Order for costs against his executors**

Where a husband died during proceedings for divorce, the Court made an order for the wife's costs against his executors. *Cunningham v. Cunningham*, (1897), 77 L.T. 405. See, also, *Townson v. Townson*, (1899) 67 L.J.P. 68, 78 L.T. 54.

**(20) Application for costs, when made.**

(a) Any application in the matter of costs must be made at least before the decree is finally settled. *Macrae on Divorce*, 1871, p. 160.

(b) The Court has no power to make any order as to costs which are for the first time asked for after the decree absolute. *Wait v. Wait and Flower*, 10 L.J.P. & M. 30.

(c) It is, however, too late to ask for costs against any party after a decree has been made absolute. *Wait v. Wait*, (1871), L.R. 2 P. & D. 223.

**(21) Husband (Petitioner) failing to comply with order to give security for wife's costs.**

(a) Where the husband is the petitioner, and fails to comply with an order to deposit or give security for his wife's costs, all proceedings in the suit will be stayed on the application of the wife until such sum is deposited or secured. *Keat v. Keat and Montezuma*, 24 L.J. P. & M. 139, note, *Hepworth v. Hepworth*, 2 S. & T. 114.

(b) The subsequent bankruptcy of the husband is no sufficient ground to cancel or vacate an order to secure such costs. *Morris v. Morris*, 15 L.T. 545.

**Costs—(Continued).**

(c) But in certain cases, it has been held that, if it be proved that the husband is a man of no means, the Court will refuse to stay the proceedings upon the application of the wife. *Walker v. Walker*, 1 Curt. 560; see, also, 14 C. 590.

(d) Where an order has been made for payment by the husband, in a suit for dissolution of marriage, of the costs the wife is likely to incur in the suit, the proceedings will not be stayed if the husband has no means to deposit the costs. 14 C. 590.

(e) Where, in a suit for dissolution of marriage by a husband, the wife applied for an order to stay proceedings until her costs were paid by her husband, and the husband's affidavit showed that he was a man without means, an enquiry as to means was directed. 14 C. 590 (583).

**(22) Husband (Respondent) failing to comply with order to give security for wife's costs**

Where the husband is the respondent and has failed to comply with an order to deposit, or give security for, a sum sufficient to cover his wife's costs, the order can be enforced against him in the manner provided by the Code of Civil Procedure for the execution of a money decree. Civ. Pro. Code, 1882, S. 220. Such failure may amount to contempt of Court. See *Bats v. Bats*, 14 P. D. 17 C.A.

**(23) Money paid by husband to meet wife's costs, disposal of.**

(a) The money paid into Court by the husband to meet his wife's costs is primarily liable for the payment of those costs when taxed, although the co-respondent may have been condemned in all the costs, and the husband is unable to obtain them from him. *Evans v. Evans and Robinson*, 24 L. J., P. & M. 136.

(b) And where the husband had died before the hearing, the Court ordered that the costs incurred by the wife's solicitors for the hearing, should be taxed and paid to them out of the sum deposited by the husband in the registry to meet his wife's costs, with leave to the solicitors of the husband's executors to attend the taxation. *Hall v. Hall*, 3 Sw. & Tr. 390.

**(24) Payment of wife's costs by husband—How such costs are taxed,**

The wife is generally entitled to have her costs taxed and paid by her husband from day to day, whether she be petitioner or respondent. See *Macrae on Divorce*, 1871, p. 150.

**(25) Taxation of wife's costs, practice as to.**

(a) The mode in which costs are taxed against a husband in matrimonial suits are the same as in other causes. *Suggate v. Suggate*, 1 S. & T. 497.

(b) The Court has power to order the wife's costs to be taxed from time to time against the husband in a suit for dissolution of marriage. *Weber v. Weber and Pyne*, 1 S. & T. 220, cited in Argument in 3 B.L.R., Ap. 5.

**(26) Discretion of the Registrar**

The taxation of costs is in the discretion of the registrar, and the Court will not interfere with his discretion in respect of particular items allowed or disallowed, unless it can be shown that the taxation proceeded on an erroneous principle. *Cooke v. Cooke*, 3 S. & T. 374.

**(27) Practice in English Courts.**

In England such costs are taxed as between party and party. *Allen v. Allen and D'Acry*, 2 S. & T. 107.

**Costs—(Continued)****(28) Practice in Courts in India.**

In India such costs are taxed, as a general rule, as between attorney and client.  
*Kelly v. Kelly and Saunders*, 3 B L R., App. 6.

**(29) Review of order relating to taxation**

The proper mode of reviewing an order as to taxation of costs is by moving for a rule to show cause why the taxation should not be reviewed, and not by an act on petition. *Dickens v Dickens*, 28 L.J., P. & M 94.

**(30) Expenses of witnesses**

(a) The number of witnesses whose expenses will be allowed is a question for the discretion of the registrar. *Allen v. Allen and D'Acy*, 2 S. & T. 107.

(b) He should allow the expenses only of such of them as there was reasonable ground for calling. (*Ibid*)

**(31) Expenses of reasonable journeys**

The reasonable expenses of journeys and inquiries taken and instituted for the purpose of procuring information may also be allowed. (*Ibid*)

**(32) Attorney's lien for wife's costs.**

(a) An attorney who has acted for a wife in a matrimonial suit, has a lien for his costs, not only on the fund paid into Court by the husband to meet his wife's costs, but also, if his costs exceed the sum so paid in by the husband, upon the alimony paid into his hands on behalf of the wife. *Brenner v Brenner and Elett*, L R , 1 P and D , 254 , 36 L J , P. & M , 11 , *Kelly v. Kelly and Saunders*, 3 B L R , p. 1

(b) The wife's attorney or proctor will have a lien on the sum to the full extent of the costs. 3 B L R App 110.

**(33) Costs of solicitor.**

"The costs of a solicitor employed by a married woman to institute proceedings on her behalf against her husband, to obtain a judicial separation, can only be recovered against the husband, when the necessity for such proceedings has been made out in point of fact." *Taylor v. Haulstone*, 52 L.J., Q.B. 101.

**(34) Solicitor guilty of misconduct.**

When the husband has been ordered by the registrar to give security for his wife's costs up to a certain amount, costs to that amount are always allowed her, whether she be successful or not, unless her solicitor has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground. *Flower v. Flower*, L R 3 P & D, 132 , 42 L J P. 45 , 29 L T 253 See, also, *Kay v Kay*, (1904), 332

**(35) Solicitor must satisfy himself as to wife's defence**

A solicitor acting for a wife is not entitled to rely on his client's instructions, but, to entitle him to look to the husband for payment of his costs, he must fairly investigate her defence, and satisfy himself as to its reasonableness. *Walker v Walker* (1897) 76 L T 236.

**(36) Position of solicitor neglecting to get usual order for wife's costs.**

If a solicitor does not follow the usual course and get an order against the husband for his costs whilst he is acting for the wife, he cannot do so after he has ceased to act for her. He will then be left to his remedy at common law. *Naume v Naume*, (1902) 71 L J P & M, 37 , 85 L T. 619.

**Costs—(Continued).****(37) Inability to pay no ground to excuse husband.**

The Court will make an order, prior to the hearing, for the taxation and payment of the wife's costs against the husband, notwithstanding his apparent inability to pay them. *Ward v. Ward*, 1 Sw and Tr., 484.

**(38) Wife suing in forma pauperis, no exception to the rule**

If the wife obtain a decree, she is entitled to costs, though she sued *in forma pauperis*. *Afford v. Afford*, 30 L.J., P. & M. 174

**(39) Withdrawal of suit.**

A husband will not be allowed to withdraw his petition before the hearing except upon payment of his wife's taxed costs. *Pearce v. Pearce*, 30 L.J., P. & M. 152.

**(40) Cross-suits—Costs of wife.**

In cross-suits, where both husband and wife fail, she may have full costs, except, perhaps, in so far as her defence was a joint one with the co-respondent. *Burroughs v. Burroughs and Silcock*, (1862) 31 L.J. (P. & M.) 124

**(41) Parties being partially successful—Costs.**

Where the parties have been only partially successful, they may have to pay their own costs. *Duplany v. Duplany*, (1892), pp. 53, 57.

**(42) Suit by father of minor husband in such father's own interests.**

(a) In a suit for nullity of marriage, instituted by the father of a minor husband, in such father's own interests, the minor and his *de facto* wife being made co-defendants, the wife's costs will not be taxed either against the petitioner or the minor husband. *Wells v. Cottam*, f. c. Wells, 3 S. and T. 593, 34 L.J., P. & M. 12.

(b) "But under the Indian Divorce Act it is not (apparently) open to the parent of either party to a marriage to sue for a decree of nullity of such marriage otherwise than in the interests of the husband or wife." *Ratigan on Divorce*, 1897, p. 366.

**(43) Suit by lunatic husband's committee.**

If the husband is a lunatic, and a suit is brought on his behalf by his committee, or other person entitled to his custody, such committee or other person must give the usual security for the wife's costs. *Smith v. Morris*, 3 Ad. 67.

**(44) Suit by next friend of minor husband.**

In a suit instituted on behalf of a minor husband by his next friend, the latter must file an undertaking in writing to be answerable for the costs of the proceeding and must also either deposit, or give security for, a sum sufficient to meet the wife's costs of the hearing. *Beavan v. Beavan*, 2 S. & T. 652, 31 L.J., P. & M. 166.

**(45) Guardian's liability for costs.**

While a guardian or next friend represents a wife who is a minor, he may, if he acts without due caution, render himself personally liable. *Brown v. Brown*, (1850) 2 Rob. Eccl. 301.

**(46) What costs allowed to the wife****(1) COUNSEL'S FEES.**

Counsel's fees for advising on the sufficiency of an answer which is not a mere traverse of the charges in the petition are allowed. *Heepworth v. Heepworth*, 30 L.J., P. & M. 253.

**Costs—(Continued).****(ii) COSTS OF COMMISSION TO EXAMINE WITNESSES.**

- (a) Where a commission to examine witnesses is applied for either by the husband alone (*Hood v Hood*, 2 Sw and Tr., 112n), or, by the husband and wife jointly, the Court will order the husband to advance such a sum of money as the Registrar may think sufficient to defray the wife's expenses of the commission. *Bailey v Bailey and Della Rocca*, 2 Sw. & Tr. 112, 30 L J., P. & M., 49.
- (b) It seems that, where the commission is sought solely by the wife, she may have the costs thereof taxed against her husband, even though it be merely vexatious and unnecessary. See *Macquon on Divorce*, 2nd Ed., p 222.
- (c) The only remedy, apparently, against this is for the husband, at the time of the application for the commission, to prove that the evidence sought to be taken is not material or necessary, when the Court will refuse to issue the commission, though it will not enquire into such circumstances of its own motion, leaving that to the affidavit of the applicant's solicitor. *Stone v. Stone and Applepton*, 34 L J., P. & M., 33.
- (d) A commission will also be refused if there have been unreasonable delay in asking for it (*Ibid*).

**(iii) COSTS OF JOURNEY TO PROCURE INFORMATION.**

Where a journey to procure information was necessary to prove the case, the costs of the journey should be allowed as a necessary expense to the wife. *Allen v. Allen and D'Arcy*, 30 L J., P. & M. 9, 2 Sw. & Tr 107.

**(iv) EXPENSES FOR WITNESSES, HOW FAR ALLOWABLE.**

"The numbers of witnesses called to prove any particular fact, whose expenses must be allowed, is a question for the discretion of the Registrar, who should allow the expenses of all those whom there was a reasonable ground for calling." *Macrae on Divorce* 1871, p. 158.

**(v) COSTS OF WIFE'S PROCTOR.**

- (a) "The wife's proctor, at any stage of the proceedings, may apply to have his costs paid out of the fund in Court." See *Macrae on Divorce*, 1871, p. 151.
- (b) Notwithstanding the dissolution of the marriage had been decreed with cost against the co-respondent, the wife's proctor could have recourse to the sum paid into Court. *Evans v Evans*, 24 L J., Pro. & Mat, 138, cited 3 B L R., Ap. 5 (6).

**(vi) WIFE'S COSTS ON APPEAL.**

(A) Generally security is asked for from husband.

Where a wife appeals against the decision of the Court dismissing her petition, she is entitled even then to security from her husband for the costs of appeal. *Jones v Jones*, L R., 2 P. 333. See, also, 1 C 260.

(B) But not where wife is found guilty.

Courts would, as a general rule, make no provision for the costs of a wife on her appeal from a decision by which she has been found guilty of adultery. *Otray v Otray*, 13 P D at pp. 15—156.

(C) Wife not allowed costs of her unsuccessful appeal against interlocutory order. A wife will not be allowed the costs of her unsuccessful appeal against an interlocutory order. *Thompson v. Thompson and Sturmfalls*, 2 S. & T. 402.



**Costs—(Continued).****(vii) COSTS OF NEW TRIAL.**

(a) Even where the wife asks for a new trial, the Court, in granting the order, cannot impose upon her the payment of costs, if she have no means, but the husband must pay the costs of both parties. *Nicholson v. Nicholson and Ratcliffe*, 3 Sw. & Tr. 214, 32 L.J., P. & M. 127.

(b) In such cases alimony *pendente lite* continues without further order. (*Ibid.*)

**(viii) HUSBAND'S PETITION DISMISSED ON GROUND OF COLLUSION.**

Where the husband's petition for dissolution was dismissed on the ground of collusion with his wife, the respondent, the Court ordered the wife's costs to be paid by the husband. *Todd v. Todd*, L.R., 1 P. & D. 121.

**(ix) COSTS OF GUILTY WIFE.**

(a) If the wife be found to be living in adultery with the co-respondent, or is separated from her husband under such circumstances that she does not pledge his credit *Held* that that was no reason for refusing her, her costs *pendente lite*, though alimony *pendente lite* might be refused under such circumstances. 3 B.L.R. App. 13.

(b) Further, under the above circumstances, she is entitled to such costs, only up to the time when her guilt is proved, and after that she is not, as an ordinary rule, entitled to costs, though the case may be still said to be pending. *Whitmore v. Whitmore*, 35 L.J., P. & M. 51.

**(47) The following costs will not, as a rule, be taxed against the husband.****(i) COSTS OF APPLICATION FOR TIME.**

Costs of an application by the wife for further time to answer to the petition will not be allowed. *Harding v. Harding and Lance*, 2 S. & T. 549, 31 L.J., P. & M. 76, See, also, *Hepworth v. Hepworth*, 30 L.J. P. & M. 253, *Friebout v. Friebout and Penney*, 30 L.J., P. & M. 214.

**(ii) COSTS OF MOTION TO EXAMINE HUSBAND ON A PETITION FOR ALIMONY.**

Costs of a motion for the husband to attend and be examined on the wife's petition for alimony after he has answered on oath thereto will not be granted to the wife, if the result of his examination is to establish the truth of his answer. (*Ibid.*)

**(iii) COSTS OF AN UNSUCCESSFUL OPPOSITION TO A MOTION FOR FURTHER PARTICULARS.**

The wife will not be allowed the costs of an unsuccessful opposition by her to a motion for further particulars of the charges in her petition for dissolution of marriage. (*Ibid.*)

**(iv) COSTS OF UNNECESSARY APPEARANCE OF WIFE.**

Nor will the wife be allowed the costs of appearing on a motion, if such appearance is unnecessary, though she may have received notice to appear from the other side. (*Ibid.*)

**(v) APPLICATION TO COURT WHICH SHOULD BE MADE IN CHAMBERS.**

If an application be made in Court which should be made in chambers, the extra expense is disallowed. *Higgs v. Higgs and Hopline*, (1862), 32 L.J. (P. M. & A.) 64.

**(vi) WIFE'S APPLICATION FOR TIME—LACHES.**

So, too, are the costs of a wife's application for time disallowed, especially if necessitated by her own laches. *Harding v. Harding and Lance*, (1862), 2 Sw. and Tr. 549.

**Costs—(Continued).****(vii) COSTS OF OBTAINING INFORMATION.**

The mere fact that a solicitor had reasonable grounds for believing, upon information obtained, that proceedings ought to be taken, is not sufficient to render the husband liable for costs incurred in obtaining such information, unless it appears to the Court that there was any necessity for such proceedings. *Taylor v. Hailstone*, 52 L.J., Q.B. 101.

**(viii) COSTS OF APPEAL.**

In a very early case the Court refused to allow the wife's costs of appeal to be taxed against her husband. *Thompson v. Thompson*, 2 S. and Tr. 404.

**(ix) MOTION TO CONVERT PETITION FOR DISSOLUTION INTO ONE OF JUDICIAL SEPARATION.**

The wife's costs of a motion to convert a petition for dissolution of marriage into one for a judicial separation will not be granted. *Cartledge v. Cartledge* (1862), 4 Sw and Tr. 249.

**(x) UNSUCCESSFUL APPLICATION FOR PARTICULARS.**

Her costs of an unsuccessful application for particulars, will be disallowed. *Hepworth v. Hepworth* (1861), 30 L.J. (P. M. and A.) 253.

**(xi) UNSUCCESSFUL APPLICATION FOR ACCESS TO CHILDREN**

The wife's costs of..... will not be allowed. (*Ibid*).

**(xii) COSTS OF UNSUCCESSFUL MAKING OR OPPOSING AN INTERLOCUTORY APPLICATION.**

A wife who unsuccessfully makes or opposes an interlocutory motion is not entitled to costs of such motion *Hepworth v. Hepworth*, 30 L.J., P. & M. 253, *Forster v. Forster and Bennage*, 3 Sw. & Tr. 151.

**(xiii) COST OF PREVENTING DECREE "NISI" FROM BEING MADE ABSOLUTE.**

The costs of an attempt on her part to prevent a decree nisi pronounced against her from being made absolute, will not be allowed her. *Stoate v. Stoate*, 2 S. & T. 384, 30 L.J. P. 173, 5 L.T. 178.

**(xiv) UNSUCCESSFUL APPEAL AGAINST AN INTERLOCUTORY ORDER.**

The costs of an..... will not be allowed to the wife. *Thompson v. Thompson and Sturmjells*, 2 Sw & Tr., 402.

**(xv) SPECIAL JURY, COSTS OF.**

Where the wife applies to have the cause tried by a special jury, the Court sometimes refuses her the costs of special jury. *Scott v. Scott*, 32 L.J.P. & M. 40.

**(xvi) COSTS OF UNNECESSARY APPEARANCE.**

She will not be allowed the costs of appearing on a motion if such appearance be unnecessary, even though she may have received notice to appear from the opposite side, *e.g.*, where she appears, having nothing to say, on a motion to make a decree nisi, for dissolution of her marriage absolute. *Frebout v. Frebout and Penny*, 30 L.J., P. & M. 214.

**(xvii) COSTS OF UNFOUNDED CHARGES.**

Costs of allegations which have no prospect of success are incurred at the risk of the party making them. *Kay v. Kay*, (1904) P., 382, 73 L.J.P. 108; 91 L.T. 360.

**(xviii) APPLICATION TO CORRECT AN UNEXPLAINED MISTAKE IN A PETITION FOR ALIMONY.**

The costs of an..... will not be allowed. *Harker v. Harker* (1868), 37 L.J., P. & M. 11.

**Costs—(Continued).****(xix) OMISSION TO APPLY FOR COSTS UNTIL JUDGMENT IS GIVEN AGAINST HER.**

If it be shown that the wife have separate property of her own, or if she have omitted to have her costs paid before the hearing and judgment have passed against her, her husband is not liable for her costs. See *Macrae on Divorce*, 1871, pp. 150, 151.

**(xx) EXPENSES INCURRED PREVIOUS TO THE FILING OF THE PETITION.**

In a petition for judicial separation brought by a wife, no costs should be allowed to her for expenses incurred previously to the filing of the petition. *Dickens v. Dickens*, 2 Sw. and Tr. 103.

**(xxi) WIFE HAVING SUFFICIENT SEPARATE PROPERTY.**

(a) A wife, who has sufficient separate property of her own, should be left to pay her own costs. *Wells v. Wells and Cottam*, 33 L.J. P. and M. 72.

(b) Thus, a wife who is in receipt of an ample allowance from her husband or from his estate, is not as a rule, entitled to have her costs *pendente lite* paid by him. *Woodgate v. Tait*, 30 L.J., P. & M. 197, note.

**(xxii) WIFE'S SUIT NOT BEING "BONA FIDE"**

If the Court has reason to believe that the wife's suit is not instituted *bona fide* but for the purpose of obtaining costs from the husband, it will refuse to make this order, and will direct that the sum paid in the registry by the husband to meet his wife's costs remain there to abide the event of the hearing. *Rogers v. Rogers*, 4 Sw. and Tr., 82, 34 L.J., P & M. 87.

**(xxiii) CONDUCT OF WIFE.**

A woman who was wilfully married her deceased husband's brother, although she is entitled to a decree of nullity, will probably not be allowed costs. *Aughtie v. Aughtie* (1810), 1 Phillim 201, *Andrews v. Ross* (1888), 11 P. D. 15.

**(xxiv) CONDUCT OF SOLICITOR NOT BEING "BONA FIDE."**

If the wife's solicitor has not acted *bona fide* for her protection, the Court may refuse to make an order for her cost. See *Laws of England*, Vol. XVI, pp. 429 (51<sup>st</sup>)

**(xxv) WIFE'S COSTS ON INTERVENTION**

(a) It is not the practice of the Court to order the husband to give security, or pay a sum of money, for his wife's costs incidental to an intervention of the Queen's Proctor. *Gladstone v. Gladstone*, L.R., 3 P. 260.

(b) Where the name of a woman is by mistake, included in an allegation of adultery, if she intervenes as a respondent, the petition may be amended, and she may be allowed her costs properly incurred. *Harding Cox v. Harding Cox*, (1908) 24 T. L.R. 634.

(c) But where insufficient particulars have been given partly by the fault of both sides, probably no order as to the costs of a necessary adjournment will be made. *Bancroft v. Bancroft and Runney* (1864), 3 Sw. and Tr. 610.

**(xxvi) RESTITUTION OF CONJUGAL RIGHTS, WIFE EVADING SERVICE OF DECREE FOR.**

(a) Where a wife evaded service of a decree for restitution by remaining out of the jurisdiction, the Court, on being satisfied that she had a sufficient separate income, condemned her in the costs of the proceedings. *Miller v. Miller*, L.R. 2 P. & D. 13.

**Costs—(Continued).****(xxvii) SUIT FOR RESTITUTION OF CONJUGAL RIGHTS—DEED OF SEPARATION SET UP AS DEFENCE.**

- "Where a husband and wife were living apart under a deed of separation, under which the husband covenanted to pay the wife a weekly allowance in the payment of which he had been on one occasion three days late, the Court held that this was not a sufficient breach of covenant to deprive him from the right to set up the deed in answer to his wife's petition for restitution, and refused to make the usual order for the wife's costs." *Kinski v. Kinski*, (1899), 68 L.J. P.M. 18.

**(xxviii) PARTIES BEING GOVERNED BY THE INDIAN SUCCESSION ACT—OPERATION OF S. 4 OF THE ABOVE ACT.**

- (a) In a suit by a wife for judicial separation from her husband both being governed by the Indian Succession Act on the ground of cruelty on the part of the husband, it was held, that the Courts should not, except under exceptional circumstances, order the husband to give security for his wife's costs. 5 C. 357 = 5 C. L.R. 1. See also 23 C. 913, 19 B. 293; 9 M. 12, 6 C.W.N. 114, 5 B.L.R. App. 9, 7 C.W.N. 565.
- (b) Where the husband and wife are subject to the provisions of S. 4 of the Indian Succession Act, 1865, the husband will not be ordered to give security for the wife's costs. 5 C. 357. See also, 14 C. 590, 23 C. 913; 23 C. 916, Note.
- (c) The foundation of the practice which prevailed in the Ecclesiastical Courts was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of the real estate, leaving her destitute of all means to conduct her case. But this state of the law has been completely altered by S. 4 of the Indian Succession Act. 5 C. 357 (362). But see 5 B.L.R. Ap. 9.
- (d) The foundation of the practice in the Ecclesiastical Courts having been displaced with respect to persons subject to the Indian Succession Act, the practice itself ought no longer, as a general rule, to be followed. 5 C. 357 (362).
- (e) Even in the Ecclesiastical Courts the practice was not an absolute one, but was subject to exceptions, as in the case where the wife had separate property of her own, or where it was proved that the husband had no means of his own. 5 C. 357 (362).
- (f) Even in the English Divorce Court, at least since the publication of the rules and orders of 1865, there has been a discretion to refuse the wife her costs, even in a case where a deposit of estimated costs had been made by the husband under the order of the Court. *Jones v. Jones* L.R. 3 P. & D. 333, referred to in 5 C. 357 (362).
- (g) In a suit for divorce between persons subject to the Indian Succession Act, the mere fact that the wife has no means of her own is not such a special circumstance as will justify the Court in ordering the husband to pay in advance or give security for his wife's general costs of the action. 6 C.W.N. 414.
- (h) "It does not appear to me that the provisions of S. 4 of the Succession Act, affect the rule as to costs which ought to be applied to the case. The rule has always been that an order as to costs pending the hearing ought not to be made against the husband, if the wife is possessed of means (technically styled separate property) sufficient to enable her to pay her own costs in the first instance. The reason for the continuance of the rule (whatever may have been its origin) is "that it is

**Costs—(Continued).**

not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours if he take up a case which he honestly believes to be genuine, but which may after all turn out to be unfounded" (Browne and Powles on Divorce, 5th Ed. p. 342). It is a rule of public policy." *Per Farran, J.* in 19 B. 293 (295).

**(48) Wife made to pay husband's costs in certain cases.**

- (a) The Divorce Court has power to condemn the wife in her husband's costs, and has in several cases made the order accordingly. *Miller v. Miller*, L.R. 2 P. & D. 13.
- (b) In one case the wife had, in answer to a petition for restitution of conjugal rights, raised charges against her husband, which were abandoned on her behalf at the trial, and she was possessed of an income of £760 in her own right. In such circumstances the wife was made to pay her husband's costs. *Miller v. Miller*, L.R. 2 P. & D. 13.
- (c) As a general principle, where no blame could attach to the husband for her misconduct, a wife who has property should be liable for the costs. *Milne v. Milne*, L.R., 2 P. & D. 202.
- (d) But if the order to pay costs would deprive her of the means of subsistence, the Court will not make the order. *Carstairs v. Carstairs, Billson and Dickenson*, 33 L.J., P. & M., 170.
- (e) Where the Court granted an application by the wife that her suit for judicial separation might be dismissed, and that she might substitute for it a petition for dissolution, made it a condition precedent that she should pay the costs of the suit for judicial separation. *Lewis v. Lewis*, 29 L.J., P. & M. 123.

**(49) Costs against wife if she has separate estate.**

- (a) If a suit be decided against a wife who has separate estate, including even an allowance under a separation deed, she may be condemned in costs. *Hyde v. Hyde and Felgate*, (1888) 59 L.T. 523, *Milward v. Milward and Andrews*, (1887) 57 L.T. 569 *Holmes v. Holmes*, (1755) 2 Lee, 90.
- (b) But she will not be so condemned in costs if her separate estate be very small. *Aves v. Aves*, (1892) 65 L.T. 859.
- (c) If the husband be responsible for her misconduct, the wife, though possessed of separate estate, would not be made liable for costs. *Milne v. Milne* (1871) L.R. 2 P. & D. 202.

**(50) Husband's liability for wife's costs—Non-applicability of the rule to Mahomedan.**

The English law which makes the husband in divorce proceedings liable *prima facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans. 21 B. 77.

**(51) Cases where parties are domiciled abroad—Rule as to husband's liability for wife's costs.**

Where the parties are domiciled abroad (Greece) and the law of that country is not before the Court, it was held that S. 7 of the Act applies, and that the Court should act on the General principles of English Law. 20 C. 619 (621) (19 B. 293, *F.*).

## Costs—(Continued).

## (53) Co-respondent's liability for costs, when arises.

## (i) ADULTERY MUST BE ESTABLISHED.

A co-respondent against whom adultery is established (though, it seems, not otherwise), may be ordered to pay the whole or any part of the costs of the proceedings. Matrimonial Causes Act, 1857 (20 & 21 Vict. C. 85), S. 34.

## (ii) HE MUST HAVE KNOWN THAT RESPONDENT WAS A MARRIED WOMAN.

But it is not the practice to make such an order, unless it be proved that he knew, before the adultery was committed, that the respondent was married. *Teagle v. Teagle and Nottingham*, (1858) 78 L.T. 392, and see *Dilby v. Dilby*, (1902) 1 S., *Newby v. Newby and White*, (1837) 77 L.T. 142 *Badcock v. Badcock and Chamberlain*, 1858, 1 Sw. & Tr. 189,

## (iii) WIFE'S CONDUCT NOT TO BE PROFLIGATE.

(a) He may escape liability for costs if the wife's conduct has been profligate to the husband's knowledge, before the adultery. *Boyd v. Boyd and Collins*, (1859) 1 Sw. & Tr. 562; *Nelson v. Nelson*, (1868) L.R., 1 P. & D. 510.

(b) A co-respondent found guilty may escape by being condemned only in the costs of the charges made against himself, although the respondent has made unsuccessful, though not unreasonable, charges against the petitioner, and particularly if she is also found to have committed adultery with some one else. *Codrington v. Codrington and Anderson*, (1865), Sw. & Tr. 63.

## (iv) HUSBAND TO BE FREE FROM GUILT.

A husband who, being himself guilty of adultery, or knowing his wife to be profligate, makes a claim for damages successfully resisted by a co-respondent, may be deprived of costs *Watson v. Watson and Wilkinson*, (1862) 31 L.J. (P.M. & A.) 102, N. *Manton v. Manton and Stevens*, (1865) 4 Sw. & Tr. 150.

## (v) CO-RESPONDENT'S ADULTERY MUST HAVE BEEN UNCONDONED.

Once adultery has been condoned, fresh adultery only by the co-respondent will revive a right, even as to costs, against him. *Norris v. Norris, Larson and Mason*, (1861) 4 Sw. & Tr. 237.

## (53) Condonation by husband, effect of

- Condonation by a husband after decree nisi is no reason for relieving, the co-respondent of his liability for costs. *Hyman v. Hyman*, (1904) P. 403 73 L.J.P. 106, 91 L.T. 361.

## (54) Costs payable by co-respondent, amount of

- (a) When a co-respondent has been condemned in costs, he will, as a general rule, be ordered to pay all the costs of the proceedings, as well those of the respondent as those of the petitioner. *Evans v. Evans and Robinson*, 1 S. & T. 328
- (b) The costs which a husband has had to provide for a guilty wife are recoverable under an order for costs against the co-respondent. See *Townson v. Townson and Bucknall*, (1898) 78 L.T. 54.

**N.B.**—In the above case the order was to the effect that the husband was to pay the wife's solicitors only what he received from the co-respondent.

- (c) But the order does not include the costs of an unsuccessful showing of cause against the decree by the King's Proctor, unless the co-respondent be made a party thereto, for a co-respondent cannot be condemned in the costs of a suit to which he is not a party. *Forbes-Smith v.*

**Costs—(Continued).**

*Forbes-Smith*, (1901) 1 P. 258 C.A., *Blackhall v. Blackhall and Clarke*, (1881), 13 P.D. 94, *Taplen v. Taplen*, (1891) p. 286.

- (d) Where, however, the King's Proctor successfully shows cause, the co-respondent may, in a proper case, still have to pay the costs of the suit ordered against him. *Hyman v. Hyman* (1904) P. 403, but see *Youell v. Youell, Tenness, and Burleigh*, (1875) 33 L.T. 578.

**(55) Practice—Petitioner need not expressly ask for costs against co-respondent.**

- (a) As a general rule, a co-respondent, whose adultery with the wife has been established, will be condemned in the costs of the suit, even though the petitioner does not expressly pray for costs in his petition. *Evans v. Evans and Robinson*, 28 L.J., P. & M. 136 *Finlay v. Finlay and R.*, 30 L.J., P. & M. 104, *Goldsmith v. Goldsmith and others*, 31 L.J. P. & M. 163.

- (b) Although the successful petitioner does not claim costs in the petition he is nevertheless entitled to the costs incurred by him. 28 C. 221 (222), See, also, *Finlay v. Finlay*, 30 L.J. P. & M. 104, *Goldsmith v. Goldsmith*, 15 L.J. Ch. 264, *West v. West*, L.R., 2 P.L.D., 196 (198) cited in argument in 28 C. 221 (222)

**(56) Costs of inquiry before registrar on apportionment of damages.**

A co-respondent condemned in costs is liable for costs of and incident to proceedings before registrar for apportionment of damages. *Irwin v. Irwin*, 59 L.J. P. 53, 62 L.T. 612

**(57) Co-respondent is not liable to pay costs in certain cases.**

- (i) WHERE RESPONDENT IS LIVING APART FROM HUSBAND AS PROSTITUTE.

- (a) In cases—co-respondent will not be condemned in costs. *Roe v. Roe*, 3 B.L.R. App. 9

- (b) If a husband allows his wife to lead a life of prostitution, the co-respondent will not be ordered to pay costs, even though at the time of the adultery the wife was living with her husband. *Adams v. Adams and Colter*, L.R., 1 P. 333

- (c) On the contrary, the petitioner's conduct in such a case would amount to connivance, and he would probably be ordered to pay the costs of the respondent and co-respondent. *Adams v. Adams and Colter*, L.R., 1 P. 333.

- (ii) CO-RESPONDENT BEING IGNORANT OF FACT THAT RESPONDENT WAS MARRIED.

—is good ground why he ought not to be condemned in costs. *Boddington v. Boddington and N.*, 27 T.J.P. & M. 53, *Priske v. Priske and Goldby*, 29 T.J.P. & M. 195 *Home v. Home*, 15 W.R. 498 (Eng.).

- (iii) WIFE LEADING AN ABANDONED LIFE.

Where a wife had lived apart from her husband for some years, and led an abandoned life, the Court, notwithstanding that the co-respondent must have known that she was a married woman, refused to condemn him in costs. *Nelson v. Nelson*, L.R., 1 P. & D. 510.

- (iv) CO-RESPONDENT HONESTLY BELIEVING PETITIONER'S MARRIAGE TO BE VOID.

A co-respondent, who acted on a bona fide belief that the petitioner's marriage was void, may escape condemnation in costs. *Ousey v. Ousey*, (1874) L.R. 3 P. & D. 223

- (v) CONDUCT OF PETITIONER AND RESPONDENT TO BE ALSO CONSIDERED—ADULTERY CONDONED OR CONNIVANCE AT WILL DISSENTILITE PETITIONER TO COSTS.

- (a) The conduct of the petitioner and respondent must be considered as well as that of the co-respondent. *Cordington v. Cordington and Anderson*, 4 S. & T. 63. See, also, 28 C. 221.

**Costs—(Continued)**

- (b) Hence, in certain cases, even if it is proved that, at the time of the adultery, the co-respondent knew that the respondent was a married woman, it does not necessarily follow that he will be condemned in costs. *Cordington v. Cordington and Anderson*, 4 S. & T. 63.
- (c) The usual course is to grant costs against a co-respondent when his conduct has made the suit necessary. *Norris v. Norris and Lawson*, 4 S. & T. 237. *Adams v. Adams* and L. 4. S. & T. 237, *Bernstein v. Bernstein*, (1893) P. 292.
- (d) He will not, therefore, be condemned in costs when his adultery has been connived at, or condoned, by the petitioner. *Norris v. Norris and Lawson*, 4 S. & T. 237, (*Ibid*).
- (e) In such a case the petitioner may be ordered to pay the co-respondent's costs. *Norris v. Norris and Lawson*, 4 S. & T. 237. (*Ibid*).
- (f) Mere remissness of conduct on the part of the petitioner towards his wife will not necessarily deprive him of his right to costs against the co-respondent. *Badcock v. Badcock*, 1 S. & T. 188.
- (vi) CO RESPONDENT GUILTY OF ADULTERY NOT CONDEMNED IN COSTS.
- (a) Where a co-respondent discovered a week after he committed an intimacy with the respondent that she was a married woman, but nevertheless continued to co-habit with her, the Court, taking all the circumstances of the case into consideration, refused to condemn him in costs. *Leamonth v. Leamonth*, 59 L.J.P. 14, 62 L.T. 608.
- (b) But, where a co-respondent denied that he knew the respondent was married on their first acquaintance, but admitted that he became aware of the fact within a fortnight, the Court, being of opinion that practically he knew the fact from the first, condemned him in costs. *Bilby v. Bilby*, (1902) P. 8, 71 L.J.P. 31, 86 L.T. 123.
- (vii) JURY NOT AGREEING AT FIRST TRIAL—PETITIONER OBTAINING VERDICT AT SECOND TRIAL
- Where a jury were unable to agree on a first trial and on a second trial the petitioner obtained a verdict, the Court refused to condemn the co-respondent in the costs of the first trial. *Wood v. Wood*, L.R., 1 P. & D. 467, 37 L.J.P. 25.
- (viii) ADULTERY WITH CO RESPONDENT CONDONED.
- (a) Where a husband had condoned adultery committed with a co-respondent which had been revived by adultery committed by another person, costs were not given against the co-respondent whose adultery was condoned. *Norris v. Norris*, 4 S. & T. 237, 30 L.J.P. 111.
- (b) Where a husband has condoned adultery committed with one co-respondent which has been revived by adultery committed with another co-respondent a decree nisi will be granted against both the co-respondents. 28 C. 221.
- (c) But, in such a case, costs will not be given against the co-respondent whose adultery was condoned 28 C. 221 (223), *Norris v. Norris*, 4 S. & T. 237, *F*.
- (d) Costs as between attorney and client can be allowed only against the first co-respondent 28 C. 221, (223), (but see *Buthwaite v. Butthwaite and Diaz* 28 C. 84 not *F*).
- (e) In allowing costs as between attorney and client against a co-respondent, the conduct of the parties is also to be looked to. Per Harington, J. in 28 C. 221 (223).



**Costs—(Continued),****(58) Co-respondent condemned in part only of the costs.**

- (a) Where a co-respondent countercharged condonation and adultery against the petitioner, and the Court found that the co-respondent had committed adultery with the respondent without knowing she was married, but acquitted petitioner, the co-respondent was condemned in the costs caused by his countercharges only. *Howe v. Howe*, 15 W.R. 498.
- (b) But costs have been given against a co-respondent where he well knew the respondent was a married woman, though there was some remissness on the part of the husband. *Badcock v. Badcock*, 1 S and T. 188.

**(59) Wife and co-respondent both condemned in costs.**

Where an order for costs was made against the co-respondent, and it was proved that the wife was possessed of separate estate, an order was also made against her for the costs of the suit. *Milward v. Milward*, 57 L.T. 569.

**(60) Decree nisi rescinded, effect of.**

Where a decree nisi is rescinded it is rescinded for all purposes, and that part of it condemning the co-respondent in costs falls with it. *Hechler v. Hechler*, 58 L.J.P. 27. See, also, *Hyman v. Hyman*, (1904) P. 403.

**(61) Petitioner and co-respondent charged with collusion.**

Where the Queen's Proctor intervened, and established a charge of collusion against both the petitioner and co-respondent, the Court condemned the co-respondent in the costs of the Queen's Proctor's intervention, although he did not appear. *Taplen v. Taplen*, (1891) P. 283, 60 L.J.P. and M. 88, 61 L.T. 870.

**(62) Co-respondent, when allowed costs.**

- (a) If the Court dismisses the husband's petition, or allows it to be withdrawn, as against the co-respondent, on the ground that there is no evidence against him, the petitioner will ordinarily be ordered to pay the co-respondent's costs. *Smith v. Smith and Mallet*, 38 L.J.P. and M. 11.
- (b) Where the adultery between the co-respondent and respondent has been established, the dismissal of the petitioner's suit does not necessarily entitle their co-respondent to costs from the petitioner, unless the suit is dismissed on the ground that the adultery in question had been condoned, or connived at, by the petitioner. *Forster v. Forster and Beridge*, 3 S. and T. 144. *Bernstein v. Bernstein* (1893), P. 292; *Seddon v. Seddon* and D, 31 L.J.P. and M. 101. *Soode v. Soode* and H. 30 L.J.P. and M. 105, *Bremner v. Bremner* and B. 83 L.J., P. and M. 102.
- (c) If the petition is dismissed on the ground that the petitioner has been proved by the co-respondent to have been guilty of incestuous adultery, the co-respondent will be entitled to be paid the costs of that issue, though, if his own adultery with the respondent has also been established, he may be liable for the costs of proving the respondent's adultery with him. *Conrad v. Conrad and Flashman*, L.R., 1 P. 68.

**(63) Co-respondent, when ordered to pay his own costs.**

- (a) Even where the husband's petition is dismissed as against the co-respondent on the ground that the charge of adultery against him has not been established, he may nevertheless be ordered to pay his own costs if he has acted imprudently with a woman, whom he had reason to believe

**Costs—(Concluded).**

to be married so as to raise a reasonable suspicion of adultery in the mind of the petitioner *Carstairs v. Carstairs and Dickenson* 3 S. & T. 538 *Winscom v. Winscom* and P. 38. and T 380, *Robinson v. Robinson and Gamble*, 32 L.J. P. and M. 210; *West v. West* and P.L.R. 2 P. 196.

- (b) In such a case he will neither be allowed nor condemned in costs. *Robinson v. Robinson and Gamble*, 32 L.J., P. and M 210.

**(64) Order as to costs—Review.**

- (a) An omission to award costs cannot be considered merely as a clerical error, but must be rectified by way of review within the prescribed time. 15 W.R. 414.

- (b) A Judge, when passing a decree, gives costs or refrains from giving costs for some reason or other, and if he refrain from giving costs, and any party considers that he is entitled to obtain costs, he should apply within the prescribed time to the Judge for a review of that part of the decree which he considers injurious to himself. Now, it is clear that in the present case the petitioner could not file a petition for review, because there had been a special appeal to the High Court, and further he was out of time, and apparently had no cause to show why he did not make the petition in due time " Per Loch J. in 15 W.R. 414.

**(65)—Suit for judicial separation—Return to co-habitation—Withdrawal of suit—****Costs**

In a suit by a wife against her husband, the attorney for the petitioner made an application on notice to the petitioner, the respondent, and the respondent's attorneys, for an order that the suit be dismissed or withdrawn, and that the petitioner's costs be taxed and the amount thereof be paid to him by the respondent, and stated in his affidavit that he had instituted the suit under the instructions of the petitioner, that the parties had returned to cohabitation and the suit had been amicably settled, that the petitioner had since instructed him to withdraw the suit, and the respondent would pay the costs for which purpose he had drawn a petition, which the respondent's attorneys would not agree to. The Court granted the application, so far as to direct that the costs of the petitioner's attorney, when taxed, should be paid by the respondent, but refused to make any order for the withdrawal or other final disposal of the suit, and ordered that the attorney should personally bear the costs of the application, the same not having been brought in proper form. 9 B.L.R. App 6. [R. 25 C. 222=2 C.W.N. 37.]



## APPENDIX V.

### EVIDENCE.

#### (1) Divorce court governed by ordinary rules of evidence.

The general rules relating to the admissibility or inadmissibility of evidence apply in the Divorce Court also. Mat. Caus. Act 1857, Ss. 47 and 48.

#### (2) Evidence to be confined to matters at issue.

(a) Evidence can be let in at the trial only on the issues. *Cherry v. Cherry*, 28 L.J., Mat. 36.

(b) It is not open to a party to prove anything which he has not specifically pleaded. *Plumer v. Plumer*, B. 29 L.J., Mat. 63.

#### (3) Evidence must relate to pleadings.

(a) Evidence must generally apply directly or indirectly, to the pleas in the suit, else it is usually inadmissible. *Plumer v. Plumer and B*, 4 Sw. & Tr. 257.

(b) A co-respondent, whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree. *Plumer v. Plumer and B*, *supra*.

(c) But the pleas can be amended to admit the evidence on notice given to the other side. *Plumer v. Plumer and B*, *supra*.

(d) In an undefended suit, evidence, that the respondent had infected the petitioner with venereal disease, was tendered under a charge of cruelty, but rejected because the infection was not specifically charged. *Squires v. Squires*, 3 Sw. & Tr. 511, and see Table of Cases.

(e) Evidence of a respondent's complaints to a third person, of the manner in which her husband treated her, is admissible when cruelty is pleaded in the answer, as showing the terms upon which husband and wife lived together. *Winter v. Woot*, 1 Moo. & Rob. 401, and see *Trelawney v. Coleman*, 2 Starkie, N.P.C. 191.

#### (4) Party seeking relief must prove his claim to it.

(a) Every party, whether he is a petitioner or respondent must prove his claim to the relief he seeks. *Osborne v. Osborne and M.* 33 L.J. Mat. 62, note.

(b) No relief can be granted in a matrimonial cause to any party unless such party proves his or her claim to it, although the other side does not appear, or appearing, asks no questions. *Simmons v. Simmons*, 1 Rob. 568, and see M.C.A. 1857, S. 29.

#### (5) Admissibility of witness.

"Any witness who can throw light upon a fact in issue should be heard to state what he knows, subject to such observations as may arise, either as to his means of knowledge, or to his disposition to state the truth" Day, C.L.P. Act, p. 261, 4th Ed.

**Evidence—(Continued.)****(6) Witness must either swear or affirm.**

Every witness who has any objection to swear must affirm. M.C.A., 1867, S. 49.

**(7) Discrediting one's own witness.**

(a) "Discrediting one's own witness is not allowed for two reasons.—

(i) If the witness finds that the party calling him has power to discredit him, he will not feel himself equally at liberty in giving his evidence;

(ii) If such party knows the witness to be a man unworthy of belief, he ought not to have brought him into Court." See Dixon on Divorce, 4th Ed., p. 179.

(b) But discrediting is at times permissible in exceptional cases. It is in the nature of cross-examination. (*Ibid.*)

(c) "A party calling his opponent cannot cross-examine him, however hostile he may be, without leave. Whether a witness's hostility, be he a party or not, justifies cross examination, is a question for the judge." *Price v. Manning*, 42 Ch. D. 373.

**(8) Contradictory statements.**

(a) If a witness, upon cross-examination as to a former statement made by him and inconsistent with his present testimony, does not distinctly admit having made such statement, proof may be given that he did in fact make it. *Ryberg v. Ryberg and S.*, 32 L.J., Mat. 112.

(b) But before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to him, and he must be asked whether or not he has made such statement. *Ryberg v. Ryberg and S.*, 32 L.J., Mat. 112.

(c) A statement made before the trial, and conflicting with his evidence at the trial, can only be put to the witness in examination-in-chief, when the judge permits it, and on the ground that he is hostile. *Ryberg v. Ryberg and S.*, 32 L.J., Mat. 112.

**(9) Right of co-respondent to cross-examine.**

(a) Usually it is not open to the co-respondent to cross-examine a witness whose evidence does not affect him. *Pearman v. Pearman and B.*, 29 L.J., Mat. 54.

(b) His cross-examination, when allowed must be confined to the allegations in the pleading. *Plumer v. Plumer and B.*, 4 Sw. & Tr. 257.

But if the examination-in-chief is directed to points not raised by the pleas, such points can be followed up on cross-examination. (*Ibid.*); *Winter v. Wroot*, 1 Moo. & Rob. 404.

**(10) Cross-examination as to adultery.**

No witness, whether party or not, shall be liable to be asked or bound to answer any question tending to show that he has been guilty of adultery unless he has already given evidence in the same proceeding in disproof of his adultery. See Evid. Amend. Act. 1869, c. 68, s. 3.

**(11) Protection claimed.**

Where a witness, called to prove adultery with one of the parties to a suit, claims the protection of the statute above, the judge will not allow the witness to be interrogated on the subject of his adultery; but if he does not claim it, the evidence is admissible and neither counsel can exclude it. *Hibblethwaite v. Hibblethwaite and others* (Q.P.), L.R., 9 P. and D. 29.

**Evidence—(Continued).****(12) Proof of marriage, necessity for.**

- (a) A marriage, if alleged, must be proved. *Anon.*, *Dea. and Sw.* 303; *Mayhew v. Mayhew.*, 2 *Philim.* 11
- (b) If there is no marriage the petitioner has no *locus standi*. *Robins v. Wolseley*, 2 *Lee*\* 149, *Guest v. Guest*, 2 *Hagg. Cons.* 322, *Pollock v. Pollock*, 31 *L.J.*, *Mat.* 49, *Sheldon v. Sheldon*, (*Q.P.*), *Ibid.* 80.

**(13) Presumption is always in favour of marriage.**

- (a) The pre-emption in favour of any thing necessary to give validity to a marriage is of exceptional strength. *Per Wilson, J.*, in 12 *C. 706* (732). See, also, *Piers v. Piers*, 2 *H.L.C.* 331.
- (b) The evidence to rebut the presumption of marriage must be strong, distinct, satisfactory and conclusive. 12 *C. 706* (714) (*F.B.*).
- (c) The presumption in favour of marriage, can only be negatived by disproving every reasonable possibility. *Per Lord Campbell, J.*, cited in 12 *C. 706* (733).\*
- (d) In one case the following facts were proved (i) that the parties went away to be married, (ii) that they returned, stating that they had been married, (iii) that they exhibited as man and wife, (iv) and that, on the day they went away, an entry of the marriage was made in the marriage register where they had been, and was signed by the husband, held that the above facts constituted sufficient evidence of the marriage. *Patrickson v. Patrickson*, 35 *L.J. Mat.* 48.

**(14) Registers of marriages—Evidence of marriage.**

- (a) Registers of marriage are evidence of the fact and date of marriage. *Doe v. Barnes*, 1 *M. & Rob.* 386, *Re v. Hames*, 1 *Daw. C.C.* 270, cited in *Phipson on Evidence*, 4th Ed., p. 316.
- (b) The validity of a marriage may also be presumed from the entries in Registers of marriage. *Taylor on Evidence*, S. 172
- (c) But in *Colonial or foreign marriages* expert or other evidence also may be required. *Dent v. Dent*, 1897, *Times*, Dec., 16, 1897, *King v. King* (*Ibid.*). Nov. 23, 1897 (cited in *Phipson on Evidence*, 4th Ed., p. 316) See, also, *Browne on Divorce*, 6th Ed., p. 510

**(15) Marriage—Evidence of general reputation.**

- (a) Evidence of general reputation (not confined to family repute) is admissible in proof or disproof of marriage. See *Taylor on Evidence*, S. 578.
- (b) Such evidence of general reputation has been sometimes accepted in preference to the oath of the party. *Elliott v. Totnes Union*, 57 *J.P.* 151. Cited in *Phipson on Evidence*, p. 353.
- (c) Such evidence of general reputation is not rendered inadmissible, by reason of it being divided, discontinuous, or restricted to a particular class or locality. *Andrews v. Ulthwaite*, 2 *T.L.R.* 895, *Re. Hayes*, 94 *L.T.* 431, cited in *Phipson on evidence*, 4th Ed., p. 354.

But these circumstances may impair the weight of such evidence. (*Ibid.*).

- (d) Such testimony must be general if it is based merely on the statements or some particular person, it ceases to be admissible as general reputation. *Sheldden v. A.G.*, 30 *L.J.P.M. & A.* 217, cited in *Phipson on Evidence*, 4th Ed., p. 354.

**(16) Treatment by friends and neighbours as proof of marriage.**

The treatment of friends and neighbours may be received as presumptive proof of marriage. See *Phipson on Evidence*, 4th Ed., p. 99.

**Evidence—(Continued).****(17) Treatment by strangers.**

Even treatment by entire strangers is, in some cases, receivable as evidence (as) the recognition by the sovereign, to prove the legitimacy of a peer. Hubb, 698 cited in Phipson on Evidence, 4th Ed., p. 99.

**(18) Burden of proof as to marriage.**

(a) It is for the person, who says that a marriage took place, to bring forward satisfactory evidence in support of the alleged marriage. 5 C L J. 1 (P.C.)=17 M L J 56=9 Bom L.R. 264.

(b) When there is no documentary evidence in support, and no certain inference can be drawn from the evidence as to the conduct of relations and friends, the oral evidence in the case being wholly untrustworthy. Held, that the marriage was not proved 5 C L J. 1 (P.C.)=17 M.L.J. 56=9 Bom. L R 264.

**(19) Foreign marriages how proved.**

Foreign marriages may be proved by an expert in the law of the country where they were celebrated. See Dixon on Divorce, 4th Ed., 1908, p. 156.

**(20) Legitimacy.—Conception during the time plaintiff's mother was abandoned—Presumption as to parentage—Burden of Proof.**

The question for decision was, whether plaintiff was the legitimate son of D. It was admitted that his mother was, at one time, married to D, it was contended by the defence, and held by the Lower Courts, that she was either divorced or abandoned by D. Held (1) that mere abandonment would not dissolve the tie of marriage, (2) that, if there was proof merely of abandonment and not of divorce, and if the plaintiff had been born during the period of abandonment, the presumption of law as to the parentage of the plaintiff would prevail, unless it could be shown that the parties to the marriage had no access to each other at a time when he could be begotten, and (3) that the burden of proof as to the divorce having taken place at a time, which would disentitle the plaintiff from relying on S 112 of the Evidence Act or as to the parties to the marriage having had no access to each other at a time when plaintiff could have been begotten, lies on the defendant. 7 Bom. L R. 95.

**(21) Identity of the parties.**

(a) Evidence as to the—may sometimes be necessary. See *Burt v. Barton*, 1 Doug. 172.

(b) Where such identity is necessary to be proved, it may be done by means of a witness present at the ceremony, or by one who could identify the signatures in the original register. See *Burt v. Barton*, 1 Doug 172

(c) Evidence of repute may suffice to prove identity if no better evidence can be obtained. *Rooker v. Rooker and M.*, 32 L.J., Mat. 42.

**(23) Adultery—Evidence as to.**

See notes under S. 10 of Act IV of 1869, at p. 60, *supra*.

**(24) Divorce cases—Proof of adultery.**

(a) In divorce cases, to prove adultery, opportunities therefor, and prior and subsequent familiarities, are admissible. As to prior and subsequent adultery. See *Cantello v. Cantello*, Times, Feb 1, 1896, *Wales v. Wales* 1900, P 63, cited in Phipson on Evidence, 4th Ed. pp. 101 and 143.

**Evidence—(Continued).**

(b) The following also are admissible in proof of adultery in divorce cases.

- (i) Association with prostitutes, *Ciocci v. Ciocci* 29 L J, P. & M 60, cited in Phipson on Evidence, 4th Ed., p 101
- (ii) The contraction of venereal disease, *Gleen v. Gleen*, 17 T.L.R. 62 cited in Phipson on evidence, 4th Ed., p 101.
- (c) Although the specific acts which the petitioner relies on for the relief must be alleged in the petition, yet similar acts both previous and subsequent thereto, between the respondent and the co respondent may be proved as presumptive evidence of the acts charged. *Cantello v Cantello*, Times, Feb 1, 1896, *Wales v Wales* 1900, P. 63. cited in Phipson on Evidence, 6th Ed. p. 14;
- (d) But such acts between the respondent and a stranger are not receivable in evidence, *Pollard v. Pollard*, Times Mar 26, 1904, cited in Phipson on Evidence 4th Ed., p 113
- (e) In a petition for divorce by the husband against his wife on the ground of her adultery with a certain person the following are relevant to prove the alleged adultery.
  - (i) Evidence of her ante-nuptial incontinence with such person. *Cantello v. Cantello*, Times, Feb 1 1896, *Kinn v. Kinn* (Ibid). Jan. 26, 1901, *Weatherby v. Weatherby* 1 Sprinks, 193 cited in Phipson on Evidence 4th Ed., p. 146.
  - (ii) Evidence of post-nuptial acts of incontinence prior to the acts of adultery charged. *Harris v Harris*, 27 L.T. 424 *Howard v Howard*, Times July 11, 1901 cited in Phipson on Evidence 4th Ed., p. 146.
  - (iii) Evidence of post-nuptial acts subsequent to the acts of adultery charged, *Wales v. Wales*, 1900, P 63, *Boddy v Boddy*, 30 L J P & M. 23.
- N B.**—Such evidence is also receivable to corroborate the testimony of witnesses, *Cole v. Manning*, *Com v. Mennam*, 31 Mees 518 cited in Phipson on Evidence, 4th Ed., p 146
- (f) When evidence of adultery has been given on one of several occasions charged then evidence may further be given of circumstances from which the court may infer adultery on some or all of the remaining occasions, even though the circumstances, amount to no more than opportunity. See Taylor on Evidence, 10th Ed., S 340
- (g) In a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition will be admissible for the purpose of showing the character of previous acts of improper familiarity. *Boddy v Boddy*, 1860, 30 L J P & M 23, *Wales v Wales* (1900) p. 63.
- (h) A Medical sheet, kept under the Army Medical Service Rules, is admissible to prove that a military patient was suffering from a venereal disease, and also to establish adultery. *Gleen v. Gleen*, 17 T L R 62 cited in Phipson on Evidence, 4th Ed., p 323

**(25) Petition for divorce by wife—Husband's habitual immoral habits—His Adultery with a different woman—Admissibility**

Where a wife petitions for divorce from her husband on the ground *inter alia* of his adultery with a particular person, evidence that he committed adultery with a different person, and that he was a man of habitual immoral habits is not admissible in evidence. *Pollard v. Pollard*, Times, March 26, 1904 (cited in Phipson on Evidence, 4th Ed., p. 146).



**Evidence.—(Continued).****(26) Character of co-respondent.**

In divorce cases, the moral character of the co-respondent (*i.e.*) the person with whom the wife is alleged to have committed the adultery is receivable in evidence. *Astley v. Astley*, 1 Hag. Ec. 714, *Buchart v. Buchart* Times, March 24 1899; *Com v. Gray*, 129 Mass. 474; cited in Phipson on Evidence 4th Ed., p. 170.

**N.B.**—This is one of those cases in which the character of a third party is received as evidence against one of the parties of the suit.

**(27) Evidence to prove unnatural offence.**

(a) Where a person is charged with committing an unnatural offence with a certain particular person, an admission by the accused that he had committed the same offence with a different person on another occasion, and that he had a tendency to such practices is *not* receivable in evidence. *Pea v. Cole*, 1810 (cited in 1 Phil. and Arn. Evidence 10th Ed. (508), *Makin v. A.G.* 1894, A.C. p. 65, cited in Phipson on Evidence 4th Ed., p. 146.

(b) "It is not competent to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character, to have committed the offence charged." Per Horrell L.C. in *Makin v. A.G.*, 1894 A.C. p. 66, cited in Phipson on Evidence, 4th Ed. p. 146.

**(28) Evidence to disprove adultery.**

The following is receivable as evidence to disprove adultery—Medical evidence that the wife or other female implicated is *virgo intacta*, *Rippingall v. Rippingall*, Times, May 4, 1876, *Tombs v. Tombs*, Times, July 12, 1902 cited in Phipson on Evidence 4th Ed., p. 101.

**(29) Evidence to disprove access by husband.**

Also, in order to disprove access by the husband, the fact that he was paralysed at the time is relevant. *Hegge v. Edmonds*, 25 L.J. Ch. 125, cited in Phipson on Evidence, 4th Ed., p. 101.

**(30) Evidence to disprove rape**

To disprove a rape, evidence that the prisoner had been afflicted with a rupture which for many years rendered sexual intercourse impossible is relevant. *Hale*, 1 C. 635-6, cited in Phipson on Evidence, 4th Ed., p. 101.

**N.B.**—In such a case the rupture may be inspected by the jury in an adjoining room. (*Ibid*).

**(31) Cruelty—Evidence as to**

See notes under S. 10 of the Divorce Act, IV of 1869, *supra*.

**(32) Cruelty, proof of, by production of previous decree for judicial separation.**

On a petition for dissolution of marriage by reason of the adultery and cruelty of the respondent, it was held that the second charge was established by the production of a previous decree of judicial separation on account of cruelty and by proof of the identity of the parties. *Bland v. Bland* L.R. 35 L.J. P and M. 104, cited and followed in 56 P.R. 1904, p. 166.

**(33) Evidence of specific acts of cruelty**

(a) The petitioner is entitled to give evidence of specific instances of cruelty, although the petition only alleged cruelty generally. *Pritchard's Digest* p. 271, *Weddell v. Weddell*, 2 Sw. and Tr., 541; cited in argument in 6 B. 416 (420).

**Evidence--(Continued).**

- (b) But it is open in such a case for the respondent to ask for the particular instances of cruelty alleged by the petitioner *Hill v. Hill*, 31 L.J. P and M. 193.
- (34) **Desertion—Evidence as to.**  
See notes under S 10 of the Divorce Act (IV of 1869), *supra*.
- (35) **Connivance—Evidence as to.**  
See notes under S 12 of the Divorce Act (IV of 1869), *supra*.
- (36) **Condonation—Evidence as to**  
See notes under S 12 of the Divorce Act (IV of 1869), *supra*.
- (37) **Impotence, evidence as to.**  
See notes under S 19 of the Divorce Act (IV of 1869), *supra*.
- (38) **Paternity of children born in wedlock, presumption as to.**  
(a) The general presumption is that the husband is the father of a child born in wedlock, but the presumption may be rebutted. *Sibbet v. Ainsley*, 3 L T., N S 583  
(b) The party wishing to rebut the presumption must raise the question in the pleadings *Gordon v. S*, p 1903, 92.  
(c) It cannot be raised by the parties at a subsequent stage, *cf. j*, on application for custody *Gordon v. S*, p 1903, 92
- (39) **Children born after divorce or judicial separation, status of.**  
(a) Where the alleged parents have been divorced or judicially separated, children born during the separation are *prima facie* illegitimates. *St. George v. St. Margaret*, 1706, 1 Salk 123, *Hetherington v. Hetherington*, 1887, 12 P. D. 112 cited *in* Taylor on Evidence 10th Ed., S. 106.  
(b) In such cases, non-access is presumed. (*Ibid*).
- (40) **Advice of counsel as to sufficiency of evidence**  
(a) It is usual to take the previous —, as also as to what evidence is necessary to establish a case. See Dixon on Divorce, 1th Ed., 1908, p. 141.  
(b) Such a practice is usually resorted to as it relieves the solicitor from responsibility. (*Ibid*)  
(c) Such practice is also desirable as enabling the solicitor to avoid the unnecessary expense to the client of summoning witnesses, whose evidence can safely be dispensed with. (*Ibid*)
- (41) **Discovery and inspection of documents, practice as to.**  
(a) The Court has power to order discovery and inspection of documents. See Mat. Causes Act, 1857, S. 47, 13 Geo. 3 C. 63, S. 42, 1. Will. 4 C. 22, See, also, Bray on Discovery.  
(b) The Court generally grants an application for such discovery, made during the pleadings. (*Ibid*).
- (42) **Interrogatories, practice as to.**  
(a) It is usual for Courts to allow interrogatories in matrimonial causes. See Mat. Causes Act, 1857, C. 85, S. 47, *Euston v. Smith*, 9 P. D. 57; *Harvey v. Lovekin*, 10 P. D. 122.
- (43) **Incriminating questions in interrogatories.**  
(a) It is competent to the Court to order——. *Harvey v. Lovekin*, 10 P. D. 122  
(b) But, it is open to the party interrogated to refuse to answer them. (*Ibid*).  
(c) Objecting to answer to an interrogatory is the sole privilege of the witness. (*Ibid*).

**Evidence—(Continued).**

- (d) It is immaterial whether such witness is a party to the suit or not. (*Ibid*).
- (e) The proper time when a witness can refuse to answer is when he is called upon to answer. (*Ibid*).

**(44) Interrogatories relating to adultery.**

A party interrogated is not bound to answer interrogatories relating to his or her adultery. *Redfern v. Redfern*, 55, Justice of the Peace, p. 37, 17th Jan. 1891.

**(45) Affidavit of documents relating to one's own adultery.**

Nor is a party obliged to make an affidavit of documents relating to his or her adultery. (*Ibid*).

**(46) Answers to interrogatories, value of.**

(a) Generally speaking answers to interrogatories may be treated as reliable evidence, provided they are not contradicted. *Davidson v. Davidson*, 1 Dea. & Sw. 132.

(b) But the objects of putting such interrogatories, and the objects of the answers, must also be taken into consideration (*Ibid*).

**(47) Affidavits, practice as to.**

(a) Occasionally evidence may be permitted to be given on affidavits *Adams v. Adams and G*, 22 W.R. 192 (Eng.), *M'Kechine v. M'Kechine and M*, 28 L.J., Mat. 31, *Ford v. Ford*, 36 L.J., Mat. 86, *Macarthey v. Macarthey*, 36 L.J., Mat. 38.

(b) Such a permission is usually granted, only when it is necessary to avoid delay and expense (*Ibid*).

**(48) Decrees not pronounced on affidavits only.**

It is not usual to pronounce decrees on affidavits only. *Walton v. Walton*, 28 L.J., Mat. 31, Note.

**(49) Evidence on affidavits is not encouraged.**

(a) —as such a practice may facilitate collusion. *Walton v. Walton*, 28 L.J., Mat. 31, Note.

(b) On this ground such evidence is rejected, especially when it goes to the gist of the case (*Ibid*).

**(50) Affidavits in answer.**

(a) —must be filed within a reasonable time. In English Law it has been fixed that they must be filed within eight days after those of the other side. Divorce Rules 52

(b) Under the practice of the English Courts copies must be given to the other side of such affidavits on the day on which they are filed. Divorce Rules 53.

**(51) Evidence on commission, practice as to.**

(a) Courts may order evidence to be taken on commission, when the witness whose evidence is sought to be taken on commission is, owing to illness or any other just cause, unable to attend in open Court. *Stone v. Stone and A.*, 31 L.J., Mat. 136.

(b) When illness is the cause, the doctor's affidavit may be required. *Davis v. Lowndes*, 7 Dowl. 101.

(c) Such an order may be made both as regards witnesses within jurisdiction as well as witnesses outside jurisdiction. *Pirie v. Iron*, 1 Dowl. 253.

**(52) Necessity for, and materiality of, evidence to be taken on commission.**

(a) The —, it is for the solicitor to decide. *Dixon on Divorce*, 4th Ed., 1908, p. 147.

**Evidence—(Continued).**

(b) Generally an affidavit as to the——suffices for the issue of the commission. (*Ibid*).

**(53) Delay in applying for commission.**

• —, if unexplained would be a good ground for refusing the application, *Stone v. Stone* and *A*, 31 L.J., Mat. 33.

**(54) Reasonable notice must be given to the other side to attend and cross-examine.**

It is necessary that.....the witness whose examination on commission has been ordered. *Fitzgerald v Fitzgerald*, 33 L.J., Mat. 39, Divorce Rules 131.

**(55) Where evidence on commission is applied for in cross suits.**

—, in which the same issues are raised, it is usual in ordering the commission to issue to draw up the commission order in such a manner as to admit evidence in both suits. *Osborne v. Osborne and M.*, 33 L.J. Mat. 38.

**(56) Wife's costs regarding commission.**

(a) It is usual in English Courts, when ordering a commission to examine a witness, for the registrar to order the husband to pay or secure the—— within a reasonable time to be fixed in the order. Divorce Court Rule 198.

(b) Where a husband applies for a commission which is not opposed by the wife, he would have to pay her costs incidental to it. *Barley v. Bailey and D*, 33 L.J., Mat. 47.

**(57) Causes for which evidence on commission may be ordered or not****(i) DANGEROUS ILLNESS.**

(a) The——of the party to be examined is good ground for ordering evidence to be taken on commission. *Wequelin v Wequelin*, 2 Cost 263.

(b) But before such evidence can be admitted at the trial an affidavit is necessary that the witness is not in a condition to undergo a fresh examination. (*Ibid*).

**(ii) PREGNANCY.**

(a) —— is generally not by itself a sufficient ground to have the evidence of such pregnant witness read at the trial. *Hamland v Hamland*, 32 L.J. Mat. 144.

(b) But, in any case, before a commission can be ordered on the ground of——, it is necessary that a competent person must swear that delivery at or about the time of the trial is probable. *Abraham v Newton*, 8 Bing. 295.

(c) In the above case an affidavit as to the above nature of the pregnancy is not necessarily sufficient. (*Ibid*).

**(iii) WITNESS BEING AGED.**

In one case a witness aged ninety one was allowed to be so examined on a medical certificate. *Cherry v Cherry*, Nov 13, 1858, Brown on Divorce, 4th Ed., p. 284.

**(iv) WITNESS BEING PERMANENTLY ABROAD.**

(a) Evidence on commission may be ordered on the ground of the..... See *Pollock v Pollock*, D. and M., 30 L.J. Mat. 153.

(b) Such a witness will be presumed to be abroad even at the trial. (*Ibid*).

(c) Slight evidence that he is abroad suffices to admit his deposition at the trial. (*Ibid*).

**Evidence—(Continued).****(58) Evidence on commission, when read at the trial—Practice.**

(a) Before the evidence taken on commission can be read at the trial, it is necessary to show that attendance of the witness at the time of the trial is impossible. *Cherry v. Cherry*, Nov. 18, 1858.

(b) It is also necessary to file an affidavit setting out the circumstances as to why the witness cannot attend. Unreported case, 23rd July, 1884, cited in *Dixon on Divorce*, 4th Ed., 1908, p. 150.

**(59) Tendering evidence taken on commission at the trial, objections to.**

(a) Objections to tendering evidence taken on commission must be taken where such evidence is tendered. *Stone v. Stone*, and *A.* 34 L. J. Mat. 33.

(b) Objections not raised at the time cannot be taken at any subsequent stage. *Hitchins v. Hitchins*, 35 L. J., Mat. 62.

**(60) Admissibility of evidence taken on commission.**

(a) Questions as to the ..... must be decided when the evidence is tendered. *Hill v. Hill*, 30 L. J. Mat. 197.

(b) Such evidence must be shown to be admissible at the time of the trial. *Brown v. Brown*, 33 L. J. Mat. 203.

**(61) Re-opening a commission.**

—— is ordered when sufficient grounds are shown to exist, and when the interests of justice require that such a procedure should be adopted. *Bevan v. Memahon*, 28 L. J., Mat. 40.

**(62) Order of proof.**

(a) The general rule is to give the evidence in the order of sequence of events. *Dixon on Divorce*, 4th Ed., 1908, p. 177.

(b) Such order is however subject to any remarks in the counsel's opening statement of the case as to the order of proof he proposes to adopt. (*Ibid*).

**(63) Order of proof where there is charge and countercharge.**

(a) In cases where there is a counter-charge, the petitioner may, as part of the case opened by him, give his own evidence and call his witnesses in answer to the respondent's charge. *Jackman v. Jackman and W.*, 14 P.D. 62.

(b) Or, in the alternative, he may reserve his answer to the charge until the respondent's witnesses in support of it have been examined. *Jackman v. Jackman and W.*, 14 P.D. 62.

(c) But he is not entitled, as of course, to divide his case, by giving his own evidence in the opening, and afterwards calling his witnesses in reply to the respondent's case. *Jackman v. Jackman and W.*, 14 P.D. 62.

**(64) Recalling witness, practice as to.**

(a) Recalling a witness may be allowed although it may add to or alter his evidence if, in the opinion of the Court, the ends of justice will be served by doing so, but not otherwise. *Bevan v. M' Mahon and B.*, 28 L. J., Mat. 40.

(a) An application to recall a witness, coming after the inquiry, might be made with a view to meet the stress of the case. *Bevan v. M' Mahon and B.*, 28 L. J., Mat. 40.

**(65) Court's power to ask questions.**

The Court may ask any question of the parties and witnesses which may guide it in the exercise of its discretion as it thinks fit. *Plumer v. Plumer and B.*, 4 Sw. and Tr. 257.

## Evidence—(Continued).

## (66) Party bound by admissions

- (a) A party is bound by admissions on the record. *Bacon v. Bacon and B.*, 29 L.J., Mat 61.
- (b) Every one is bound by the admission of a fact which operates against him. *Miles v. Chilton*, 1 Rob. 693.
- (c) The admissions of the respondent are not admissible against the co-respondent. *Robinson v. Robinson and L.*, 1 Sw. and Tr. 362.
- (d) Nor would those of the co-respondent be evidence against the respondent. *Robinson v. Robinson and L.*, 1 Sw. and Tr. 362.
- (e) Admissions are not evidence against parties implicated but not present. *Gray v. Gray*, (Q.P.) 2 Sw. and Tr. 554

## (67) Admissions, weight to be attached to.

- (a) The truth or falsehood of an admission, whether written or verbal is a question for the Court. *Williams v. Williams*, 1 Hagg. C.C. 304, Lord Stowell.
- (b) Due regard must be had to the circumstances under which such admissions were made. *Williams v. Williams and P.*, L.R. 1 P. and D. 29.
- (c) The admissions of a wife as to her adultery, if unsupported by other evidence should be received with the utmost caution. (*Ibid*).
- (d) They may be acted upon as conclusive, provided they are clear, distinct, unequivocal and free from suspicious circumstances. (*Ibid*).
- (e) A wife's admission of adultery, though uncorroborated, may, if trustworthy, be sufficient evidence upon which to grant a divorce. *Robinson v. Robinson*, 1 S. & T 362, *Williams v. Williams* L.R. 1 P. and D 29, *Chilcott v Chilcott*, Times, June 21, 1904, cited in Phipson on Evidence 4th Ed. p. 213.
- (f) But if corroboration is available, such corroboration must be produced. *White v White*, 62 L.T 663, cited in Phipson on Evidence 4th Ed. p. 213.

## (68) Admissions in undefended cases.

Alleged confessions in undefended cases usually need corroboration. Dixon on Divorce, 4th Ed, 1908, p. 134

## (69) Confessions—Rules governing their admissibility and the value attaching to them in matrimonial causes

- (a) The general rule is that a person's confession or admission is only evidence against that person himself. Taylor on Evidence, 10th Ed., Ss. 768—769.
- (b) As against that person such confession or admission may be acted upon even though there be no other evidence. (*Ibid*)
- (c) But it is not evidence against any one else. (*Ibid*)
- (d) Hence, a wife's confession of having committed adultery with him is no evidence against a co-respondent. *Williams v Williams* 1866, L.R., 1 P. & D. 29 cited in Taylor on Evidence, 10th Ed Ss 768—769.
- (e) So also a co-respondent's admission to the effect of his having committed adultery with the respondent is no evidence against the woman. (*Ibid*.)
- (f) Nevertheless, a wife's confession may be acted upon, if the co-respondent admits the adultery, as he thereby makes an admission against interest. *Le Marchant v. Le Marchant*, 1867, 45 L.J.P. D & A 43, cited in Taylor on Evidence 10th Ed., Ss. 768—769

**Evidence—(Continued).**

- (g) The House of Lords, in proceedings upon bills of divorce, was in the habit of rejecting letters from the wife to the husband containing confessions of adultery. *Ld. Cloncurry's case* 1811, *Macq. H. of L. Practice*, 606, cited in *Taylor on Evidence* 10th Ed., *Ss.* 768—769.
- (h) Such letters were admitted when offered in mere confirmation of circumstances which tended strongly to prove the defendant's guilt. *Doyly's case*, 1830, *Macq. H. of L. Practice*, 654 cited in *Taylor on Evidence*, 10th Ed., *Ss.* 768—769.
- (i) Under such circumstances, even the wife's oral confession of guilt to a third party was held admissible in evidence against her. *Ld. Ellenborough's case*, 1830, *Macq. H. of L. Practice*, 655; But see *Wiseman's case*, 1824, *Macq. H. of L. Practice*, 631, cited in *Taylor on Evidence*, 10th Ed., *Ss.* 768—769.
- j) In the Ecclesiastical Courts also the practice was similar to that of the House of Lords. *Taylor on Evidence*, 10th Ed., *Ss.* 768-769.
- (k) A caution of 1603 rendered a mere confession, unaccompanied by other circumstances, insufficient to support a prayer for a separation *a nensâ et thoro* *Taylor on Evidence*, 10th Ed., *Ss.* 768-769.
- (l) Nevertheless a confession was always admissible in evidence, and, if coupled with other facts of a suspicious nature, generally proved an important ingredient in the decision of the Court. *Grant v Grant*, 1839, 2 *Curt* 16, *Caton v Caton*, 1849, 7 *Notes of cases, Ecc. and Mar.* 28, *Fanssett v Fanssett*, 1849, 7 *Notes of cases, Ecc. and Mar.* 93, cited in *Taylor on Evidence*, 10th Ed., *Ss.* 768-769.

**(70) Proof of previous marriage—Admissions not sufficient**

In a suit asking for a decree for nullity of marriage by reason of a former marriage, the defendant's simple admission of such former marriage was held not sufficient. *Searle v. Price*, 2 *Hagg. Cons.* 189, cited in *Taylor on Evidence*, 10th Ed., *Ss.* 768-769

**(71) Letters from alleged paramour—Admissibility.**

In the Ecclesiastical Courts, letters from the alleged paramour, found in the wife's possession were admissible, but, if they did not necessarily imply the commission of adultery, or were not supported by other evidence of indecent familiarities, they were insufficient to support a sentence of separation. *Hamerton v Hamerton*, 1843, 2 *Hagg. Ecc. R.* 8 cited in *Taylor on Evidence*, 10th Ed., *Ss.* 768-769

**(72) Bigamy—Value of admission in proof of**

A prisoner's admission of a former valid marriage is some evidence to support a conviction for bigamy. But it is not conclusive by itself. *Rex v. Flaberty*, 2 *C. & K.* 742, *Rex v. Kanage*, 13 *Cox* 178; *Rev v. Lindsay*, 66 *J. P.* 505, *R. Newton* 2 *Moo* and *R.* 503, *R. Simmons* to 1 *C.* and *K.* 164 cited in *Phipson on Evidence*, 4th Ed., p. 213

**(73) Identity, proof of.**

- (a) Respondent and co-respondents who do not appear in Court must each be clearly identified. *Goldsmith v Goldsmith*, 31 *L.J.*, *Mat.* 163.
- (b) Identity may be established either by direct or indirect circumstantial evidence. *Booker v. Booker and N.*, 33 *L.J.*, *Mat.* 42.
- (c) Direct evidence is that of a witness who, on seeing a respondent (wife), recognizes her in both characters—those of wife and adulteress. *Dixon on Divorce*, 4th Ed., 1908, p. 185.

**Evidence—(Continued.)**

(d) The petitioner's evidence, though direct, cannot alone be enough to prove identity, and must be corroborated. *Harris v. Harris*, M.L.R. 2 P. and D. 77.

**(74) Proof of identity of parties by identity of handwriting.**

"Jones is living in lodgings in adultery as Brown. His land-lady knows his handwriting. He goes away in debt, leaving a box behind him. He writes for his box, signing himself Brown. His wife arrives at the lodgings, too late to see him, but in time to see his letter. The land-lady recognizes the writing in it as Brown's. The wife recognizes it as Jones's. Brown and Jones are thus identified as Jones *alias* Brown." *Dixon on Divorce*, 4th Ed., 1908, p. 185.

**(75) Photographs in proof of identity.**

Photographs are unsafe to rely upon for proving identity. *Frith v. Frith and P.*, P., 1896, 74.

**(76) Communications made during marriage, privileged.**

(a) Husband and wife are protected from disclosing any communication made by one to the other during marriage. 16 & 17 Vict., c 83, S. 3; and see *Gray v. Gray*, 2 Sw. and Tr. 554.

(b) "No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married, nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other." See Evidence Act, S. 122.

**(77) Principle of the above rule.**

This protection of matrimonial communications has been considered requisite in order to ensure that unlimited confidence between husband and wife upon which the happiness of the married state and the peace of the families depend. *Taylor on Evidence*, S. 909.

**(78) Such communications are privileged even though the marriage is dissolved by death or divorce.**

The rule that "no husband is compellable to disclose any communications made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage" applies even after the marriage has been dissolved by death or divorce. *Monroe v. Twistleton*, Pea. Add. Cas. 221, explained in *Aveson v. Kinnaird*, 6 East, 188, 193 (cited in *Phipson on Evidence*, 4th Ed., p. 193).

**(79) Reason of the above rule.**

"It never can be endured, that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved." See *Taylor on Evidence*, 10th Ed., S. 910-A.

**(80) Communications made to solicitors, privileged.**

Solicitors may and generally ought to decline to give evidence of matters which have been imparted to them in confidence by their clients. See 10 Mod. 40; 12 Mod. 341; 3 Black. Com. 370.



**Evidence — (Continued).****(81) Reason of the above rule.**

Unless there be such privilege a client would be afraid to instruct his solicitor fully, and as a consequence might lose a case, which, were justice done, he might win. (*Ibid*).

**(82) But for such privilege free intercourse between solicitor and client might be fatal to the client's position. *Lyell v. Kennedy*, 9 App. Cas. 81, 86.****(83) Time when the above privilege is to be claimed.**

The proper time for refusing to answer is when the witness is called upon to do so. *Harvey v. Lovekin*, 10 P.D. 122.

**(84) Client refusing to allow solicitor to give evidence is no ground to make any adverse presumption against client.**

Where a client refuses to allow his solicitor to give evidence of communications made to him by the client, it is no reason for any adverse presumption being made against the client. *Wentworth v. Lloyd*, 10 H.L. Cas. 589.

**(85) Privilege exists for protection of client, not solicitor.**

(a) The privilege exists for the protection of the client, and not for the protection of the solicitor. *Simmons v. Simmons*, 5 N.C. 331.

(b) Hence, where a party after examination of his solicitor by the other side, examines him on matters which the witness would be protected from divulging, on the ground of professional confidence, if questioned by the other side, he should be held to have waived the privilege, which exists for the protection of the client not for that of his solicitor. *Simmons v. Simmons*, 5 N.C. 331.

**(86) Privilege does not extend as to protect fraud from being disclosed.**

Communications between solicitor and client, relating to the perpetration of a fraud, on the Court or otherwise, are not privileged. *R. v. Cox and Railton*, 14 Q.B.D. 158.

**(87) Professional communication—Rule laid down in the Indian Evidence Act.**

"No barrister, attorney, pleader or vakil shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil, by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any illegal purpose :

(2) any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.

*Explanation.*—The obligation stated in this section continues after the employment has ceased." See Evidence Act, S. 136.

**Evidence—(Concluded).**

**(88) S. 126. Evidence Act to apply to interpreters, &c.**

"The provisions of S. 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils." See Evidence Act, S. 127.

**(89) The above privilege not waived by volunteering evidence.**

If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126, and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose. See Evidence Act, S. 126.

**(90) Confidential communications with legal advisers.**

"No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others." See Evidence Act, S. 129.

**(91) Evidence of medical man.**

A medical man may give evidence of declarations to him by his patient since dead, concerning his illness. *Arson v. Kinnaird*, 6 East, 184.

**(92) Suit for divorce—Inspection of letters.**

The respondent is entitled to have brought in Court letters written by her to the petitioner while the facts to which they speak were fresh in her memory. If the petitioner has none, he should make an affidavit to that effect. 3 B L R O C J, 100.

**(93) Suit by wife for dissolution of marriage among Hindus—Ante-nuptial agreement—"Public policy."**

- (a) In a case in which the parties were Hindus, a wife sued for dissolution of her marriage, and based her claim thereto on an ante-nuptial agreement to the effect that her husband was bound, under certain circumstances to let her go. *Held* that such an agreement was contrary to public policy and unenforceable. 15 P R 1900.
- (b) It is against the policy of the law as administered by British Courts to allow persons by a contract between themselves to avoid a marriage on the happening of any event they may think fit to fix upon. 15 P.R. 1900.



## APPENDIX VI.

### Practice and Procedure.

#### I.—PETITION.

##### (1) **Petition to what Court to be addressed—English Law.**

A petition for dissolution of marriage should be addressed to the Court for divorce and matrimonial causes. *Evans v Evans*, 1 Sw. & Tr. 78, 27 L.J., P. 31, 6 W.R. (Eng.) 556

##### (2) **Pleading must be brief**

(a) All pleadings should be as short as is consistent with alleging a legal ground for the prayer. *Stuygate v. Stuygate*, 1 Sw. & Tr. 489, 28 L.J., Mat. 7, 5 Jur. N.S. 127.

(b) The respondent may apply for further specification, if necessary. (*Ibid*).

##### (3) **Domicile, pleadings as to—(Under the Indian Law, permanent residence).**

(a) It is not absolutely necessary that the question of domicile (under the Indian law, residence,) should be raised by the pleadings. *Parkinson v. Parkinson* 69 L.T. 53

(b) The Court may allow the question to be raised at the hearing if the evidence then adduced points to a doubt as to the Court's jurisdiction (*Ibid*)

(c) There is no necessity to allege a separate domicile for the wife unless it be different from that of the husband *Clark, In the matter of*, 75 L.J. P. 7, 22 T.L.R. 158—Baigrove Deane, J.

##### (4) **Consolidation of connected petitions.**

(a) If it is expedient to bring before the Court acts of adultery alleged to have occurred after the date of the original petition, a supplemental petition should be filed for the purpose. *Borham v Borham and Brown*, 40 L.J. Mat. 6, L.R. 2, P. 193, 23 L.T. 600, 19 W.R., (Eng.) 215.

(b) And, on the preliminary proceedings being completed the two petitions will be consolidated. (*Ibid*).

##### (5) **Second petition for same ground of relief.**

See *Devah v. Brevan* 4 Sw. & Tr. 265, 29 L.J. P. 45

##### (6) **Amended petition—Advertisement.**

Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised. *Smith v. Smith*, 3 Sw. & Tr. 216, 32 L.J. Mat. 115; 9 L.T. 118 See Divorce Rules, 1865, r. 187.

##### (7) **Reserving amended petition.**

If a respondent, misnamed in a petition, has been served, but has not appeared, the petition, when amended, must be reserved *Kisch v. Kisch*, 33 L.J., Mat. 115.

##### (8) **Delay in objecting to the form of petition**

After a petition had been served upon a respondent, his solicitor on two occasions applied to the Judge in chambers for further time to file an

**Practice and Procedure—(Continued).**

answer, and both applications were granted :—*Held*, that it was too late afterwards to take objections to the form of the petition, and to ask that certain paragraphs of it should be struck out. *Hepworth v. Hepworth*, 80 L.J. Mat. 215 ; 6 Jur. (N.S.) 831.

**(9) Petitioner's adultery admitted in pleadings.**

Where a petitioner in his pleadings admitted that he had been guilty of adultery and pleaded condonation by the respondent, the Court allowed the case to go the jury *Boucher v. Boucher*, 1 R. 494 ; 67 L.T. 720.

**(10) Estoppel—Cross-petitions—Decree nisi on wife's petition—Collusion—Intervention of Queen's Proctor—Rescission of decree—Second suit by husband.**

A verdict of cruelty and adultery against a husband upon a wife's petition in the Divorce Court for dissolution of marriage, followed by a decree nisi which is afterwards rescinded on grounds *dehors* the verdict and wholly unconnected therewith, is conclusive evidence of the husband's guilt in a subsequent suit between the same parties, where the husband seeks a similar relief against the wife. *Butler v. Butler*, 63 L.J., P. 1 ; [1894] P. 25, 1 R. 535, 69 L.T. 545 ; 42 W.R. (Eng.) 49—C.A.

**(11) Interim receiver—Wife's petition—Arrears of alimony—Costs unpaid—Ex parte application.**

Where money was due to the wife for arrears of alimony and taxed costs, and her husband had a bill of sale on his furniture, the Court, on an *ex parte* application, appointed a receiver of the amount said to be standing in the husband's name at his bank over the next motion day, and limited to the amount stated in the affidavits. *Angliss v. Angliss*, 1 R. 532, 69 L.T. 462.

**(12) Petition alleging adultery.**

- (a) A petition for a divorce on the ground of adultery must allege adultery in distinct terms. *Ambler v. Ambler and Houghton*, 32 L.J. Mat. 6, 7 L.T. 299, 11 W.R. (Eng.) 111.
- (b) Adultery will not be inferred from bigamy alone being alleged in the petition. *Bonaparte v. Bonaparte*, 65 L.T. 795.
- (c) It is not sufficient that the petition alleges information and belief of the petitioner that the respondent has committed adultery. *Spilsbury v. Spilsbury*, 3 S. & T. 210, 32 L.J. Mat. 126 ; 9 L.T. 23.
- (d) A petition alleged that the respondent and the co-respondent had been living and co-habiting together, but contained no specific charge of adultery. Neither the respondent nor the co-respondent appeared ; *held*, that the allegation was insufficient, and leave to amend was refused at the hearing. *Forman v. Forman and Davies*, 32 L.J. Mat. 80 ; 11 W.R. (Eng.) 401.

**(13) Particulars of matrimonial offences to be given.**

- (a) Allegations of adultery, cruelty, or misconduct, without specifying particulars, are bad. *Windham v. Windham and Giuglini*, 32 L.J. Mat. 89, 9 Jur. (N.S.) 82.
- (b) A general allegation of adultery, not specifying person, place, or time, is bad, and will be struck out. *Porter v. Porter and Jaggard*, 3 Sw. & Tr. 796, 33 L.J. Mat. 207, 13 W.R. (Eng.) 108.



**Practice and Procedure—(Continued).**

- (c) A petition by a wife for a judicial separation, on the ground of adultery, contained a paragraph alleging that the husband had two illegitimate children, the issue of an adulterous connection, born on certain specified days — *Held* that the paragraph was objectionable, as pleading mere evidence, and should be struck out. *Matison v. Matison*, 29 L.J. Mat. 80.

**(14) Conduct of parties—Adultery.**

- (d) On proof of petition for dissolution of marriage by reason of the adultery of the wife, some evidence should be given of the conduct of the husband towards the wife previously to the adultery, and what care he took of her. *Boddington v. Boddington*, 27 L.J. p. 53

**(15) Adultery with persons unknown—Striking out allegations—Undefended suit.**

Where a petition in an undefended suit contained allegations of adultery with two co-respondents, and also with two unknown persons, the Court ordered the paragraphs of the petition referring to the two unknown persons to be struck out. *Peacock v. Peacock*, 6 R 656.

**(16) Alleging cruelty.**

- (a) In a petition asking for relief on the ground of cruelty, acts sufficient to establish legal cruelty should be alleged. *Suggate v. Suggate*, 1 Sw. & Tr. 489, 28 L.J. Mat. 7

- (b) A petition, alleging that on the 26th day of July, 1848, and other days between that day and the 21th of July, 1858, the respondent was guilty of cruelty to the petitioner, is not sufficient, but such acts should be specified as, if proved, would constitute cruelty. (*Ibid*).

- (c) But the precise date of the commission of such acts need not be alleged. (*Ibid*).

- (d) It is not necessary that every charging paragraph in a petition by reason of cruelty should allege a fact or facts on which, if proved, the Court could found a sentence. Some allegations short of this are admissible as showing the habits and animus of the party charged. *Ipsley v. Leete*, 2 Sw. & Tr. 368, 31 L.J. Mat. 121, 6 L.T. 507.

- (e) Allegation of actual violence, however general as to time and place, can only be met by a summons for particulars. (*Ibid*).

- (f) A petition for judicial separation on the ground of cruelty should specify all the acts of the respondent intended to be relied on as constituting cruelty. *Goldney v. Goldney*, 32 L.J. Mat. 13.

- (g) A general allegation, that during a specified time the respondent "committed diverse acts of cruelty," is bad. (*Ibid*).

**(17) Cruelty to wife and cruelty to children—How to be alleged.**

he two questions of cruelty to the wife and cruelty to the children cannot be mixed up together. *Suggate v. Suggate*, 1 Sw. & Tr. 489, 28 L.J. Mat. 46.

**(18) Alleging cruelty—Whole petition is to be read together.**

Cruelty may consist in the aggregate of the acts alleged in a petition, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought. *Green v. Green*, 33 L.J. Mat. 64.

**Practice and Procedure—(Continued).****(19) Alleging desertion.**

When a petition alleges desertion only as the ground for judicial separation, proof of cruelty previously to desertion will not be admitted, even to explain a subsequent refusal on the part of the petitioner to return to co-habitation. *Brookes v. Brookes*, 1 Sw. & Tr. 326; 28 L.J. Mat. 38.

**(20) Particulars to be given.**

A petition for dissolution of marriage by reason of the husband's adultery and desertion was directed to be amended by a distinct averment of the fact of desertion, some statements of circumstances in such a petition may be necessary, but evidence should not be pleaded. *Pyne v. Pyne*, 1 Sw. & Tr. 80, 6 W.R. (Eng.) 507-

**(21) Petition for reversal of decree of judicial separation.**

It is not sufficient in such a petition to allege merely the non-appearance of the petitioner, but the petition must further set out the cause of his non-appearance, and must also state circumstances tending to show that the decree was wrong on the merits. *Phillips v. Phillips*, 35 L.J. Mat 70, L.R. 1 P. 169, 14 L.T. 601, 14 W. R. (Eng.) 902.

**(22) Decree for judicial separation—Subsequent decree for dissolution.**

(a) A wife who had obtained a decree of judicial separation on the ground of adultery is entitled to a dissolution of marriage on the ground of cruelty committed before the filing of the first petition and adultery committed since the decree for judicial separation, if she satisfies the Court that she abstained from applying in the first instance for dissolution because she hoped that her husband would reform. *Green v. Green*, L.R. 43, L.J.P. and D. 6, cited and followed in 56 P.R. (1901) P. 166.

(b) The decree of judicial separation is not to be considered as a license to commit adultery for the future. (*Ibid*).

**(23) Divorce—Judicial separation may be decreed on a petition for dissolution of marriage.**

See 8 Ind. Cas. 1191

**(24) Prayer as to custody of children in the petition.**

If a petitioner claims the permanent custody of the children, a prayer to that effect should be inserted in the petition. *Seymour v. Seymour*, 1 Sw. & Tr. 332.

**II.—LUNATICS, SUITS ON BEHALF OF.**

See pp. 361 to 362, *supra*.

**(1) Petition by or on behalf of lunatic.**

(a) The lunacy of a husband or wife is not a bar to a suit by the committee for the dissolution of the lunatic's marriage. *Baker v. Baker*, 49 L.J. P. 49; 5 P.D. 142; 42 L.T. 332, 28 W.R. (Eng.) 630, affirmed in 49 L.J., P. 83. 6 P.D. 12 C.A.

(b) Such a suit may be instituted by the committee of the estate of the lunatic, (*Ibid*).

(c) The committee of a lunatic may maintain a suit for judicial separation, on the ground of the adultery of the wife of the lunatic. *Woodgate v. Taylor*, 2 Sw. & Tr. 512; 30 L.J., Mat. 197; 5 L.T. 119.

**Practice and Procedure—(Continued).****(2) Petition against lunatic.**

(a) A suit for dissolution of marriage cannot be maintained against a lunatic. *Bawden v Bawden*, 2 Sw & Tr 417, 31 L J, Mat 94, 8 Jur (N S) 157, 6 L T. 27, 10 W R (Eng) 292

(b) Where such a suit has been instituted, the court refused to appoint a curator *ad litem* to the respondent in order to enable the petitioner to proceed with the suit. (*Ibid*).

**(3) Petitioner in lunatic asylum—Guardian *ad litem***

The Court granted a decree *nisi* for a dissolution of marriage on the petition of a person detained in a lunatic asylum under a reception order made by a Magistrate, the petitioner appearing by his guardian *ad litem*. *Burrell v Burrell* 17 F L R, 41—Gorell Barnes, J

**III—SUITS BY MINORS**

See pp. 362 to 366, *supra*

**IV—CIVIL PROCEDURE CODE TO APPLY TO MATRIMONIAL CAUSES IN THIS COUNTRY**

See p. 359, *supra*

**Attachment before judgment**

An order for attachment before judgment cannot be made in divorce proceedings. There is much in the Code of Civil Procedure which deals with substantive law and not procedure, and O XXXVIII, n. 5 and 6, have no application in divorce proceedings. Attachment before judgment is a matter of remedy and not of procedure. *Phillips v. Phillips*, 17 C. 613=7 Ind. Cas. 792

**V.—CITATION.**

**N B.**—On this point see also notes at pp. 152, 366 to 370, *supra*

**(1) Where address of respondent is unknown**

When the address of a respondent is unknown, he may be described in the citation as late of the last known place of his residence. *Forster v Forster*, 32 L J., Mat. 131.

**(2) Where name of respondent is misspelt.**

If the name of a respondent is misspelt in a citation, and there is no appearance, the Court will not order that service of such citation shall be deemed sufficient, but a fresh one must be extracted. *Cotton v. Cotton and Knuts*, 4 Sw & Tr 275, 32 L J., Mat. 133.

**(3) Amendment of citation and petition**

(a) In an affidavit verifying a petition for dissolution of marriage, a co-respondent's Christian name was stated to be John instead of William, and a similar mistake was made in the citation. Held that the petition had to be amended. *Reuss v. Reuss and Appleworth*, 32 L J., Mat. 168.

(b) When a citation has issued for dissolution of marriage, on the ground of adultery and desertion, and the petition is afterwards amended by adding a charge of cruelty, if the respondent has appeared to the citation, a fresh citation is not necessary. *Rowley v. Rowley* 1 Sw & Tr 187, 29 L J. Mat. 15, 7 W R (Eng) 653



**Practice and Procedure—(Continued).****(4) Citation by advertisement.**

- (a) Where a husband had no tidings of his wife, who left him in 1850, except as living with the adulterer in 1851, and could gain no information of her by inquiring of her relations or at the places at which she was last supposed to have been, the Court directed the citation to be left in the registry, and advertisements of that fact to be inserted in newspaper *Peckover v. Peckover*, 1 Sw. and Tr 219.
- (b) Where a respondent is cited by advertisement, and leave to amend the petition is afterwards granted, the amended petition need not be advertised *Smith v. Smith*, 3 Sw. and Tr 216, 32 L.J., Mat 145; 9 L.T. 118.
- (c) Two insertions in a newspaper, of advertisements, on the 7th and 14th of a month, are a sufficient compliance with an order to advertise twice within the interval of a week. *Elseley v. Elseley*, 32 L.J., Mat. 145.

**(5) Service of citation and petition**

When every reasonable effort has been made to trace the respondent for the purpose of effecting a personal service of the citation and petition in a suit for dissolution of marriage, but without success, the Court will dispense with such personal service *Appleyard v. Appleyard and Smith*, L.R. 3, P. 257.

**(6) Service by registered letter**

- (a) In a petition for divorce it appeared that the respondent and co-respondent were residing together abroad, and that, by the law of the place where they resided, the co-respondent, a foreigner, had a right of action against any person serving him with English process.—*Held*, that the citation might be served on the co-respondent by inclosing it in a registered letter addressed to him, another copy being sent to the respondent so as to make it more probable that it would come to his knowledge. *Trubner v. Trubner*, 59 L.J., p. 56, 15 P.D. 21; 32 L.T. 186, 38 W.R. (Eng.) 464, 54 J.P. 167. See *Cornish v. Cornish*, 59 L.J., P. 84, 15 P.D. 131, 62 L.T. 667.
- (b) The Court made an order for substituted service of a divorce petition and citation upon a husband by registered letter, but directed that such service should not be treated as complete service until the Court should be satisfied that the letter was actually received by the proposed respondent *Cox v. Cox*, 61 L.T. 698.

**(7) Substituted service—No inquiries made—Affidavit of petitioner.**

- (a) Except under very special circumstances, it has been the invariable practice of the Court not to give leave for substituted service of a petition and citation unless the motion for such substituted service is supported by an affidavit of the petitioner. *Williams v. Williams*, 65 L.J., P. 98, [1896] P. 153.
- (b) The Court will not order substituted service of the citation, without evidence that personal service could not be effected. *Moore v. Moore*, Ir. 5 R. Eq. 172.
- (c) And, therefore, it refused to substitute service where there was no evidence of the respondent's place of residence at the time of making the affidavit, or of any inquiries made to ascertain it. (*Ibid.*)

**Practice and Procedure—(Continued).**

- (d) To entitle a petitioner, in a suit for dissolution of marriage, on the ground of the husband's adultery, to proceed without personal service of the citation, it is not sufficient to show that the respondent is abroad, and that the petitioner does not know where he is *Sudlow v Sudlow*, 28 L.J., Mat. 4.
- (e) Some attempts should be made to discover and serve him (*Ibid.*)
- (f) Substituted service of the citation was refused until an affidavit made before some competent authority, whether a personal service could be effected, was produced. *Robotham v. Robotham*, 1 Sw. & Tr. 73, 27 L.J., Mat. 33, 4 Jur (N.S.) 148, 6 W.R. (Eng.) 328.
- (g) An application was made on behalf of a wife, who had presented a petition for dissolution of marriage, to dispense with personal service of the citation, and allow substitutional service on the brother of the husband. Affidavits showed that the husband was living abroad under an assumed name, and that the wife could not ascertain where he was, but that her husband's brother was in communication with him, and had undertaken to forward the citation to him. The application was rejected on the ground that personal service might be effected through the husband's brother *Chandler v Chandler*, 27 T. J., Mat. 35.
- (h) In a suit for dissolution of marriage on the ground of a wife's adultery, affidavit in support of a motion to dispense with personal service of the citation, and copies of the petition stated that the wife had deserted her husband at Liverpool in August 1857, that there was reason to believe that she afterwards lived in this country with Q, the co-respondent, as his wife, that in October, 1857, two persons passing under the names of Mr and Mrs Q, sailed from London for Australia, and afterwards landed in Melbourne, that there was reason to believe that the said Mrs. and Mr Q, were the respondent and co-respondent, that inquiries had been made in Melbourne of the agent of the ship in which those persons went to Australia, and of other shipping agents there, also of the inspector of police at Sydney, but that no trace of them, or of their movements, could be discovered. The Judge dispensed altogether with service on the respondent and co-respondent *Cook v Cook and Quarte*, 28 L.J., Mat. 5.
- (i) In a suit by wife for judicial separation, application having been made for an order that service of the citation and copy of the petition upon the father of the husband should be deemed good service, upon affidavits that the wife did not know where the husband was, and that his father, though it was believed he knew his address, would not disclose it, and that the wife had last heard from her husband in 1854, when he wrote to her, the Judge refused to make the order without an affidavit that inquiries had been made for two husband at the place from which the letter was addressed *Lacey v. Lacey*, 28 L.J., Mat. 24.
- (j) Service of a citation upon a co respondent will be dispensed with if, after a sufficient search, he cannot be found *Parker v. Parker*, 5 Jur. (N.S.) 103

**Practice and Procedure**—(Continued).

- (k) A wife filed a petition for dissolution of marriage, but was unable to effect personal service of the citation, in consequence of her husband having gone abroad, but whither she knew not. A, knowing where the husband was, though refusing to give his address, forwarded to him, by post, an office copy and a plain copy of the petition and two copies of the citation. The husband returned by post to A, the plain copy of the petition and one of the copies of the citation, on which were indorsed memoranda signed by him, acknowledging the receipt of the office copy of the petition and also a copy of the citation. The husband not having entered an appearance, the wife was allowed to proceed without further service. (*Chandler v. Chandler*, 28 L.J., Mat. 6.
- (l) Though the fact that the respondent's whereabouts cannot be discovered may be due to the petitioner's delay in bringing his petition, substituted service of the petition and citation may be allowed. *Jenson v. Jenson*, 78 L.T. 764—Jeune, P.
- (m) An affidavit by the petitioner of his ignorance of the address of the parties to be served should be filed with application for substituted service. *Martin v. Martin* (No. 1), 78 L.T. 170—Gorell Barnes, J.
- (n) S. 82 of the Code of Civ. Procedure, does not contemplate substituted service being granted except after reasonable endeavours, to serve a summons personally. 4 L.B.R. 195.

**(6) Practice of Indian Courts follows that of the English Courts**

- (a) The practice of this Court, as to service of petition on the Respondent, is governed by what prevails in the Matrimonial Courts in England. 12 C.W.N. 1009.
- (b) It is essential, in suits for dissolution of marriage, that the petition of the Plaintiff should be personally served under S. 50 of the Indian Divorce Act on the Respondent or that sufficient notice of its contents should be given to him. 12 C.W.N. 1009.
- (c) S. 50 of the Indian Divorce Act says that "every petition under this Act shall be served on the party to be affected thereby, either within or without British India, in such manner as the High Court (not the Civil Procedure Code) by general or special order from time to time directs."

In this case, no order for substituted service of the petition was obtained. It is essential, in suits for dissolution of marriage, that the petition of the Plaintiffs should be served on the Respondent or that sufficient notice of its contents should be given to him. 12 C.W.N. 1009.

**(9) Advertisement in news papers**

A mere advertisement in newspapers of a petition for dissolution is not sufficient to bring the fact of the petition home to the respondents in the absence of proof that endeavours were made to serve the respondent personally. 4 L.B.R. 195.

**(10) Petition amended—Personal service dispensed with**

When a respondent in India who had been served with the citation and petition, had not appeared, and the petition was amended by changing the name only of the woman with whom adultery was alleged, the Court allowed personal re-service of the amended petition to be dispensed with, *Roberts v. Roberts*, 53 S.J. 304—Bingham, P.

**Practice and Procedure—(Continued)****(11) Decree nisi for dissolution of marriage—Service on respondent.**

A decree nisi for dissolution of marriage need not be served upon the respondent, in order to be made absolute. *Hicks v Hicks*, 8 C. 756.

**(12) Application to make decree nisi absolute—Notice**

See 1 B L R., O C., 52.

**(13) Divorce suit Decree nisi passed and served on respondent Notice of application to make decree absolute need not be given**

See 18 C. 443.

**(14) Questions put to respondent as to acts of adultery on serving citation and petition**

It is an improper practice for the person who serves the respondent to a divorce petition to take that opportunity to interrogate him to obtain admissions of guilt. *Hallam v Hallam*, 20 F. L. R. 31—Bucknill, J.

**(15) Respondent in prison—Service.**

If a respondent, in prison, the Court will not be satisfied with substituted service of the petition and citation to be made on an officer of the gaol in which he is confined, unless there is a reasonable probability that the contents of those documents will thereby become known to him. *Bland v Bland*, 41 L. J., Mat. 14, L. R. 3, P. 233, 32 L. T. 401, 23 W. R. (Eng.) 119.

**(16) Respondent in lunatic asylum—Service and citation**

The respondent in a suit for nullity of marriage being resident in a lunatic asylum, and having a mother living, it was ordered that the citation should be served upon him personally in the presence of the superintendent of the asylum, and also on his mother. *B. v. B*, 1r R. 9 Eq. 551.

**(17) Loss of original citation after service**

(a) A citation was personally served upon the respondent, but was lost or destroyed by the clerk to whom it was given to be returned into the registry. The Court allowed a duplicate to be filed with the usual affidavit of service. *Chilcott v Chilcott and Smith*, 43 L. J., Mat. 8, 29 L. T. 518, 22 W. R. (Eng.) 166.

(b) The Court will not make an order, dispensing with the necessity for the return of a citation into the registry, even when it is satisfied that the original citation has been lost by the carelessness or fraud of a defaulting solicitor. *Perret v. Perret and Allt*, 35 L. T. 910.

**(18) Undertaking of solicitor to accept service**

(a) An undertaking by a respondent's solicitor to appear is not sufficient. The citation must be served upon the respondent. *De Neeville v De Neeville*, 37 L. J., Mat. 13.

(b) The Court will not allow a suit to proceed upon the mere undertaking of an attorney to accept service of the citation for the respondent. Personal service on the respondent is necessary, unless the Court has dispensed with such service. *Milne v Milne*, 4 Sw. & Tr. 183, 34 L. J., Mat. 143.

**Practice and Procedure—(Continued).****(19) Affidavit of service of citation and petition.**

An affidavit of service of a citation and petition should allege that the party served is a respondent in the suit. *Temple v. Temple*, 31 L.J., Mat. 34.

**(20) Indorsement of service.**

Where a respondent had been personally served with the citation at Shanghai, and the citation had been returned without the certificate of service indorsed on it, the Court allowed the suit to proceed without re service. *Coghull v Coghull and Laureiro*, 35 L.J., Mat. 32, L.R. 1, p. 26.

**VI.—APPEARANCE****(1) Non-appearance**

In a suit for dissolution of marriage on the ground of a wife's adultery, the respondent did not appear. The co-respondent denied the adultery, and that issue was found in favour of the husband. The evidence upon which the verdict was founded being unsatisfactory, the Judge declined upon it to make a decree against the respondent. *Dolby v. Dolby and Hewitt*, 2 Sw. & Tr 228, 30 L.J., Mat. 110, 3 L.T. 679, 9 W.R. (Eng.) 476.

**(2) Admitting jurisdiction.**

- (a) A respondent in a suit by her husband for dissolution of marriage having entered an absolute appearance, cannot afterwards plead to the jurisdiction of the Court, nor can she raise such objection by act on petition. *Forster v. Forster and Berridge*, 3 Sw. & Tr 144, 31 L.J., Mat. 185, 9 L.T. 147.
- (b) If a respondent intends to plead to jurisdiction of the Court, she should appear under protest. (*Ibid*).
- (c) A respondent who appears absolutely, thereby admits the jurisdiction of the Court, and cannot afterwards amend his appearance in order to plead to the jurisdiction. *Garstin v Garstin*, 4 Sw. & Tr 72, 34 L.J., Mat. 45, 13 W.R. (Eng.) 508.
- (d) A party who appears absolutely and not under protest, cannot plead to the jurisdiction, and delay filing an answer on the merits until the question of jurisdiction raised by the plea is determined, but in his answer on the merits he may also plead the matters on which he relies as showing that there is no jurisdiction. *Wilson v. Wilson and Howell*, 41 L.J., Mat. 1, L.R. 2, P 341.
- (e) A respondent in a suit for dissolution of marriage, who has entered an absolute appearance, cannot file an answer raising the question of jurisdiction solely, but may in an answer on the merits also allege facts raising the question of jurisdiction. *Wilson v. Wilson and Howell*, 40 L.J., Mat. 77, 24 L.T. 671, 19 W.R. (Eng.) 879.
- (f) A respondent who has entered an absolute appearance will not be permitted to withdraw it in order to enter an appearance under protest to enable him to plead to the jurisdiction. *Moore v. Moore*, Ir. R 5 Eq. 371.

**Practice and Procedure—(Continued).****(3) Appearance under protest**

- (a) Where, in a suit for dissolution of marriage, the alleged adulterer, who had been made a co-respondent, appeared under protest and pleaded to the jurisdiction, the Court, on an application of the petitioner, dismissed the co-respondent from the suit on payment of his costs. *Gaynor v Gaynor and Deglantonis*, 31 L J., Mat 116
- (b) If a foreigner appears to a citation otherwise than under protest, he submits himself to the jurisdiction of the Court. *Bond v Bond*, 2 Sw & Tr. 93, 29 L.J., Mat. 143, 2 L T., 513, 8 W R (Eng.) 630
- (c) If a respondent in a suit for dissolution of marriage intends to plead to a dilatory plea, he should appear in person, and under protest. *Forster v. Forster and Berridge*, 31 L J. Mat. 185, 9 L T 147.

**VII.—ANSWER.****(1) Not answering, effect of.**

- (a) In a suit for dissolution of marriage where the co-respondent has appeared, but has put in no answer, he cannot, at the hearing of the petition, be allowed to take any part in the proceedings. *Norris v Norris and Gyles*, 1 Sw & Tr 171, 27 L J., Mat 72, 6 W R (Eng.) 610.
- (b) He cannot dispute the allegations of the petition either by cross-examining the witnesses in support of it, or by addressing the Court. (*Ibid.*)
- (c) Nor can he be heard even on the question of costs. (*Ibid.*)
- (d) Where a respondent is in default by failing to file an answer in due course, he cannot object to a paragraph of the petition on the ground of irrelevancy. *Burrell v. Burrell*, 32 L J., Mat 136. S.P., *Hepworth v. Hepworth*, 6 Jur. (N S.) 831

**(2) Condonation, notice of, by Court, though not pleaded**

Condonation proved at the hearing will be noticed by the Court, although it has not been pleaded. *Curtis v Curtis*, 1 S. and T 234

**(3) Leave for further time to file answer**

- (a) An application for leave to file an answer, after a cause has been set down for trial, must be supported by an affidavit showing reasonable grounds for granting it. *Jago v Jago and Graham*, 32 L.J., Mat. 49, 11 W.R. (Eng.) 551.
- (b) An answer filed without the leave of the Judge, after the time allowed for filing it has elapsed, may be treated by the petitioner as a nullity. *Availa v. Availa*, 30 L J., Mat. 104.

**(4) New averments to be verified by affidavits.**

- (a) Where a petition, on the face of it sets up a sufficient case, it should be met by a responsive plea and cannot be dismissed by the Court on an affidavit of facts, which might be a sufficient plea in law. *Evans v. Evans*, 1 Sw. and Tr. 78, 27 L J., Mat 31, 6 W R. (Eng.) 356.
- (b) All matter in answer beyond a simple denial must be verified by affidavit, which, however need not be in absolute terms. *Tourle v Tourle*, 1 Sw. and Tr. 165, 27 L.J., Mat. 52, 6 W.R. (Eng.) 544,

**Practice and Procedure—(Continued).****(5) Alleging cruelty by way of answer.**

Cruelty may consist in the aggregate of the acts alleged in an answer, and each paragraph need not allege an independent act of cruelty sufficient in itself to warrant the relief sought, *Green v. Green*, 33 L.J., Mat. 64.

**(6) Undue familiarities alleged against petitioner Motion to strike out—Refusal**

See *Col v. Col*, 70 L.T. 200—C.A.

**VIII—PARTICULARS****(1) Particulars, how and when can be obtained.**

(a) A general allegation, that during a specified time the respondent "committed divers acts of cruelty" is bad, and is ground for an order that the petition be amended by specifying such acts, but not for an order that particulars of the acts of cruelty be given. *Goldney v. Goldney*, 32 L.J., Mat. 13.

(b) It is the practice to ask for an order for particulars by summons in chambers, and not by motion in Court. *Huggs v. Huggs and Hopkins*, 32 L.J., P. 61, 11 W.R. (Eng.) 151.

(c) Where such an order is obtained upon motion in Court, the extra costs incurred by proceeding by motion instead of by summons will not be allowed. (*Ibid.*)

(d) A petition for dissolution of marriage alleged a specific act of adultery on the 25th of August, and other acts of adultery between that day and the 31st of October. The Court declined to order particulars of the dates of these latter acts of adultery. *Boddy v. Boddy*, 28 L.J., Mat. 16.

(e) Allegations of actual violence, however general as to time and place, can only be met by a summons for particulars. *Leete v. Leete*, 2 Sw. & Tr. 568, 31 L.J., Mat. 121, 6 L.T. 507.

(f) A petition alleged that the co-respondent lived in the same house with the petitioner and his wife for two years, and that the adultery was committed on divers occasions during that period. The Court refused to order the petition to be amended by the insertion of further particulars of the acts of adultery, being of opinion that it gave sufficient information of the charge to enable the respondent to meet it. *Smith v. Smith and Liddard*, 20 L.J., Mat. 62, 5 Jur. (N.S.) 1318.

(g) A petition for dissolution of marriage alleged that the co-respondent had lived in the same house with the petitioner and his wife for two years and that the adultery was committed "on divers occasions during that period." The Court refused further particulars. *Smith v. Smith and Liddard*, 29 L.J., P. 62.

**(2) Persons.**

Where a wife alleged acts of cruelty against her husband, such acts consisting partly of abusive language alleged to have been used by him to her in the presence of servants, the court ordered the wife to give particulars of the names of the servants in whose presence it was alleged the abusive language had been used by him to her. *Bishop v. Bishop*, 70 L.J., P. 93, [1901] P. 325, 85 L.T. 173, 17 T.L.R. 616—Jeune, P.

**Practice and Procedure—(Continued).****(3) Adultery.**

- (a) Under an order to give further and better particulars of the dates and places when and where alleged acts of adultery, extending over ten months, were committed, the petitioner must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case. *Hartopp v. Hartopp*, 71 L.J., P. 78, 87 L.T. 188—C.A.
- (b) It is not a sufficient compliance with such an order to allege generally that the respondent and co-respondent were constantly meeting and were in the respondent's boudoir and bedroom together, and that they were frequently out riding and driving alone together, from which the Court will be asked to infer that they committed adultery. (*Ibid*).

**(4) Particulars not corresponding to the charges—Effect.**

- (a) When a respondent filed as particulars of cruelty alleged in her answer allegations of cruelty which did not correspond with the charge in the answer, but were fresh charges, the Court ordered them to be struck out. *Sanderson v. Sanderson, Stephens and Hiscock*, 41 L.J., Mat. 24; 25 L.T. 857, 20 W.R. (Eng.) 261.
- (b) In a wife's petition for a judicial separation on the ground of cruelty, particulars were ordered to be given, but as they did not correspond with the original charges, the Court ordered them to be struck out. *Grafton v. Grafton*, 24 L.T. 144.
- (c) Subsequently they were allowed to be added to the petition as new charges. (*Ibid*)

**(5) Facts omitted in particulars**

When particulars of a general charge of adultery contained in a petition have been ordered and delivered, the petitioner, if he intends at the hearing to prove acts of adultery not included in the particulars, should give notice of them to the other side a reasonable time before the hearing. *Bancroft v. Bancroft and Rumney*, 34 L.J., Mat. 31, 13 W.R. (Eng.) 506.

**(6) Where particulars are insufficient—Practice.**

If the particulars are not sufficient the proper course is to apply for further and better particulars. *Codrington v. Codrington and Anderson*, 4 Sw. & Tr. 63.

**(7) Particulars of charges in petition—Explanatory affidavit.**

An explanatory affidavit in lieu of particulars of charges in a petition for divorce should be made by the solicitor who has seen the witnesses. *C. v. O.*, 55 S.J. 141—Bargrave Deane, J.

**IX.—AMENDMENT OF PLEADINGS****(1) Amendment of pleadings, when allowed.**

- (a) A petition alleged that the respondent and co-respondent had been living and cohabiting together, but contained no specific charge of adultery. Neither the respondent nor the co-respondent appeared —*Held*, that the allegation was insufficient, and leave to amend was refused at the hearing. *Forman v. Forman and Daris*, 32 L.J., Mat. 80; 11 W.R. (Eng.) 401.
- (b) The Court will not order a pleading to be amended unless it is so framed as to embarrass the opposite side. *Green v. Green*, 33 L.J., Mat. 83.



**Practice and Procedure—(Continued).****(2) Amendment, by adding charge.**

- (a) A wife, who had instituted a suit for judicial separation, on the ground of cruelty, subsequently discovered that her husband had also been guilty of adultery. The Court allowed her to amend her petition by adding a charge of adultery and praying for dissolution of marriage on the ground of cruelty and adultery. *Carlidge v. Carlidge*, 31 L.J., Mat. 135, 8 Jur. (N.S.) 193.
- (b) Where a petitioner, after an adjournment of the case part heard, in order to procure further evidence, asks leave to amend his petition by adding a new charge, it is an objection to granting the application that the charge had come to his knowledge before the petition in its original form was drawn. *Bannister v. Bannister and Davis*, 29 L.J., Mat. 53.
- (c) After hearing a petition by a wife for dissolution of marriage on the ground of adultery and cruelty, no divorce having been pronounced, the Court allowed the petition to be amended by the addition of a charge of bigamy, which came to her knowledge in the interval between the cause being set down for hearing and the hearing. *Walker v. Walker*, 30 L.J., Mat. 214.
- (d) A petitioner for divorce is by precedent entitled to the leave of the Court to amend his petition, by adding charges of fresh acts of adultery committed after the date of the petition by the respondent with the correspondent. *Borham v. Borham and Brown*, 40 L.J., Mat. 6, L.R. 2 P. 193, 23 L.T. 600, 19 W.R. (Eng.) 215.
- (e) In the above case, the Court, however, expressed a doubt as to such a course standing investigation on appeal and intimated that the better course would be for the petitioner to file a supplemental petition and to consolidate the two petitions before the hearing (*Ibid*).
- (f) Cruelty is a matrimonial offence which must essentially be within the wife's knowledge when she files her petition; and the Court, therefore, will not allow her to add new charges to her petition, except under very special circumstances. *Austin v. Austin*, 41 L.J. Mat. 8, 25 L.T. 856, 20 W.R. (Eng.) 128.
- (g) A wife brought a suit for dissolution on the ground of adultery and cruelty. She proved the adultery, but failed to prove the cruelty. The hearing was adjourned, and she subsequently discovered that the communication of syphilis amounted to legal cruelty. The Court allowed her to add a charge of cruelty to that effect to the petition. *Parkinson v. Parkinson*, 21 L.T. 597.
- (h) A petition by a wife for dissolution of marriage, on the ground of adultery and desertion, may be amended by adding a charge of cruelty if the Court is satisfied that the fresh charge is brought forward *bona fide*, and not for the purpose of vexation. *Rowley v. Rowley*, 1 Sw. & Tr. 487, 29 L.J. Mat. 15, 7 W.R. (Eng.) 653.

**(3) Amendment by striking out charge.**

The Court allowed a petition for judicial separation to be amended by striking out a charge of adultery. *Hudson v. Hudson*, 33 L.J. Mat. 5; 9 Jur. (N.S.) 1302; 12 W.R. (Eng.) 216.

**Practice and Procedure—(Continued).****(4) Amendment regarding dates of charges.**

A petition for dissolution of marriage, on the ground of adultery and cruelty, charged cruelty "in and during the months of April and May." The respondent filed an answer, denying the charges. At the trial the respondent did not appear, and the petitioner failed to prove cruelty at the time alleged, but established cruelty in June and July—*Held*, that the petition might be amended by substituting the date of the cruelty proved. *Bunyard v. Bunyard*, 32 L J, Mat 176, 11 W R (Eng.) 990

**(5) Amendment of charge of adultery—With whom.**

See *Jago v Jago and Graham* 32 L J, Mat. 18, 11 W R. (Eng.) 192

**(6) Amendment of pleadings by adding a claim for damages.**

(a) When the object appeared to be *bona fide* to obtain damages, the Court allowed a paragraph praying for damages to be added to a petition before an answer had been filed—*Symonds v. Symonds and Hannan*, 23 L T 568, 19 W R (Eng.) 166

(b) Leave was granted to amend a petition for dissolution of marriage by adding a claim for damages—*Bartlett v. Bartlett and Balmanno*, 34 L J, Mat 64.

(c) At the date of filing his petition the only evidence which the petitioner had was the confession of the respondent. He subsequently obtained independent evidence of her alleged adultery with the co-respondent, and he then applied to amend his petition by adding a claim for damages. The Court allowed the amendment—*Henslow v Henslow and Beardshy*, 10 L J, Mat. 31, 21 L T 816, 19 W R (Eng.) 786.

**(7) Amendment of claim for judicial separation to dissolution of marriage.**

(a) Where both parties are before the Court a wife's suit for judicial separation may be turned into one for a dissolution of marriage without issuing a fresh citation—*Cartledge v Cartledge*, 1 Sw & Tr. 219.

(b) But there must be a re-service of the petition on the respondent—(*Ibid*).

(c) The Court granted an application by a wife that a petition for a judicial separation filed by her might be dismissed, and that she might substitute for it a petition for dissolution of marriage, upon the terms of her paying the costs—*Lewis v Lewis*, 29 L J, Mat 123.

**(8) Amendment regarding allegation of desertion**

(a) A petition for dissolution of marriage by reason of the husband's adultery and desertion was directed to be amended by a distinct averment of the fact of desertion. *Pryce v Pryce*, 1 Sw & Tr. 80, 6 W.R. (Eng.) 507.

(b) Some statements of circumstances in such a petition may be necessary, but evidence should not be pleaded—(*Ibid*).

**(9) Amendment of claim for dissolution of marriage to one of judicial separation.**

(a) The adultery of the respondent having been proved, and also cruelty and misconduct on the part of the petitioner which conduced to such adultery, the Court refused to allow a prayer for judicial separation to be substituted for that for dissolution of marriage, in order that the evidence of the misconduct of the petitioner should be expunged. *Lempriere v Lempriere and Roebel*, 37 L.J., Mat. 78, L R. 1 P, 569, 19 L T. 50, 16 W.R. (Eng.) 1192.

**Practice and Procedure—(Continued).**

- (b) It is competent for the Court to decree a judicial separation, although the petition prays only for a decree for a dissolution of marriage, if the facts proved will entitle a petitioner to the former, but not to the latter decree. *Smith v. Smith*, 1 Sw & Tr 359; 28 L.J., Mat. 27; 7 W.R. (Eng.) 382.
- (c) A petition of a wife prayed simply for a decree of dissolution of marriage on the ground of adultery and desertion. At the hearing, adultery having been proved, but not desertion, the Court decreed a judicial separation. (*Ibid*).
- (d) Where the petitioner refuses to amend the petition by praying for judicial separation, the petition must be dismissed. *Rowley v. Rowley*, 4 Sw. & Tr. 137, 11 Jur. (N.S.) 562 12 L.T. 505.
- (e) The Court will, at the prayer of a petitioner, at the hearing, make a decree of judicial separation instead of a decree ~~now~~ for dissolution, although the petition prays for dissolution, and facts are proved on which the dissolution may be granted. *Dent v. Dent*, 4 Sw. & Tr. 105, 34 L.J., Mat. 118, 13 L.T. 252

**(10) Amendment of answer.**

- (a) The Court inclines to order an amendment of a plea where that will enable a point of law to be raised by demurrer. *Holland v. Holland*, 16 W.R. (Eng.) 406.
- (b) A co-respondent whose answer merely traversed the allegation of adultery, was not allowed to cross-examine the witnesses called to establish that allegation, for the purpose of eliciting that the petitioner had been guilty of adultery, or of such misconduct as would induce the Court to exercise its discretion by withholding a decree. *Plumer v. Plumer and Bygrave*, 4 Sw & Tr. 257
- (c) But upon a statement being made that the co-respondent would probably be able to establish a case of such misconduct on the part of the petitioner if he had the opportunity, the Court allowed him to amend his answer by the insertion of various counter-charges against the petitioner. (*Ibid*)

**(11) Application to rescind amendment.**

See *Greatorex v. Greatorex*, 34 L.J., Mat. 9.

**(12) Amendment of answer by adding a cross prayer**

See notes at p. 153, *supra*.

**(13) Death of petitioner—Orders for costs and alimony—Adding executors.**

A wife presented a petition for divorce, and the husband was ordered to pay alimony *pendente lite* and to pay the taxed costs up to a certain stage. The wife died before the petition was heard. Her executors applied to be added as petitioners so as to enable them to enforce the above orders. The Court refused to make the order. *Schenck v. Schenck*, 24 T.L.R. 739, 52 S.J. 551; *Bargrave Deane*, J

**(14) Wrong date of marriage in petition and decrees—Amendment—Motion—Costs.**

Where a marriage had been twice celebrated, and *per incuriam* the second marriage alone was alleged in the petition and dissolved by decrees ~~now~~ and absolute accordingly, on affidavit of service of notice of motion

**Practice and Procedure—(Continued).**

on respondent the petition and decrees were ordered to be amended by inserting as well the date of the first marriage, without costs against respondent. *Hampson v. Hampson*, 77 L.J., P. 148, [1908] P. 355, 99 L.T. 882, 24 T.L.R. 868, 52 S.J. 729—Gorell Barnes, P.

**X.—ADJOURNMENT.**

**N.B.**—On this point see pp. 379-380, *supra*

**(1) Trial in cross suits—Staying proceedings**

(a) Where cross-suits had been instituted by a husband for dissolution and by the wife for judicial separation, in which the same issues were raised, the Court stayed the proceedings in the wife's suit, which had been commenced after that of the husband, until after the hearing of his suit. *Osborne v. Osborne and Martelli*, 3 Sw. & Tr. 327, 33 L.J., Mat. 38, 10 Jur. (N.S.) 80, 9 L.T. 456

(b) In this case, there being cross-issues of adultery in a husband's petition for dissolution standing for trial, the Judge suspended his judgment until these issues were disposed of. *Burroughs v. Burroughs*, 2 Sw. & Tr. 514, 5 L.T. 771.

**(2) Insanity of respondent, if ground for staying proceedings.**

See notes at p. 58, *supra*.

**(3) Staying proceedings to obtain evidence**

(a) In a suit promoted by the husband, by reason of the adultery of the wife, the proof of the guilt of the wife was conclusive, and she had also in terms admitted it. An application on her behalf to stay the proceedings, to enable her to examine witnesses resident in India and Australia, to prove condonation on the part of the husband, was rejected, and sentence of separation pronounced. *Campbell v. Campbell*, 3 Jur. (N.S.) 845, 5 W.R. (Eng.) 519.

(b) Where on evidence in support of an undefended petition for dissolution of marriage by reason of the husband's adultery, cruelty, and desertion, a doubt arose as to whether the parties had not voluntarily separated, the Court ordered the case to be adjourned to have further evidence produced. *Ward v. Ward*, 1 Sw. & Tr. 185, 27 L.J., P. 63, 6 W.R. (Eng.) 867.

**(4) Adjournment on the ground of surprise**

(a) When a petitioner at the trial opened evidence which was admissible on the record but took the other parties by surprise, the Court adjourned the trial. *Bancroft v. Bancroft and Rumney*, 3 Sw. & Tr. 610, 11 L.T. 515, 13 W.R. (Eng.) 506.

(b) An adjournment was granted on the ground of surprise, at the instance of the respondent in respect of a charge of adultery with a person other than the co-respondent. *Codrington v. Codrington and Anderson*, 4 Sw. & Tr. 63.

**(5) Motion for adjournment—Notice of motion.**

The Court will not postpone the trial of a cause on the application of one of the parties, if no notice of the motion has been given to the other party. *Hepworth v. Hepworth*, 2 Sw. & Tr. 514, 30 L.J., Mat., 198, 5 L.T. 120.

**Practice and Procedure—(Continued).**

**XI.—WITHDRAWAL AND DISMISSAL OF PETITION.**

**N.B.**—On this point see also pp. 209-210, *supra*.

**(1) Dismissal of petition, when petitioner does not appear.**

(a) Where a wife, the petitioner, did not appear on the day of hearing, the Court before dismissing the petition required that a rule to show cause should be first served upon her, and intimated that, in all such cases, that practice should be followed *Curtis v. Curtis*, 38 L.J., Mat 9, 19 L.T. 610.

(b) When a petitioner fails to appear at the hearing, the Court will either grant a rule to dismiss the petition, or, if information is laid before it tending to show that the petitioner does not intend to go on with his suit, will dismiss it at once *Round v. Round*, 20 L.T. 87.

(c) Dismissal—Petitioner not appearing.

See *Desmarest v. Desmarest*, 31 L.J., Mat 34.

**(2) Agreement for compromise.**

A husband and wife are competent to make a binding agreement for compromise of a divorce suit *Hart v. Hart*, 50 L.J., Ch. 697, 18 Ch. D. 670, 45 L.T. 13, 30 W.R. (Eng.) 8.

**(3) Agreement to compromise for good consideration.**

An agreement for good consideration that the petitioner in a suit for dissolution of marriage will withdraw from the suit, is binding, if it has not been obtained by fraud or duress *Sterbum v. Sterbum* 39 L.J., Mat. 82, 22 L.T. 552.

**(4) Agreement to refer to arbitration**

Where the parties, on the eve of the trial of a suit by the wife for judicial separation, by reason of cruelty, agreed that the arbitration should be resorted to—*Held* that the petitioner was not at liberty to repudiate the agreement, except on the ground of fraud, or of such an error in the terms of the agreement that she ought not to be bound by it. *Hooper v. Hooper*, 3 Sw. & Tr 251, 30 L.J., P. 49.

**(5) Agreement between the parties, not made an order of Court**

Where by agreement between the parties a petition for dissolution of marriage is dismissed, the Court will not allow such agreement to be made an order of Court for the purpose of enforcing its terms *Ryder v. Ryder*, 30 L.J., Mat. 164.

**(6) Intervention by Queen's proctor**

When the Queen's proctor objected, the Court refused to dismiss the petition on consent, and held that he was entitled to prove the adultery charged by him against the petitioner. *Clapham v. Clapham and Guest*, 17 L.T. 551.

**(7) Dismissal or withdrawal of petition after decree nisi.**

(a) When a decree nisi for the dissolution of a marriage has been pronounced, the Court has power to dismiss the petition, as for want of prosecution, unless the petitioner moves to have the decree made absolute within reasonable time. *Pollack v. Pollack, Deane and Macnamara*, 16 W.R. (Eng.) 1130.

**Practice and Procedure—(Continued).**

- (b) After the decree *nisi* for dissolution of marriage at the suit of a wife had been pronounced, she renewed marital intercourse with her husband, and informed her attorney that she did not wish any further proceedings to be taken in the suit. Upon an application by the husband to dismiss the petition, the Court declined to accede to it, but said that if both parties consented, it would order all proceedings in the suit to be stayed. *Lewis v Lewis*, 2 Sw & Tr 494; 30 L.J., Mat. 199; 7 Jur. (N.S.) 831, 4 L.T. 772.

**(8) Withdrawing petition.**

When a respondent has appeared, the Court will not allow a petitioner to withdraw the petition, unless the respondent consents, or has had notice of the motion. *Lutwyche v Lutwyche*, 28 L.J., Mat. 56, 5 Jur. 76.

**(9) Cross prayer for affirmative relief—Petitioner not to be allowed to withdraw petition.**

See *Schua v Schua*, L.R. 1, p. 166 noted at p. 153 *supra*.

**(10) Notice of withdrawal of petition no bar to affirmative relief being prayed for by respondent.**

See *Hall v. Hall and Richardson* (1879), 19 L.J., P. 57 noted at p. 153, *supra*.

**(11) Withdrawal of record**

When issues raised in a suit for dissolution of marriage come on for trial, a petitioner will not be allowed to withdraw the record, but on his application, if there is no opposition by the other parties, the petition will be dismissed. *Ryder v. Ryder*, 30 L.J., Mat. 161.

**XII—DELAY IN PROSECUTING SUIT.**

**N B**—(On this point see notes at pp. 138 to 141, *supra*.)

**(1) Unreasonable delay, what is**

The unreasonable delay in presenting or prosecuting a petition for dissolution of marriage, is delay from which it would appear that the petitioner is insensible to the injury of which he complains. *Pellew v. Pellew and Berkeley*, 1 Sw & Tr 553, 29 L.J., Mat. 14, 2 L.T. 89. And see *Beaucherk v. Beaucherk*, 60 L.J. P. 20, (1891) p. 189; 64 L.T. 35—C.A.

**(2) Effect of unreasonable delay.**

(a) Delay in instituting a suit for judicial separation, on the ground of cruelty, is not a bar to the suit, but it is a material fact for the consideration of the Court, as tending to show that there was no serious apprehension of further violence. *Smallwood v. Smallwood*, 2 Sw. & Tr. 397; 31 L.J., Mat. 3; 8 Jur. (N.S.) 63, 5 L.T. 321, 10 W.R. (Eng.) 65.

(b) Or taken in connection with other circumstances the delay may show that the suit is not instituted for the protection of the wife, but for some collateral purpose. *Matthews v. Matthews*, 1 Sw. & Tr. 499, 29 L.J., Mat. 118, 6 Jur. (N.S.) 659, 2 L.T. 172; 3 W.R. (Eng.) 591.

(c) The Court in one case granted a decree *nisi* for a dissolution of marriage although a delay of twenty years had taken place in taking proceedings. *Edwards v Edwards*, 17 T.L.R. 38—Jeune, P.

**Practice and Procedure—(Continued).**

(d) Suit for divorce—Limitation—Delay in suing to be satisfactorily explained.  
See 58 P.R. 1870.

**(3) Want of means, if excuses delay.**

A petitioner is not guilty of unreasonable delay if he is prevented by poverty from taking earlier steps to obtain a divorce. *Ratchiffe v. Ratchiffe and Anderson*, 1 Sw. & Tr. 467; 29 L.J., Mat. 171. 5 Jur. (N.S.) 714, 7 W.R. (Eng.) 726.

**(4) Unreasonable delay—Respondent in lunatic asylum and not expected to live.**

The fact that the respondent was insane and had been confined in a lunatic asylum for many years, and that the husband was in constant expectation of release from the marriage by her death, was held to be a sufficient answer to a plea of unreasonable delay. *Johnson v. Johnson*, 70 L.J., P. 44, [1901] P. 193, 84 L.T. 725—Jeune, P.

**(5) Relief withheld on account of delay.**

(a) Lapse of time between knowledge of the conduct complained of and the commencement of the suit requires explanation, and may, along with the circumstances of the case, induce the Court to withhold the relief sought. *Boulting v. Boulting*, 3 Sw. & Tr. 329, 33 L.J., Mat. 33; 10 Jur. (N.S.) 182, 9 L.T. 779, 12 W.R. (Eng.) 389.

(b) In such cases the Court will require to be satisfied of the sincerity of the complaint of the petitioner. (*Ibid*).

(c) If a petitioner, with a full knowledge of the facts of the case, does not present his petition for two years, he must give some sufficient reason for the delay, otherwise his petition may be dismissed. *Nicholson v. Nicholson*, L.R. 3, P. 53, 29 L.T. 103

**(6) Practice—Petition, service of—Substituted service—Unreasonable delay.**

(a) The practice of this Court, as to service of petition on the respondent, is governed by what prevails in the Matrimonial Courts in England. *Arabella Clarressa Eliza Mitter v. John Charles Mitter*, 12 C.W.N. 1009.

(b) It is essential, in suits for dissolution of marriage, that the petition of the plaintiff should be personally served under S. 50 of the Indian Divorce Act, on the respondent or that sufficient notice of its contents should be given to him. (*Ibid*).

(c) Unless satisfactory explanation is given for the long delay in presenting and prosecuting a petition, a Court is obliged to refuse a decree for dissolution of marriage, under S. 14 of the Indian Divorce Act. (*Ibid*).

**XIII.—ABATEMENT OF SUITS.**

**N.B.**—On this point see notes at p. 58, *supra*.

**(1) Abatement of suit by death of petitioner.**

(a) By the death of a petitioner a suit for dissolution of marriage abates. *Grant v. Grant, Bolwes and Patteson*, 2 Sw. & Tr. 522; 31 L.J., Mat. 174; 6 L.T. 660.

(b) If, therefore, he dies after a decree nisi has been pronounced the Court cannot make it absolute. (*Ibid*).

**Practice and Procedure—(Continued).****(2) Abatement of suit by death of respondent**

(a) A petition for dissolution of marriage abates on the death of the respondent.  
*Brocus v. Brocus*, 2 Sw & Tr 383, 30 L.J. Mat 172, 5 L.T. 137.

(b) But the court will not, on the application of the petitioner, order that the petition and affidavit in support be removed from the files of the Court. (*Ibid*).

**(3) Death of co-respondent—Effect.**

When a co-respondent dies during the pendency of a suit for dissolution of marriage, a motion should be made for leave to strike his name out of the petition *Sutton v. Sutton and Peacock*, 32 L.J., Mat 156.

**XIV—CROSS SUITS****(1) Cross suit—Practice as to staying one**

Where the same issues are raised in cross suits, the Court will, in general, stay one, without reference to their position in the cause list. *Osborne v. Osborne and Martelli* 3 Sw and Tr 327, 33 L.J. Mat 38, 10 Jur. (N.S.) 80, 9 L.T. 156.

**(2) Cross suits—Verdict in one if can be pleaded in another**

Where there are cross suits, and the wife in her suit (which was for a judicial separation on the ground of cruelty) was acquitted of the charges of adultery alleged in the husband's answer, the Court refused to allow this verdict to be pleaded in answer to the husband's petition for dissolution, in which the same acts of adultery were charged *Bancroft v. Bancroft and Luningy*, 3 Sw & Tr 597, 34 L.J. Mat 31.

**(3) Cross suits—Relief, if can be granted on a verdict in one when same issue is pending in another**

Judicial separation was decreed on a verdict establishing the husband's cruelty, though an issue in a cross suit as to his wife's adultery was pending *Bancroft v. Bancroft* 4 Sw Tr 81, 34 L.J., Mat. 70, 12 L.T. 236, 13 W.R. (Eng.) 519.

**(4) Both parties claiming relief**

When a husband petitions for a dissolution of marriage on the ground of his wife's adultery, and she in her answer prays for a judicial separation on the ground of desertion, the Court will not at his instance (the wife opposing) terminate the suit by dismissing the petition *Schura v. Schura and Sampayo*, L.R. 1, P. 166.

**(5) Counter-claim for restitution of conjugal rights—Cross petition—Practice**

A wife petitioned for a judicial separation on the ground of respondent's cruelty. The respondent, in his answer, denied the cruelty and claimed a decree for restitution of conjugal rights. *Ibid*, that the respondent's proper course would have been to file a cross petition, and that the relief prayed for could not be granted on a mere counter-claim in the answer not verified by affidavit. *Bunfield v. Bunfield*, 78 L.T. 568—Gorell Barnes, J.

**(6) Right to begin—Wife's petition for restitution—Cross petition by husband for dissolution—Consolidated suit.**

A wife petitioned for restitution of conjugal rights, and her husband in his answer charged her with adultery, and afterwards filed a cross-petition



**Practice and Procedure—(Continued).**

praying for a dissolution of his marriage with her on the ground of her adultery with the co-respondent. The suits having been consolidated, came on for hearing together —Held, that the burden of proof lay on the husband, and that his counsel must begin *Smith v. Smith and Charlesworth*, 69 L.J. P. 44, [1900] p. 66—Jefne, P.

**XV.—CLOSING DOORS DURING TRIAL**

See pp. 378, 379, *supra*

**(7) Trial in camera—Jurisdiction of Court.**

The inherent jurisdiction of the Probate, Divorce, and Admiralty Division to try cases in camera is not confined to that branch of its jurisdiction which it inherits from the Ecclesiastical Courts. Evidence tendered in a suit for dissolution may also be heard in camera when its nature is such that justice cannot be done if it be heard in open Court. *C. v. C.* (38 L.J., p. 37, L.R. 1, P. and D. 640) *not followed*. *Druce v. Druce*, 72 L.J. P. 51, [1903] p. 114, 88 L.T. 573, 19 T.L.R. 387—Jefne, P.

**XVI.—COMPROMISE OF SUIT.**

**N.B.**—See also (xi) Withdrawal and dismissal of petition, *supra*.

**(1) Capacity of wife to compromise suit**

A wife as party to a matrimonial suit may bind herself by a compromise. *Hooper v. Hooper*, 30 L.J., P. 49

**(2) Power of Court to enforce agreement to compromise.**

Where a wife has instituted a suit for a divorce, an agreement between husband and wife alone for compromise of suit will be supported, provided it contains no stipulations which the Court cannot enforce [In this case, provisions as to custody of children—*Held*, incapable of being enforced] *Vansittart v Vansittart*, 4 Kay. and J. 63; 27 L.J., Ch. 222, 4 Jur. (N.S.) 276, 6 W.R. (Eng). 238, *affirmed*, 2 Kay. and J. 249, 27 L.J. Ch. 289 4 Jur. (N.S.) 519, 6 W.R. (Eng). 389. „

**(3) Agreement to compromise suit for nullity, not one against public policy.**

An agreement to put an end to a suit for nullity of marriage on the ground of impotency is not void as against public policy *Wilson v. Wilson* 14 Sim. 405, *affirmed* in 11 L. Cas. 538 See also *Hart v. Hart* 50 L.J. Ch. 697 18 Ch. D. 670.

**(4) Agreement for separation.**

(a) The Court will enforce the due performance of a deed for separation and arrangement between husband and wife *Jodrell v. Jodrell*, 9 Beav. 45, 15 L.J. Ch. 17, 9 Jur. 1022

(b) And the discontinuance of a suit for a divorce by her, held a sufficient consideration (*Ibid*)

(c) Nor would a stipulation for his performance of the deed, and acting “according to the spirit and intention of the deed,” and partaking of certain benefits in the establishments proposed, render it void for uncertainty. (*Ibid*)

**Practice and Procedure—(Continued)****(5) Payment to petitioner to withdraw.**

An agreement by a petitioner in a suit for dissolution of marriage to withdraw from the suit, in consideration of a sum of money paid and to be secured by the co-respondent, is a fraud and void as against public policy. *Gipps v Hume*, 2 John and El 517, 31 L J Ch 37, 7 Jur. (N.S.) 1301, 5 L T 307, 10 W.R. (Eng) 38.

**(6) Dissolution—Dismissal of petition by consent—Application in chambers—English Law and Practice.**

An application to dismiss a petition for dissolution by consent ought now to be made by summons in chambers and not by motion in open Court. *Slater v. Slater and Bolderson*, 69 L.J., P. 48 Goroll Barnes, J.

**XVII—NEW TRIAL.****(1) New trial, when granted**

Whether the rules as to granting a new trial on the ground of fresh evidence discovered showing misconduct in the petitioner are the same as in a case between ordinary litigants. See *Hewarth v Hewarth*, 9 P.D. 219, 51 L.T. 872—C.A.

**(2) Re-hearing as to some of the charges only granted.**

A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, and that the charge of personal violence was proved, on the application of the husband the Court, on the ground of surprise, granted a re-hearing of the charge of personal violence, but refused a re-hearing of the charge of infection. *Lee v Lee*, L.R. 2 P. & D. 409; 41 L.J., P. 85, 27 L.T. 321.

**(3) New trial, &c.—Mistake in evidence not affecting material issues.**

Where a respondent was persuaded by his solicitor to withhold evidence which would have gone to clear his character as a gentleman and a man of honour, but would not otherwise have affected the question, at issue, the Court refused a new trial. *Hill v Hill*, 2 S. & T. 407, 31 L.J. P. 193, 5 L.T. 363.

**(4) Where material issue affected**

On the other hand, where a witness made a mistake in a date, which, if correctly given, might have affected the verdict, the Court granted a new trial. *Jago v Jago*, 3 S. & T. 103, 31 L.J., P. 101, 7 L.T. 645.

**(5) Fresh evidence**

(a) The Court will grant a new trial, where fresh evidence has been obtained since the original trial, if it is of opinion that such evidence would lead to a different verdict. *Taylor v Taylor* (1899), 68 L.J. P. 116; 81 L.T. 494.

(b) The Court will grant a new trial or rehearing, where fresh evidence has been obtained since the original trial or hearing, if it is of opinion that the proposed fresh evidence is such that, if brought before a jury, a different verdict to that in the former trial or hearing would probably be given. *Anderson v. Timmes*, (36 L.T. 711) followed *Taylor v. Taylor* 68 L.J. P. 116, 81 L.T. 494—1).

**Practice and Procedure—(Continued)****(6) Application—Verdict against weight of evidence**

- (a) The Court will not grant a new trial on the ground that the verdict is against the weight of evidence, unless it is dissatisfied with the verdict. That it might, on the same evidence, have come to a different conclusion itself, is not sufficient. *Miller v. Miller and Hicks*, 2 Sw. & Tr. 427; 31 L.J. Mat. 73, 5 L.T. 850
- (b) That other evidence could be produced to the jury on a new trial is not sufficient, if such evidence could with reasonable diligence have been obtained before. (*Ibid*)
- (c) A rule for a new trial upon the ground that a verdict is against the weight of evidence will not be granted, unless the Court is satisfied with reasonable certainty that there has been error or miscarriage. *Scott v Scott*, 3 Sw. & Tr. 320, 33 L.J. Mat. 1, 9 Jur. (N.S.) 1251, 9 L.T. 454, 12 W.R. (Eng.) 126.
- (d) The full Court granted a new trial, on the ground that the verdict was against evidence, although the Judge ordinary, who tried the case, was not dissatisfied with the verdict. *Stone v Stone and Appleton*, 3 Sw. & Tr. 608, 34 L.J. Mat. 33, 13 W.R. (Eng.) 414
- (e) Where there is a conflict of evidence upon an issue of adultery (the Queen's Proctor intervening), the Court will not grant a new trial on the ground that the verdict is contrary to the evidence unless it is dissatisfied with the verdict. *Gethun v. Gethun*, 2 Sw. & Tr. 560, 31 L.J. Mat. 57, 5 L.T. 721, 10 W.R. (Eng.) 266

**(7) Where witnesses have suppressed material facts.**

The Court will not grant a new trial on the ground that witnesses called upon the first trial have wilfully suppressed material facts. (*Ibid*)

**(8) Mistake made in evidence**

On trial of an issue of adultery, the jury found a verdict against the petitioner. On an affidavit by a witness called on his behalf, that she had made a mistake in an important date in giving her evidence, the Court directed a new trial, the error, if there were one, being likely, in the opinion of the Court, to have disturbed the judgment and misled the minds of the jury. *Jago v. Jago and Graham*, 3 Sw. & Tr. 103, 32 L.J., Mat. 10, 8 Jur. (N.S.) 1081, 7 L.T. 645, 11 W.R. (Eng.) 86.

**(9) Evidence withheld by mistake.**

The Court affirmed the refusal of the Judge ordinary to grant a rule for a new trial on the representation that the respondent was led by the mistaken suggestion of his solicitor to withhold evidence. *Hill v. Hill*, 2 Sw. & Tr. 407, 31 L.J., Mat. 193; 7 Jur. (N.S.) 1206, 5 L.T. 363; 10 W.R. (Eng.) 194.

**(10) Verdict for respondent.**

- (a) When a verdict has been found for the respondent, the Court will not dismiss the petition until the time allowed for moving a new trial has elapsed. *Hitchcock v Hitchcock*, 2 S. & T. 513; 30 L.J. P. 198; 5 L.T. 120.
- (b) For the controversy between the parties is not ended until that period has elapsed. *Godrich v. Godrich*, 19 L.T. 611.

**Practice and Procedure—(Continued)****(11) Verdict against two co-respondents—New trial on application of one**

If a verdict has been found against two co-respondents in a suit for dissolution of marriage, and the Court afterwards, on the application of one of them, grants a new trial, on the ground that a verdict against him was contrary to the weight of the evidence, there must be a new trial as to both. *Walker v. Walker*, 1 S. & T 264, 31 L.J., P 26

**(12) Notice of application for new trial no ground for suspending decree nisi.**

It is no ground for suspending the decree nisi, after a verdict for the petitioner in a suit for dissolution of marriage, that the respondent has given notice of an application for a new trial. *Stone v. Stone*, 3 S. & T 212, 32 L.J. P. 117, 9 L.T. 21

**(13) Order of Court of Appeal for new trial—Decree nisi annulled**

Where on a motion for a new trial, the Court of Appeal made the following order: "Upon hearing Counsel it is ordered that the verdict and judgment be set aside and that a new trial be held," Sir F. Joins held that this order annulled the decree nisi which had been pronounced in the case. *Worsley v. Worsley* (1904), 20 T.L.R. 171

**(14) Second decree nisi made absolute forthwith.**

Where the Court had pronounced a decree nisi on a first trial, and after a new trial had done so again for the second time, and the Queen's Proctor stated that he had no intention of intervening, it made the decree absolute, without waiting for the expiration of six months from the date of the second trial. *Sheffield v. Sheffield*, 29 W.R. (Eng.) 523.

**(15) Motion for new trial—Security for costs**

A party moving in the Court of Appeal for a new trial where a divorce cause has been tried by a jury is not required to give security for costs. *Rickaby v. Rickaby* (1901), P. 134, 70 L.J., P. 24, 84 L.T. 182.

**XVIII—CO-RESPONDENT**

**N.B.**—On this point, see notes at pp 99 to 106, *supra*.

**(1) Affidavit of petitioner, not sufficient to dispense with co-respondent.**

The Court will not, upon an affidavit of the petitioner only, allow him to proceed without making a co-respondent. *Leader v. Leader*, 32 L.J. Mat 136

**(2) Order of Court necessary before co respondent can be dispensed with.**

(a) If a petition alleges adultery with persons unknown, the order of the Court must be obtained dispensing with making them co-respondents, notwithstanding that there are already other co-respondents who have been served with process. *Penly v. Penly*, 51 L.J., P. 24; 7 P.D. 19; 17 L.T. 131, 30 W.R. (Eng.) 381.

(b) A petitioner must make every person whom he charges in the petition with having committed adultery with his wife a co-respondent, unless he is excused from so doing by the Court on special grounds. *Carryer v. Carryer and Watson*, 1 Sw & Tr. 94, 34 L.J. Mat. 47; 11 Jur. (N.S.) 352, 13 L.T. 250, 13 W.R. (Eng.) 507

**Practice and Procedure—(Continued).****(3) Adultery of husband—Joining alleged adulteress.**

In a suit by a wife for dissolution of marriage, the Court, upon application on behalf of the person with whom it was alleged that the husband had committed adultery, directed that she be made a respondent. *Bell v. Bell*, 8 P.D. 217.

**(4) Application to dispense with co-respondent, when should be made.**

An application to dispense with making a co-respondent should be made at an early stage of the suit. *Jeffers v. Jeffers*, 16 L.J. P. 80, 2 P.D. 90, 25 W.R. (Eng.) 513.

**(5) Power to dismiss co-respondent before hearing**

The Court has power to dismiss a co-respondent from a suit before the hearing without his consent. *Wilson v. Wilson and Howell*, 41 L.J. Mat. 33, L.R. 2 P. 353; 26 L.T. 139, 20 W.R. (Eng.) 372.

**(6) Leave to dispense with co-respondent—Evidence.**

It is an invariable rule of practice that the Court will not give leave to dispense with making a co-respondent on the uncorroborated affidavit of the petitioner only. *Barber v. Barber*, 65 L.J., P. 58, (1876) P. 73.

**(7) Divorce—Parties—Application by alleged adulteress to intervene**

(a) In a wife's suit for divorce, on the ground of the husband's incestuous adultery, the application of the alleged adulteress to intervene was refused. *Bailey v. Bailey*, 30 C. 490, note.

(b) The Court has no power, under the Indian Divorce Act, to allow the alleged adulteress to intervene. *Bell v. Bell*, (1893) L.R. 8 P.D. 217, *li*.

**(8) Respondent found guilty and co-respondent not.**

In divorce cases, the respondent may be found guilty and the co-respondent not. See *Long v. Long*, 15 P.D. 218, *Wright v. Wright*, 49 Sol. Jo. 134. (Cited in Phipson on Evidence, 4th Ed., pp. 76-77).

**(9) And also vice versa.**

So also, in divorce cases, the co-respondent may be found guilty and the respondent not. See *Long v. Long*, 15 P.D. 218, *Wright v. Wright*, 49 Sol. Jo. 134 (Cited Phipson on Evidence, 4th Ed. pp. 76-77).

**XIX.—DAMAGES AND COSTS AGAINST ADULTERER.**

See pp. 262 to 270, *supra*.

**XX.—RESTITUTION OF CONJUGAL RIGHTS, PRACTICE IN PROCEEDINGS RELATING TO**

See pp. 235 to 262, *supra*.

**XXI.—PROTECTION ORDERS.**

See pp. 228 to 234, *supra*.

**XXII.—DISCHARGE OR VARIATION OF PROTECTION ORDERS.**

See pp. 232 to 233, *supra*.

**XXIII.—REVERSAL OF DECREE OF JUDICIAL SEPARATION.**

See p. 225, *supra*.

**XXIV.—DECREE NISI FOR DISSOLUTION OF MARRIAGE.**

See notes at pp. 153 to 176, *supra*.

**(1) Who can apply for decree absolute.**

See p. 159, *supra*.

**Practice and Procedure—(Continued)****(2) Time for making decree absolute.**

See pp 159 to 162, *supra*

**(3) Practice in applying for decree absolute**

See pp 162 to 164, *supra*.

**(4) Dissolution of marriage—Decree—Grounds of jurisdiction to be set out.**

(a) A District Judge must, in all cases, inquire into and in his judgment set forth the facts relied on as giving jurisdiction to the Court to pronounce a decree of dissolution of marriage. *Nash Durand v. Rebecca Durand*, 14 W.R. 416

(b) Decree nisi—Duty of the Court passing that decree—Confirmation. See 6 A.L.J. 793=6 M.L.T. 96=31 A. 511=3 Ind. Cas. 969.

**XXV.—DECREE FOR DISSOLUTION OF MARRIAGE, MADE BY DISTRICT JUDGE, CONFIRMATION OF.**

See pp. 176 to 181, *supra*

**XXVI.—DECREE OF NULLITY OF MARRIAGE MADE BY DISTRICT JUDGE, CONFIRMATION OF**

See pp 203 to 204, *supra*

**XXVII.—IMPOTENCE—MEDICAL EXAMINATION AS TO ALLEGED IMPOTENCY.**

See pp 194 to 195, *supra*.

**XXVIII.—CUSTODY OF CHILDREN.**

See pp. 337 to 359, *supra*

(a) Counter charges—Custody of children. See 62 P.R. 1887

(b) Suit under Ind. in Divorce Act—Father demanding the custody of children—Immoral conduct of the father—Discretion of Court as to custody of children. See 69 P.R. 1870.

**XXIX.—ALIMONY PENDENTE LITE**

See pp. 271 to 293, *supra*

**(1) Mode of determining husband's means for purposes of alimony pendente lite**

See pp 286 to 289, *supra*.

**(2) Enforcing order for alimony pendente lite.**

See pp. 289 to 290, *supra*

**(3) Practice and procedure in proceedings for alimony pendente lite**

See pp 290 to 293, *supra*

**(4) Application by wife for alimony pendente lite Means alleged, denied by respondent—Practice**

Where the petitioner (the wife) made an application for alimony *pendente lite*, and the respondent denied means alleged by the wife, the Court, refusing to refer the point to the Registrar for enquiry and report, ordered the respondent to attend Court for cross-examination as to his means. *Stevenson v. Stevenson*, 46 C. 764

**(5) Alimony 'pendente lite'—Permanent alimony—Practice.**

(a) An order for alimony *pendente lite* cannot be made after a decree nisi in the suit has been made, and an application for permanent alimony can be made only when the decree is to be made absolute. *J.D., Bennett v. J.C.A. Bennett*, 11 C. 354

**Practice and Procedure—(Continued).**

- (b) Decree for dissolution of marriage—Petition by husband for refund of alimony paid under—Sums paid in up to date of petition, not refundable. See 18 A. 238=A.W.N. 1896, 52.

**XXX.—ALIMONY, PERMANENT.**

See pp. 293 to 311, *supra*.

**(1) Enforcing payment of permanent alimony.**

See p. 309, *supra*.

**(2) Varying orders regarding permanent alimony**

See pp. 309 and 310, *supra*

**XXXI.—VARIATION OF SETTLEMENTS.**

- See pp. 314 to 337, *supra*.

**XXXII.—INTERVENTION, PRINCIPLES REGULATING.**

See pp. 165 to 175, *supra*.

*Ex parte* hearing—Decree nisi—Procedure after—Application by husband to intervene See 17 C 570

**XXXIII.—APPEALS FROM ORDERS AND DECREES IN MATRIMONIAL SUITS, ENFORCEMENT OF**

See pp. 381 to 383 *supra*.

**XXXIV.—APPEALS TO QUEEN IN COUNCIL**

See pp. 383 to 394, *supra*.

**XXXV.—EVIDENCE**

See pp. 371 to 376 and Appendix V, *supra*.

**(1) Additional evidence after case has been heard**

After a cause has been heard, and before judgment given, the Court will not allow either party to introduce additional evidence, except by the consent of the other party *Gipps v Gipps and Hume*, 3 Sw. & Tr. 116.

**(2) Judge's notes—Admissibility**

- Upon a second trial of the same issues, the Judge's notes of evidence of deceased witnesses who were examined on the first trial are not admissible except by consent *Conradt v Conradt, Worrall and Way*, 37 L.J. Mat. 55, 1 L.R. 1 P. 511, 15 L.T. 659, 16 W.R. (Eng.) 1023.

**(3) Proof of adultery.**

Petition for dissolution of a marriage—Petitioner alleged the adultery of respondent—The only evidence in proof of the adultery was to the effect that the wife (respondent) had left petitioner and had been seen on two occasions in company with two boys in a house which was not alleged to be a brothel *Held*, this was not evidence sufficient to prove adultery. It did not constitute adultery with the two boys or either of them—So a decree for dissolution of marriage could not be granted. 4 L.B.R. 195

**(4) Proof of unnatural offence.**

The Court would not accept the uncorroborated testimony of the wife, that her husband had committed or attempted to commit an unnatural offence on her person. 161 P.L.R. 1905=77 P.R. 1905.

**Practice and Procedure—(Concluded)****(5) Burden of proof—Right to begin**

- (a) It is the duty of the petitioner, in the first instance, to prove everything which is necessary to entitle him *prima facie* to a decree, not merely to show that his wife has committed adultery, or whatever the matrimonial offence charged may be, but also to prove that he has conducted himself towards her in such a manner as to entitle him to relief—*Narracott v Narracott and Hesketh*, 3 Sw. & Tr, 408, 33 L J, P & M, 61 *Osborne v Osborne and Martelle*, *ib.* (n)
- (b) Even though the only real issue in the case lies on the respondent, the petitioner is entitled to begin, as he must prove the marriage affirmatively. *Burroughs v Burroughs*, 31 L J., P. & M., 56.

**(6) Examining and cross-examining witnesses, and addressing Court.**

- (a) The co-respondent's counsel cannot cross-examine a witness upon such part of his evidence as is not evidence as against the co-respondent. *Pearman v Pearman and Burgess*, 29 L.J., Mat. 54.
- (b) The co-respondent's counsel, by examining the witnesses of the respondent, adopts them as his own. *Glennie v Glennie and Bowles*, 3 Sw. & Tr 109, 32 L J, Mat. 17, 7 L T 696, 11 W R. (Eng.) 28.
- (c) But if he calls no witnesses, he should address the Court after the opening speech of the respondent's counsel (*Ibid*)
- (d) A co-respondent from whom damages are claimed, who has appeared, but has not filed an answer, cannot at the hearing cross-examine the petitioner's witnesses. *Lowe v Lowe and Blackney*, 37 L.J., Mat. 9, L R 1, p 508, 15 L T 512.
- (e) He is, however, entitled to be heard upon the question of costs (*Ibid*).

**XXXVI —AFFIDAVIT**

See pp 371 to 376 and Appendix V *supra*.

**(1) Suit for divorce—Facts fresh in memory—Inspection of letters—Affidavit**

The respondent is entitled to have brought into Court letters written by her to the petitioner when the facts to which they speak were fresh in her memory. If the petitioner has none in his possession, he should file an affidavit to that effect. *Gordon v Gordon*, 3 B L R (O.C.J.) 100.

**XXXVII —COSTS**

See p 271 and Appendix IV, *supra*.





## APPENDIX VII.

### Parsi Law of Marriage.

**N.B. 1**—This appendix is to be taken as a supplement to Act XV of 1865 (Parsae Marriage and Divorce) noted at pp. 193 to 536, *supra*

**N B 2**—The following cases decided before the passing of XV of 1865 (Parsae Marriage and Divorce) have been given below as showing the nature and incidents of marital relations among Parsis as laid down by case law prior to the passing of the above Act.

#### (1) Parsis—Right to contract second marriage - Generally not allowed.

(a) A Parsi cannot contract a second marriage during the life of his first wife, unless there be a sufficient cause, originating either from disease, imbecility of mind, adultery, or incapacity from age, to justify the procedure. *Mihurwanjee Nusluwanjee v Awan Bae*. 16th March 1822 2 Borr, 209—Romer, Sutherland and Ironside.

(b) And where a Parsi had neglected his first wife, and contracted a second marriage, he was not only enjoined by the Court to receive his first wife into his family, to afford her his protection, and to reinstate her in all conjugal rights and privileges, but he was also required to put away his second wife, and keep her apart, and all costs were awarded against him. (*Ibid*).

#### (2) Case where second marriage allowed.

It appears, however, that a Parsi may contract a second marriage if his first wife be old and barren, and give consent to her husband marrying again, but not without *Kaoojee Ruttunjee v Awan Bae*, 16th Dec. 1817, cited in 2 Borr 218—Keate and Sutherland.

#### (3) Mangni (betrothal) nature and incidents of.

A *Mangni* between two Parsis was declared, on reference to a *Panchayat* including the *Modi and Dastur*, to be indissoluble according to the customs of the Parsis, even where the betrothed husband was a notoriously bad character, and the woman, on that account, had the greatest repugnance to the match. *Norrozjee Khooshedjee v Dhuana Bae* 15th May 1811, 1 Borr 382—Crow, Day & Romer

#### (4) Alimony.

Parsis being subject to English law generally it follows, that as a Parsi husband is liable for the debts of his wife, and absorbs his wife's property, a Parsi wife is entitled to alimony on exactly the same principles as an English wife would be if she claimed it. *Buckoobjee v Merwanjee Nasserwanjee* 8th Aug 1814 Perry's Notes Case 15

#### (5) Divorce.

*Quere* Whether a Parsi husband can pronounce a divorce from his wife, she refusing to allow him to consummate the marriage" (*Ibid*).

#### (6) Temporary alimony—Husband's means

In a suit for temporary alimony, brought by a Parsi woman against her husband, it was held that she, having neglected to examine witnesses to show what were her husband's means, will be considered an assenting party to his affidavit as to their amount (*Ibid*).

**Parsi Law of Marriage—(Concluded).****(7) Dower.**

- (a) A Parsi disagreeing with his wife cannot retain her clothes and jewels against her will. *Kaoojee Ruttunjee v. Awan Baee*. 16th Dec. 1817 cited in 2 Borr, 218 —Keate and Sutherland.
- (b) Nor can he compel his wife to enter into security for the amount of the value of dower in her possession, as the property in question belongs to her as of right, and is not in its nature subject to the controul of her husband *Mihunwanjee Nushurwanjee v Awan Baee*. 16th March 1822. 2 Borr. 209 Romer, Sutherland, and Ironside.
- (c) In an action by a Parsi to recover the dower of his deceased wife (from whom he had separated) from her brother, to whom she had bequeathed it, it was decreed that, in the absence of proof that the property constituting her dower was derived from her husband, and on the opinion of the Parsi *Panchayat* that the will under which his brother-in-law claimed was valid, that the appellant should be nonsuited, and made liable for all costs. *Tinnorjee Bheemjee v. Ferozshaw Dhunjee-shaw*. 10 Sept 1839 Sel. Rep. 206.—(Gibberne, Payne, and Greenhill

**N B.**—The above cases have been taken from Motley's Digest of Indian Cases, Vol. I, p 209

# THE MARRIAGE AND DIVORCE ACT.

## INDEX.

Figures which are marked in thick types at the end of each line indicate the pages of the

- Abandonment*, must continue for two years or upwards to constitute desertion, *M—Q*,  
98
- Abatement of suit*, for dissolution of marriage, *K—M*, 58.
- Absence*, Suit for a decree of dissolution in case of, among Parsis. In case of, for seven years, *S—29*, 513
- Absence on business*, is no desertion, *R*, 230
- Accessory*, Connivance, how differs from being, *J*, 106, 107  
Duty of Judge to satisfy himself that petitioner is not, *K*, 107  
Meaning, *H*, 106  
Connivance and being, to distinguish, *R*, 109
- Accessory before the fact*, Part, counting need not be, *W—Y*, 108
- Access to children*, See CHILDREN.  
See CUSTODY OF CHILDREN  
Interim orders regarding custody of children and, 348—350  
Order as to, 350—352  
Cases where application for, were refused, *R—B*, 351, 352  
Practice and procedure in making orders as to custody of children and, *P*, 352—359.
- Act XXIX of 1849 (Dower), 411—424
- Act XXI of 1850 (Caste Disabilities Removal), 425—449.
- Act V of 1852 (Marriage by Registrar), 879—886
- Act XV of 1856 (Hindu Widow's Re-marriage), 451—492.
- Act XXXI of 1851 (English Law - Fines, and Common Recoveries), 910, 911.
- Act XXV of 1861 (Marriage of Christians), 887—892
- Act V of 1865 (Indian Marriage), 893—909
- Act XV of 1865 (Parsee Marriage and Divorce), 493—536
- Act XXI of 1866 (Native Converts' Marriage Dissolution), 645—659
- Act I of 1867, Loss of caste—Succession under Oudh Estates, *V* 441
- Act IV of 1869 (Marriage and Divorce), 1—409
- Act II of 1869, Code of Civil Procedure to apply to proceedings under Divorce, *S*, 45, 359.
- Procedure under the Divorce, 359—394
- Divorce, not applicable to Muhammadan converts to Christianity, *J*, 440.
- Act III of 1872 (Special Marriage) 537—560
- Act III of 1872, Re-marriage, if to be as Hindu—Re-marrying under,—Forfeiture, if collected, *O, P*, 464, 465.
- Act XV of 1872 (Indian Christian Marriage), 561—640
- Act III of 1871 (Married Women's Property), 661—680.
- Act XII of 1880 (Kazis), 681—694.

*Act III of 1872* —(Concluded).

Act VI of 1886 (Births, Deaths and Marriages Registration), **695—757**.

Act XVI of 1890 (Births, Deaths and Marriages Registration Act), (1886) Amendment, **759—760**.

Act II of 1892 (Marriage Validation), **641—644**.

Act XIV of 1903 (Foreign Marriage), **763—766**.

Act VII of 1909 (Anand Marriage), **767, 768**

Act IX of 1911 (Births, Deaths and Marriages Registration Amendment), **761, 762**.

*Bengal Acts*, Ben. Act I of 1876 (Bengal Muhammadan Marriages and Divorces Registration), **769—792**

*Madras Acts*, Act IV of 1896 (Malabar Marriage), **793—830**.

*Adjournment*, Practice as to, *H*, **33**.

Where deception is not proved to have been for two years or upwards—Practice—and withdrawal of suit, *J—L*, **209**

Power to adjourn cases under Divorce Act, *S* **54, 379**.

Costs of, *W*, **379**.

Provisions of the Code of Civil Procedure regarding, *Y—Y*, **379, 380**.

Sufficient cause for which, have been granted, *Z—D*, **380**

Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—for a year—Interview—*S*. 15, **650**, Procedure on expiration of, —Interrogation of respondent—Decree, *S*. 16, **550**.

*Administration*, Effect of Divorce on widow's right to administer estate, *Y*, **178**.

to wife dying after a judicial separation or protection order—English law, *Z—D*, **178, 179**.

*Administrators* Non-survival of right to sue for divorce to executors or, *E, F*, **179**.

*Admission*, See *CONFESSION*.

See *CO-RESPONDENT*.

Decree based merely on, and without recording evidence, *R—T*, **98**

Decree for dissolution not to be made on mere—, *P*, **127**

*Adoption*, See *HINDU LAW—ADOPTION*.

Relationship by, *D, E*, **201**.

Loss of caste—Right to give son in, *X—Z*, **447**

among Parsis—Will—Evidence, *X—Z*, **496**.

different forms of, in Malabar, *K—P*, **810**.

*Adulterers*, to be co-respondent in suits for dissolution of marriage, *S*. 11, **99**.

Reason for making alleged, a co-respondent, *C*, **100**.

Husband not compelled to charge every, *J*, **101**

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged, to intervene, *A, B*, **102**,

Every allegation of adultery involves "an alleged," *C*, **102**.

Where, is absent abroad—Practice, *L*, **103**.

Petitioner knowing the name of the, even when wife is leading the life of a prostitute—Co-respondent, *T, U*, **104**.

Petitioner being unable to obtain evidence against, *A—C*, **105**

Name of alleged, not known—Effect, *V, W*, **105**.

Name being known after filing petition—Practice, *Z*, **105**.

Where identity of—Is lost through neglect—, *D*, **106**.

Husband may claim damages from, *S*. 31, **262**.

Damages and costs against—, **262—271**.

Damages against,—Measure of damages, **263—271**, Circumstances which tend to reduce, **267**, Those which tend to enhance them, **268**.

*Adulterer*—(Concluded),

Order as to the payment and disposition of damages against, 268—270.

Practice in claiming damages against, 270

Claim for damages against, without claiming dissolution or judicial separation,  
F—I, 270

Power to order, to pay costs, S. 35, 271.

*Adulteress*, Reason for making alleged, a co respondent, D, 100

*Adultery*, Bigamy with, S 3, 44

Reasons why divorce cannot be granted for simple, of husband, T—W, 56

Wife's ante nuptial incontinence cannot be pleaded in defence of wife's—, G, 58.

Decree of judicial separation granted on ground of cruelty—Divorce on ground of  
subsequent, U, 59

Decree for judicial separation granted on ground of husband's,—Divorce on ground  
of subsequent cruelty, V, 59

what is, H, 59.

must have been actually committed for purposes of relief, V, 59.

Respondent and co-respondent—One may be found guilty of, and the other not,  
A—C, 60

Consummation of marriage not necessary to constitute, D, 60.

Evidence of—, 60—62.

Wife's, no excuse for rape by husband, C, 66

Charge of, and of the birth of the child, if cruelty, V, 75

Condoned, and desertion—Revival of, A, 80

Condoned, revived by undue familiarities with stranger, D, 80

Revival of condoned cruelty, by and condoned by subsequent cruelty, Z, 80.

Charge of, with persons, of whom some are known and some unknown—Practice,  
I, 101.

Every allegation of, involves "an alleged adulterer," C 102

Connivance of, with A bars relief in respect of—, with B, I—K, 109

Cruelty and,—Revival of one by the other, A, 113

Court refusing relief on ground of petitioner's—Such refusal no bar to Court's  
granting relief on subsequent proceeding, M, N, 130

Reference to previous records in proof of petitioner's, O, 131

Discretion in case of petitioner's—, Cases where the discretion has been exercised  
in favour of the petitioner, I—E, 132

Petitioner's—, Z, 132

Evidence of, G, 133, R—T, 277

See ALSO EVIDENCE

Cases where petitioner's was excused and decree made in petitioner's favour—

Where the—, is committed in ignorance of fact—When the—, is committed  
in ignorance of law, 134—136

Where the—, is committed in consequence of the violence and threats of the  
husband, petitioner's, is excused and decree passed for dissolution, R, S, 135

When the—, is committed by petitioner to the knowledge of respondent, and by  
him or her long since pardoned and condoned, petitioner's—is excused and a  
decree passed for dissolution, 135, 136

Conduct of petitioner conducting to—Just and reasonable cause for desertion—  
Drunkenness of wife, S 143

And cruelty, 152, 153.

Proof of, A, N, 377—378

Effect of incontinence or second marriage on right to dower, A—Y, 420

*Adultery*—(Concluded).

Suit for divorce or Judicial separation among Parsis—On ground of wife's,—On ground of husband's, &c., S. 30, **513—522.**

Of Parsi petitioner—Effect, *Z—B*, **519, 520.**

Petitioner's cruelty or, to bar suit under Act XXI of 1866, S. 25, **653**

*Adultery coupled with desertion*, Bigamy coupled with adultery—What are, *M*, **515, 516.**

*Affidavit*, See EVIDENCE

To dispense with co respondent—Practice as to, *I—R*, **101**

in support of motion to dispense with co-respondent, *I, J*, **193**

in support of the petition for restitution of conjugal rights, contents of—English law and Practice, *T—W*, **238**

Mode of taking evidence in cases under the Divorce Act, S. 51, **371.**

Provisions of the Code of Civil Procedure relating to, *J—L*, **371**

Suit for dissolution of marriage—Practice, *M, N*, **371**

Inter alienations, alterations, or erasures in body of, *Z*, **375**

use of, in matrimonial matters, **371—376**

*Affinity*, See CONSANGUINITY

See PROHIBITED DEGREES

Prohibited degrees of consanguinity or, contemplated by the law—English law and Indian, *K—J*, **63**

More carnal connection with a woman is, *Q*, **199.**

to wife's kindred, *R*, **199**

to husband's kindred, *S*, **199**

between kindred of husband and kindred of wife, *T*, **200**

Consanguinity and,—English Law—Consanguinity and, before 5 & 6 Will. 1 c. 54, S. 2, *G—J*, **574**

*Age*, of parties—How affects right to relief, *A, B*, **182**

*Agreement*, Power of Court to make provision for children not affected by, between parties, *P*, **206.**

not to bar dower may be enforced, *S* 11, **423**

*Alimony*, see ALIMONY PENDENTE LITE

See Alimony permanent.

Power to award, where there is plea to jurisdiction, *Q*, **50**

Right of wife to apply for, general rule as to—It is not material whether she applies as petitioner or respondent, *J, A*, **272**

Grant of, discretionary with Court, *B*, **273.**

Object of, *V—I*, **273.**

Felony and imprisonment if bar to an application for—*B—D*, **275.**

Suspension of payment of, *E*, **277**

Applicant (wife) found guilty in first trial—in second trial, *U, V*, **277.**

Jurisdiction questioned, no bar to grant of, *G, H*, **278.**

Question of domicile being in dispute if a bar to grant of, *I*, **278.**

Independent support of wife, a bar to grant, *J*, **278**

The husband's means being small, a bar to granting, *O, P*, **278**

Marriage null and void on the face of petition and answer—Effect on, *Q*, **278.**

Bigamous marriage No, *R*, **278**

Guardian *ad litem*, not liable for, *A*, **279.**

Application to make decree absolute—Ancients of, *B*, **279**

No application would lie for a small sum pending petition for, *S*, **279**

is purely personal allowance to wife—No power of alienation, *T—V*, **279.**

Present distress of wife no ground for urgency in granting, *W—X*, **279.**

## INDEX.

### *Alimony*—(Concluded).

- Power to order permanent, S, 37, **293**.
- Power to order monthly or weekly payments, S, 37, **294**.
- Power of Court to order permanent, after decree absolute, J—L, **295, 296**.
- Permanent, before decree absolute, M, **296**.
- not assignable, O, **296**.
- Period from which permanent, commences, P, **296**.
- Where wife undergoes sentence of penal servitude, Q, **296**
- Costs, W, **296**.
- Conditions on wife in granting permanent, X, **296**.
- Charge on husband's property for, B—D, **297**
- Four ways in which distinct sums of money may be secured to the wife—Practice of English Courts, E, **297, 298**.
- Permanent allowance after decree of judicial separation and dissolution of marriage—Difference in English Law, F—J, **298**.
- Difference between, granted after judicial separation or after divorce, K—N, **298, 299**.
- Bankruptcy of the husband, effect of on, O, **299**.
- Children to maintain—Effect of, in fixing, J—O, **303**.
- Injunction to restrain husband from making away with property, I, J, **305**
- Permanent, for a guilty wife, **306—308**.
- Amount of permanent, ordered to a guilty wife, F—J, **307, 308**
- Judicial separation on ground of wife's cruelty, C, **308**.
- Security from husband for payment of permanent, H, **308**
- Enforcing payment of permanent, **308, 309**.
- Order by consent for, L, **309**.
- Arrears of promise to release, M, N, **309**.
- Covenant as to, X, Y, **310**
- Court may direct payment of, to wife or to her trustee, S, 38, **311**.
- Order to pay, to solicitor, B—D, **311**.
- Permanent, among Parsis, S, 34, **521**.
- Payment of, to wife or her trustee among Parsis, S, 35, **522**.
- Parsi Marriage and Divorce Act XV of 1865—Charge on husband's immoveable property—Widow—Distributive share, I—J, **522**
- Power of Court to award, under Act XXI of 1865, S, 28, **654**.
- Bequest of savings of, J, **667**.
- Alimony pendente lite*—See *Alimony*.
- See *Alimony permanent*
- Effect of protection order upon, S, **232**
- S, 36, **271, 272**.
- Jurisdiction—Application after decree nisi, C—E, **273**.
- And *alimony permanent*—Difference, S—X, **273**
- From what time payable, F, G, **273, 274**.
- Until what time payable, H, I, **274**
- When payable—Ecclesiastical Courts, practice of, J, **274**
- Question of, disposed of at first hearing of the suit, K, **274**
- Facts to be established before, can be granted—Practice of Ecclesiastical Courts, L—T, **274, 275**
- Wife's conviction for felony, no bar to granting A, **275**.
- Neglecting to apply promptly for, Effect, E, **275**
- Nature of suit not to affect wife's right to, U, V, **275**.
- Plea as to jurisdiction no bar to grant, W, **275**.
- Decree nisi for dissolution, no bar to ordering, X, **275**.



*Alimony pendente lite*—(Concluded).

Appeal, no bar to, *Y, Z*, 275.

Wife's guilt, how affects her right to. 275—277

Protection order no bar to application for, *P*, 277.

Amount to be awarded as, 280—286.

Mode of determining husband's means for the purpose of awarding, 286—289

Enforcing order for, 289, 290.

Practice and procedure regarding the grant of, 290—293

Non-payment of, effect of, *X*, 293.

Permanent alimony larger in amount than *H, I*, 303

Absence of means—Reference to Registrar—Practice, *H*, 305

Among Parsis, *S* 33, 520.

*Alimony permanent* See *Alimony pendente lite*

Points to be considered by the Court in granting, 299—301

Points to be considered in fixing, *R—T*, 301.

Amount of permanent alimony—No fixed rule as to amount of permanent alimony—Generally left to discretion of Court—General rule as to one-third—But liable to variation—Circumstances where permanent alimony has been fixed at less than one-third, 302—306.

Permanent alimony not to exceed one half of joint income, *G*, 303.

Permanent alimony larger in amount than *alimony pendente lite*, *H, I*, 303

Amount of—Estimation of husband's income, *X—I—A*, 304

Varying orders regarding, 309, 310

*Alimony pendente lite* and alimony permanent—Difference, *S—X*, 273  
*R*, 272.

*Aliyasanthana Law*, See *Malabar Law*

See *Marumakkathayam Law*

*Marumakkathayam Law* and,—Nature of family governed by such Law—Classes governed by *Marumakkathayam*, *D, E*, 799, 800

Classes governed by the, *F*, 800

*Aliyasanthana Marriage*, See *Malabar Marriage*

how differs from *Marumakkathayam marriage*, *H, I*, 800

*Alteration of Jurisdiction*, Power to alter territorial jurisdiction of District Courts, *S* 18, 510.*Alterations, Interalienations, or erasures in body of affidavit*, *Z*, 375.*Amendments* See *Practice and Procedure*, App. VI

of petition for dissolution into one for judicial separation, *T, U*, 128.

Opportunity to be given to petitioner to amend petition in certain cases, *V*, 128

of answer by adding a cross-prayer, *G, H*, 153

of petition as to claim for damages—Addition of co-respondent, *C, D*, 270

of *Marriage Act*, 713, 714.

The Births, Deaths and Marriages Registrations Acts XVI of 1886, 1890, 759, 760.

The Births, Deaths and Marriages Registration Act, 1911, 761, 762.

*American authorities*, value of, *Y—B*, 8, 9.*Anand marriage*, Validity of, *S* 2, 767.*Anand Marriage Act*, Act VII of 1909, 767, 768.*And*, Meaning, *V—X*, 10, 11.

Case where, is to be read as "or," *B*, 152.

*Anglican*, *S* 3, 370.*Annuity*, Covenant in separation deed to pay, *A*, 310.*Ante-nuptial debts*, Husband not liable for wife's, *S* 9, 679.

*Ante-nuptial settlement*,—Inquiry into existence of ante-nuptial or post-nuptial settlements, S. 40, 315.

*Any person, A—C*, 164

*Appeal*, Co-respondents' right to be heard in, M, 104.

From decree nisi, provisions as to, U—1, 155.

No bar to alimony *pendente lite*, Y, Z, 275.

Enforcement of, and appeals from, orders and decrees under the Divorce Act, S. 55, 381.

filed after time—Cause of delay, A—B, 382

Provisions of the Code of Civil Procedure relating to, to the King in Council and principles and practice governing the same, 383 394

to High Court under Parsi Marriage Act, S. 12, 528

No, under Act XXI of 1866, but Judge may state case raising question whether conversion has dissolved marriage, S. 29, 655. Case to state necessary facts and documents, and suit to be stayed, S. 30, 655. Case to be decided by three Judges, S. 31, 653.

Refusal to register to be recorded under Bengal Act I of 1876, S. 20, 777. against refusal to register, S. 21, 777.

*Appeal to Queen in Council*, under Divorce Act, S. 56, 383

*Application of the Act*, Act applies only to marriages recognized as such by Christian Law, B, 24

*Apportionment of damages*, General principles as to, I—B, 313, 314.

Variation of order regarding, of damages, T, 313

Examples as to, Q—S, 268, 269

*Armenians*, Applicability of the Dower Act to, —English Law of dower it introduced in this country, C—M, 412, 413.

*Army* Registration of Births, Deaths and Marriages Act, 1879, 843, 844.

*Arrangements*, of alimony, promise to release, M, N, 309

*Asarud*, ceremony of, what is, C, 499.

*Assault*, Conviction for indecent, no bar to suit for dissolution on ground of rape, D, 66.

*Assignment of dower*, G—I, 418

*Attempt*,—to commit sodomy or bestiality, J—A, 66.

*Bail*, Discretion of Judge to admit to, or not of persons charged under Sati Regulation, S. 1, 837.

*Bankruptcy*, of the husband, effect of on alimony, O, 299

*Bar of suit*, for criminal conversation under Divorce Act, S. 61, 398

*Barring dower*, Dower may be barred by a declaration in a deed, S. 6, 422—or by a declaration in the husband's will, S. 7, 422

Devise of real estate to the widow shall bar her dower, S. 9, 422.

Bequest of personal estate to the widow shall not bar her dower. S. 10, 423.

Agreement not to bar dower may be enforced, S. 11, 423.

Equitable, by contract, U, V, 420

*Bar to decree*, for divorce *a mensa et toco*, S. 22, 206.

*Bar to marriage*, Prior marriage, a, W, 572.

Insanity, if—, X, Y, 572.

*Bar to relief*, Delay as,—Reason of the rule, W—B, 138, 139

Nature of the delay contemplated as being C—G, 139

Cruelty of petitioner as a, in suits for dissolution of marriage, 141, 142.

Reason of the rule as to desertion being a discretionary, P—R, 142, 143.

**Bar to relief—(Concluded).**

Petitioner's desertion a, in suits for dissolution of marriage, **142, 145.**

Willful neglect of petitioner a, in suits for dissolution of marriage, **145.**

Misconduct of petitioner a, in suits for dissolution of marriage, **146—150.**

**Bar to suit,** Petitioner's cruelty or adultery to bar suit under Act XXI of 1866, S. 25, **683.**

Male petitioner's co-habitation with one of several wives to bar suit under Act XXI of 1866, S. 26, **654.**

**Bengal,** Muhammadan Marriages and Divorces Registration Act, I of 1876, **769—792.**

**Bengal Sati Regulation, 1829,** Reg XVII of 1929, **831—833**

**Bequest,** of personal estate to the widow shall not bar her dower, S. 10, **423.**

**Beshahity,** ground for dissolution of marriage, **66, 67.**

**Betrothal,** Specific performance of contract of, if can be granted, *F*, **459, 460.**

What is—Legal effects of betrothal in Hindu Law, *X—E*, **453, 459.**

**Bigamous marriage,** No alimony, *R*, **278.**

**Bigamy,** proof of, for purposes of Criminal Law and Divorce proceedings, *P—Q*, **64.**

Proof of, *R*, **64**

When second marriage is void for consanguinity, *S*, **64**

When second marriage has not been formally celebrated, *T*, **64.**

Taking place abroad, *U*, **65**

Adultery not presumed from, *V*, **65**

Condoned, revival of, *Z*, **118**

As grounds of decree of nullity of marriage, *S* 19, **189**

Or consanguinity, effect on marriage, *G—L*, **199.**

Punishment for, among Parsis, *S*. 5, **503**

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsi Marriage Act, not punishable, *R*, **504**

Second marriage contracted by a Parsi husband while first wife was living, prior to the passing of this Act *N—U*, **516, 517**

Punishment for, under Special Marriage Act, *S* 16, **552**

**Bigamy coupled with adultery,** What is, *M*, **515, 516.**

**Bigamy with adultery,** *S*. 3, **44**

What is, *K, L*, **64**

English Law, *M, N*, **64**

Proof of adultery and bigamy with same woman necessary, *O*, **64.**

**Bill,** Forms in which, came before Council if guide in construction of Act, *B*, **14.**

History of the Divorce bill as to jurisdiction based on residence, *C*, **32.**

**Births,** General Registry offices of, Deaths and marriages, **703—705**

Persons whose, and deaths are registrable, *S*. 11, **705, 706.**

Registration of, and deaths, **705—713**

Duty of Registrar to register, and deaths of which notice is given, *S* 19, **709.**

Persons authorized to give notice of, *S*. 20, **709, 710.**

Entry of, or death to be signed by person giving notice, *S*. 22, **710, 711.**

Grant of certificate of registration of, or death, *S* 23, **711.**

Exceptional provision for registration of certain, and deaths, *S*. 26, **712.**

Correction of entry in register of, or deaths, *S* 28, **713**

The Deaths and Marriages Registration Act, XVI of 1886, Amendment Act, 1890, **759, 760**

Deaths and Marriages Registration (Amendment) Act, 1911, **761, 762.**

Registration of, Deaths and Marriages Act, 1879, **843, 844.**

**Blind man,** Affidavit by blind or illiterate defendants, *I*, **375, 376.**

**Books,** Government to provide seal and, under Bengal Act I of 1876, *S*. 5, **773.**

*Brahmo Marriage*, History of the Special Marriage Act—Reasons for passing of the Act, 540—545.

Principle on which Special Marriage Act is based is one of religious toleration, *L*, *M*, 545, 546

Conditions upon which marriages under, Act may be celebrated, *S* 2, 546

One of the parties to intended marriage to give notice to Registrar under Special Marriage Act, *S* 4, 547, Notice to be filed and copy entered in the Marriage Notice Book, *S* 5, 547, Objection to marriage, *S* 6, 548, Procedure on receipt of objection—Objector may file suit, *S* 7, 548, Certificate of filing of suit to be lodged with Registrar, *S* 8, 548, Court may fine when objection not reasonable, *S* 9, 549.

Marriage how to be solemnized under Special Marriage Act—Place where marriage may be solemnized, *S* 11, 12, 550.

Rules and orders made under Act III of 1872, (Special Marriage)—(General, 556, Bengal, 557, Bombay, 557, 559, U P 559, 560, Punjab, 560

*Brahmo Marriage Act*, The Special Marriage Act, 1872, 537—560.

*British India*, *S* 2, 497.

Court in which suits to be brought under Parsi Marriage Act—When defendant has left, *S* 26, 511.

*British subjects*, abroad marriage of—English Law, *X A*, 578, 579

*Brothel*, Wife living in a, *R* 104

*Brothers*, Marriage between two, and two sisters not void, *U*, 200

*Buddhism*, Conversion of Christian to, Effect of, *J*, 27, 28

*Buddhist Law*, Restitution of conjugal rights, Provisions of Buddhist law relating to suits for restitution of conjugal rights, 254

*Burden of proof*, in suits for dissolution of marriage, *V*, 99

in suits for nullity of marriage, *G*, 182

as to lucid interval Opinion of Lord Thurlow, *B*, 573.

## C

*Canon Law*, *compensatio criminum* doctrine of—Above doctrine not applicable under Indian Divorce Act, *II -J*, 133

*Carelessness*, Mere, is not neglect or misconduct, *R*, 145

*Castle*, See Conversion.

Loss of, No forfeiture of rights of property, *P*, 430

Law or usage which inflicts forfeiture of, or affects, rights on change of religion or loss of, to cease to be enforced, *S* 1, 441.

Loss of, Succession under Oudh Estates Act I of 1869, *N*, 441.

Act XXI of 1850 intended to prevent the forfeiture of rights of others than those who are put out of, on account of their renouncing or being excluded from religion—Case-law on the point reviewed *V*, *W*, 443, 444

Degradation from, No ground of exclusion from inheritance, *K*, 445.

Exclusion from, for intrigue—Effect on civil rights, *U*, 447.

Loss of, —Hindu convert to Mahomedanism—Succession, *V*, 447

Loss of, —Right to give son in adoption, *X -Z*, 447

Hindu Law—Loss of,—Effect on right of guardianship of father, *B -I*, 447, 448.

Hindu Law—Loss of,—Right of guardianship of mother, *J—L*, 448, 449.

Widow re-marrying according to custom of her, if forfeits her rights, 465—470.

*Caste Disabilities Removal Act*, XXI of 1850, 425—449.

*Ceremony*, Constituting valid marriage to have same effect on widow's marriage, *S* 6, 475

As valid, of, what is, *C*, 499

Form and, of marriage—English Law, *R*, 577

**Ceremony— (Concluded).**

if essential in Sambandham, *C*, 807

among Nambudiri Brahmans, *F*, 809.

**Certificate, and registry of marriages under Parsee Marriage Act, S 6, 504.**

Penalty for omitting to subscribe and attest, under Parsi Marriage Act, S. 11, 507.

Penalty for not registering, under Parsi Marriage Act, S 13, 507

to be sent monthly to Registrar-General, S. 55, 606

Officers to whom Registrars in Native States shall send, S, 56, 606

Registrars to ascertain that notice and, are understood by Native Christians, S 57, 606.

On what conditions marriages of Native Christians may be certified, S 60, 607.

(Grant of, of marriage of Native Christians, S 61, 609

Forbidding by false personation issue of, by marriage Registrar—Penalty, S. 67, 612.

Issuing, or marrying without publication of notice—Penalty, S 71, 617

Issuing against authorized prohibition—Penalty, S. 71, 618

Issuing after expiry of notice, or in case of minor, within fourteen days, after notice, or, against authorized prohibition—Penalty S 72, 618

Issuing, or marrying, without publishing notice, or after expiry of, Issuing for, or solemnizing, marriage with minor within fourteen days after notice—Issuing, authoriz dly forbidden—Penalty, S 73, 618 6 9

Unlicensed person granting, pretending to be licensed—Penalty, S 74, 619, 620. of certain marriages to be sent for Secretary of State, S 81, 622.

(Grant of, of registration of birth or death, S 23, 711

Transmission of certified copies of certificates in marriage register to Registrar General of Births Deaths and Marriages, S 31 714

Person objecting to registration of Sambandam may file a suit in a Civil Court, S. 9, 818—Registration to be delayed pending final disposal of suit, if, of institution is lodged with Registrar, S 10, 819

Registrar to enter, of marriage in "The Marriage, Book", under Malabar Marriage Act, S. 12, 820

**Certificate of marriage, under Special Marriage Act, S 13, 551**

Licensing of persons to grant, between Native Christians under Christian Marriage Act, S 9, 581

**Certified copy, See copy**

Transmission of certificates in marriage register to Registrar General of Births, Deaths and Marriages, S 8 A 505

Transmission of, of entries in marriage certificate book to the Registrar-General of Births, Deaths and Marriages under Special Marriage Act, S 13-A, 551.

of entry in marriage register, etc., to be evidence, S 80, 621.

Duty of Registrars as to sending, of entries in register books to Registrar-General, S. 24, 711.

Transmission of, of entries in marriage certificate book to the Registrar-General of Births, deaths and marriages, S 29, 713, S. 31, 714

Searches of lists prepared by Commissioners and grant of, of entries, S 35, 716.

*Chadar Andazi* Marriage by, between a Khatri and a Khatri widow—Legitimacy of children of such marriage, S 457.

*Chapel*, The solemnization of marriage must be in an established Church or public, or other registered building, unless by special licence *C*, 576

*Charge*, on husband's property for alimony, *B—D*, 297

Priority to partial estates, and specialty debts, S 5, 422

*Charge*—(Concluded).

- Parsi Marriage and Divorce Act, XV of 1865—Alimony on husband's immoveable property—Widow—Distributive share, *I—J*, 822
- Charge of adultery*, and of the birth of the child, if cruelty, *I*, 75
- Chief executive officer*, Power to invest, with powers of Local Government under Parsi Marriage Act, S 52, 531.
- Chief Justice*, S 2, 497
- Chief Matrimonial Courts*, Parsee, S 16, 509
- Child*, Cruelty to, if cruelty to wife, *X*, 75, 76.
  - Cruelty to, if cruelty to mother *II*, 78.
  - Prayer for custody of, of void marriage, *M*, 191
  - Nullity suit, provision for,—English Law and Practice, *I—O*, 206.
  - Power of Court to make provision for, not affected by agreement between parties, *I*, 206.
  - Necessaries procured for maintenance of, *M—O*, 226, 227
  - To maintain—Effect of, in fixing alimony, *J—O*, 303
  - Power to order settlement of wife's property for benefit of husband and, S 39, 311, 312
  - Interest of infant, protected in matters of variation of settlements—Interests of infant, sometimes adversely affected—Unborn children's interests, *O—V*, 333
  - Power to make orders as to custody of in suit for separation, S 11, 337—Power to make such orders after decree, S 12, 337, 338
  - Custody of, 337—359
  - Power to make orders as to custody of, in suits for dissolution of nullity, S 43, 338
  - Power to make such orders after decree or confirmation, S 14, 338
  - Who may intervene in petition for custody of, *D—L*, 340, 341.
  - Interest of, primarily cared for in making orders is to custody of, *M—O*, 341.
  - Of the, of the parties under Parsi Marriage Act, 529, 530
  - Settlement of wife's property for benefit of, under Parsi Marriage Act, S 15, 530
  - Law to apply to issue of marriages under Special Marriage Act, S 18, 552
  - Dissolution of marriage not to affect status or right of, under Act XXI of 1886, S 27, 654
  - S 2, 809.
  - Maintenance of wife and,—Malabar Marriage Act, S 17, 821, 822
  - Guardianship of minor wife and, S 18, 823
- Children of annulled marriage*, status of, S 21, 204
- Christian*, See Native Christians
  - Marriage between, and non-Christian—Law applicable to, *O—R*, 25, 26
  - Conversion of, to Buddhism—Effect of, *J*, 27, 28
  - Indian Marriage Act, 1872, 561, 640
  - S 3, 571.
  - Marriage of Act XXV of 1864, 887—892.
- Christianity*, Profession of, by petitioner at time of presenting petition under Divorce Act necessary, *I*, 23.
  - Respondent's religion, not material, *B*, 24.
  - Hindu convert to—Application of the Divorce Act—Conflict of rulings between Madras and Calcutta High Courts, *S—W*, 26.
  - Conversion to, or from, does not affect liabilities incurred by previous marriage, *K—N*, 28.
  - Divorce Act, (IV of 1869.) not applicable to Mahomedan converts to *J*, 440.
  - Suits for restitution of conjugal rights by a Mahomedan convert to, *K*, 440.

*Christian marriage*, what is, *C—E*, 24.

Conversion, effect of, on, *C—E*, 27.

"Marriage"—Refers to, *O, P*, 39

Relief provided for by Divorce Act only applies to, *Q—U*, 197.

*Christian religion*, Petitioner's, should also be proved in Matrimonial Suits, *W*, 99.

*Church*, English Minister refusing to perform ceremony of second marriage should permit use of his, *S*, 99, 396

*S*, 3, 570.

The solemnization of marriage must be in an established, or public chapel or other registered building, unless by special licence, *U*, 576.

*Church of England*, *S*, 3, 570.

Persons authorized to solemnize marriage other than Clergy of Churches of England, Scotland or Rome—Solemnizing marriage with minor within fourteen days after notice—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Church of Rome*, *S*, 3, 570.

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome)—Issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Church of Scotland*, *S*, 3, 570

Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, *S*, 73, 618, 619.

*Civ. Pro. Code*, Provisions of the, as to enforcement of decrees for restitution of conjugal rights, *B—D*, 238, 239

Code of Civil Procedure to apply to proceedings under the Divorce Act, IV of 1869, *S*, 45, 359.

Provision of the, with regard to suits by or against minors and persons of unsound mind, 363 - 366

Provisions of the Code of the Civil Procedure regarding adjournments, *V*, 379, 380.

Provisions of the Code of Civil Procedure relating to appeals to the King in Council and principles and practice governing the same, *P*, 383—394

Applied to proceedings under Parsi Marriage Act, *S*, 40, 528.

Applied to proceedings under Act XXI of 1866, *S*, 22, 653.

*Clergy*, Persons authorized to solemnize marriage (other than of Churches of England Scotland or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing, marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorized forbidden—Penalty, *S*, 73, 618, 619.

*Clergyman*, English, not compelled to solemnize marriages of persons divorced of adultery, *S*, 58, 395.

*Closed doors*, Power to close doors in proceedings under the Divorce Act, *S*, 53, 378.

Suits with under Parsi Marriage Act, *S*, 38, 527.

*Co-habitation*, Resumption of, after decree for judicial separation—Effect, *Y*, 228.

Male petitioner's with one of several wives to bar suit under Act XXI of 1866, 26, 654.

*Collusion*, Danger of, to be guarded against delay, *I*, 99

In suit for dissolution, Court to be satisfied of absence of connivance, etc., *S*, 12, 106.

Dismissal of petition for dissolution on ground of, etc., *S*, 13, 121.

Principle on which, is discouraged, *B—D*, 122.

Object of the provision against, *E*, 122

What is, in Divorce Courts, *F—A*, 122.

122—126.

In one suit does not bar relief in another suit, *F*, 123.

In presentation of petition for dissolution—English and Indian Law, *G*, 123.

No, between respondents, *J*, 123

Parties concurring to get up evidence of the case, if, *I*, *M*, 123.

What amounts to, 124, 125

What does not amount to, 125, 126.

Effect, *R*, 128.

Decrees for dissolution to be nisi, *S*, 16, 153, 154

Sec 175.

Suppression of facts not sufficient to establish counter-charge may be, *K*, 175.

Stamp on petition under Divorce Act—Petition to state absence of, or connivance—Statements to be verified, *S*, 47, 360

*Commissioners*, Appointment of, to examine registers—Act VI of 1886, *S*, 33, 715 ; Duties of, *S*, 34, 715, 716.

*Commission for examination of witness*, Judge to order commission to issue for examination of exempted persons, *S*, 20, 652

*Communications during marriage* privileged, *F*, 377

*Compensatio criminum*, doctrine of, Canon Law—Above doctrine not applicable under Indian Divorce Act, *H—J*, 133

*Compounding of suits*, for dissolution marriage, *H*, *I*, 58

*Compromise*, Agreement to, suits for dissolution of marriage, *J*, 58  
of suit, practice as to, *G*, 208

*Condonation precedent*, to an offer of condonation, *L*, 117

*Condonation*, Condoned adultery and desertion Revival of, *A*, 80

Revival of condoned cruelty by subsequent cruelty, *B*, 80.

Acts that would revive condoned offences, *C*, 80.

Condoned adultery revived by undue familiarities with stranger, *D*, 80.

Harsh treatment revives condoned cruelty, *E*, 80.

Revival of former acts of cruelty by subsequent threats, *F*, 80.

Habitual unkindness revives condoned cruelty, *G*, 80.

Revival of condoned cruelty by adultery and condoned adultery by subsequent cruelty, *Z*, 80.

Connivance and, distinguished, *Z—B*, 108.

Connivance if criminal—is often noble, *C—D*, 109

what constitutes, *F—P*, 114, 115.

114—120

implies knowledge of the offence condoned, *Q*, *R*, 115

Mere desire to condone is not, *S*, 115

Principle of the doctrine of, *T*, 115

Motive for, *U*, 115.

by wife, and, by husband—Difference, *V—Z*, 115, 116.

is question of fact, *A*, 116.

Evidence of, *B—D*, 116.



**Condonation—(Concluded).**

need not be specially pleaded, *E*, 116

Of wife's adultery—Effect on husband's claim for damages against co-respondent, *F*, *G*, 116.

Always assumed to be conditional, *H*, *I*, 116

Presumed to be conditional, 116, 117

May be expressly made conditional, *J*, *K*, 117

Condition precedent to an offer of, *L*, 117.

What amounts to, 118, 119.

What does not amount to, 119, 120

Matters of discretionary bar being condoned—Effect, *P—R*, 131

Counter charge against petitioner, if barred by, *P*, 133.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136

Cruelty condoned—Effect, *D E*, 141, 142

*Condoned offence, revival of*, See Revival

*Conduct*, Of husband held to constitute connivance, 110—112

Of husband held not to constitute connivance, 112, 113.

Of wife held to constitute connivance, 113.

Of wife held not to constitute connivance, 113, 114.

Misconduct of petitioner a bar to relief in suits for dissolution of marriage, 146, 150.

*Conduct of husband*, Custody of wife—Discretion of Court, *Q—S*, 254, 255

*Conduct of petitioner*, Conducting to adultery—Just and reasonable cause for desertion  
Drunkenness of wife, *S*, 143.

*Confirmation*, Of decree for dissolution by District Judge, *S* 17, 176, 177

District Judge passing decree for dissolution of marriage, subject to, with costs against respondent—Power to execute decree as to costs before, *L*, 180

Decree for nullity of marriage, by High Court—Practice—Procedure, *R*, 181

Of District Judge's decree of nullity, *S*, 20, 203.

*Confirmation of decree by High Court*, See CONFIRMATION

*Conflict of law*, Arising out of *S*, 21 of the Divorce Act IV of 1869, *K*, 205, 206

*Conflict of rulings*, Hindu convert to Christianity—Application of the Act between Madras and Calcutta High Courts, *S—W*, 26

*Connivance*, Suit for divorce—Prostitute, *O—Q*, 104.

In suit for dissolution, Court to be satisfied of absence of collusion, etc., *S* 12, 106.

How differs from being "accessory to," *J*, 105, 107

Meaning of, *L*, *M*, 107.

What constitutes, *N—P*, 107.

Implies corrupt conduct, *Q—S*, 107, 108

Conniving at meaning of, 107—114.

Passive,—Effect, *T*, 108.

Extreme negligence may amount to, *U*, 108

Party conniving need not be accessory before the fact, *W—Y*, 108

And condonation distinguished, *Z—B*, 108.

Is criminal—Condition is often noble *C*, *D*, 109

And being "accessory to" distinguished, *E*, 109.

Not to be presumed easily, *F—H*, 109.

Of adultery with *A* bars relief in respect of adultery with *B-1—K*, 109.

\* Deed of separation—Presumption of, *L*, 109.

*Connivance*—(Concluded).

Proof of, *M—O*, 109, 110

Consent given in consideration of an allowance constitutes, *P*, 110

Conduct of husband held to constitute, 110—112.

Examples of, 110—114.

Conduct of husband held not to constitute, 112, 113.

Conduct of wife held to constitute, 113.

Conduct of wife held not to constitute, 113, 114

Stamp on petition under Divorce Act—Petition to state absence of collusion or statements to be verified, *S* 17, 360.

*Consanguinity*, See AFFINITY.

See PROHIBITED DEGREES.

Prohibited degrees of, or affinity contemplated by the law—English law and Indian, *E—J*, 63

Void and voidable marriages—Differences—Relationship by, *E, F*, 198.

Bigamy or, effect on marriage, *G—L*, 199.

and affinity—English law—and affinity before 5 & 6, Will, 4, c., 54, *S*. 2, *G—J*, 574.

*Consent*, Want of, of the party deserted is necessary to constitute desertion, 89—93.

given in consideration of an allowance constitutes connivance, *P*, 110.

Incapacity and want of, effect of, on marriage, *M, N*, 199

Want of real, by one of the parties, effect of, on marriage, *U*, 203.

Order by, of alimony, *K*, 309

to re-marrage of minor widow, *S* 7, 476

Infant marriage amongst Parsis, of father or guardian—may be implied, *E—G*, 500—502.

Want of,—Effect of force or fear on marriage, *E, F*, 574

*Consent of parties*, cannot confer jurisdiction, *A*, 35.*Construction*, of Act, 3—16

of words and phrases

See WORDS AND PHRASES.

*Consular marriages*, Saving of, Act XV of 1872, *S*. 87, 625.

*Consular Marriage Act*, 1868, *St* 31, and 32, *Vict* c 61, 841

*Consummation of marriage*, Not necessary to constitute adultery, *D*, 60.

Practically impossible Effect—on marriage, *O—Q*, 189.

*Contract*, Marriage, how differs from other, *J—N*, 38, 39.

Separated wife deemed spinster for purpose of and suing, *S*. 25, 220, 221.

No suit to enforce marriage or bring out of marriage when husband under 16, or wife under 14 years—*Marriage Act*, *S* 37, 527

*Conversion*, See CASTE

Effect of, on Mahomedan marriage, *A, B*, 27

effect of, on Christian marriage, *C—E*, 27,

of Christian to Buddhism—Effect of, *J*, 27, 28.

to or from Christianity does not affect liabilities incurred by previous marriage,

*K—N*, 28.

in 1839, effect of, on rights of inheritance, *M*, 429.

in 1845, effect of, on rights of inheritance, *N, O*, 429.

Degradation by apostacy does not dissolve marriage tie among Hindus, *R—V*, 430

Provisions of the Hindu Law as to the effect of, on the status of marriage, *W, X*, 430, 431

*Conversion—(Concluded).*

Effect of change of religion on claim for restitution of conjugal rights among Hindus—Act XXI of 1850, *G, H*, **432, 433.**

Change of religion by either spouse justifies desertion by the other—Hindus, *I—K*, **434.**

Effect of, on right of inheritance under Mahomedan Law—Act XXI of 1850, *N*, **435, 436.**

Provisions of Mahomedan Law as to the effect of change of religion on the status of marriage, *O—G*, **436—439**

Effect of, on the status of marriage according to the Mahomedan Law—Extracts from the writings of Muslim jurists, *H, I*, **439, 440.**

Divorce Act IV of 1869 not applicable to Mahomedan converts to Christianity, *J*, **440.**

Suits for restitution of conjugal rights by a Mahomedan convert to Christianity, *K*, **440**

Effect of change of religion on the obligation to maintain relatives under the Mahomedan Law, *L*, **440**

Apostacy—Dissolution of marriage—Singha Jats of Tarn Taran—Custom in Punjab, *M*, **440.**

Law or usage which inflicts forfeiture of, or affects rights on change of religion or loss of caste to cease to be enforced, *S*, **1, 441.**

Effect of, on relationship of parties—Hindu Law, *P*, **442**

Rule to regulate succession of Hindu after, *X—Z*, **444**

Effect of, under Hindu Law prior to Act XXI of 1850, *W*, **447.**

Decree in case of male respondent refusing to co-habit on grounds of petitioner's change of religion—Act XXI of 1866, *S* 17, **650**, Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage, *S*, **18, 651.**

Proof of marriage and desertion or repudiation of petitioner in consequence of, *S*, **21, 652, 653.**

No appeal under Act XXI of 1866 but Judge may state case raising question whether, has dissolved marriage, *S* 29, **655**, Case to state necessary facts and documents, and suit to be stayed, *S*, **30, 655**; case to be decided by three Judges, *S*, **31, 655.**

*Convert*, Hindu, to Christianity—Application of the Act—Conflict of rulings between Madras and Calcutta High Courts, *S—W*, **26**

Privileges of, which would interfere with the autonomy of caste, *S*, **442.**

Application of Act XXI of 1850 to heirs of, *A—C*, **444**

Loss of caste—Hindu, to Mahomedanism—Succession, *P*, **447**

The Native Convert's Marriage Dissolution Act XXI of 1866, **645—659**

When, deserted by his wife may sue for conjugal society—Act XXI of 1866, *S*, **4, 647**, When, deserted by her husband may sue, *S*, **5, 647**. Court in which suit shall be brought, *S*, **6, 647, 648.**

*Conviction*, Proof of rape—Proof of, for rape not sufficient, *Z*, *A*, **66.**

of husband—Consequent break-down of wife's health—If cruelty, *Z*, **76.**

Wife's for felony, no bar to granting alimony *pendente lite*, *A*, **278.**

*Copy*, See CERTIFIED COPY.

Searches in register book and, of entries, *S*, **63, 610.**

Solemnizing marriage with minor within fourteen days with authority of Court or without sending, of notice—Penalty, *S*, **71, 618.**

Searches and, of entries—Act XV of 1872, *S*, **79, 621**

*Copy—(Concluded).*

- of entries to be admissible in evidence, S 9, 705
- Searches and, of entries in register books, S. 25, 712.
- of entry to be given to parties, S 12, 775, Index to be kept under Bengal Act I of 1876, S. 13, 775, 776.
- Co-respondent*, Respondent and,—One may be found guilty of adultery and the other not, A—C, 60.
- Adulterer to be, in suits for dissolution of marriage, S. 11, 99.
- Reason for making alleged adulterer a, C, 100
- Reason for making alleged adulteress a, D, 100.
- All alleged adulterers to be made, H, I, 201
- Affidavit to dispense with, Practice as to, P—R, 101.
- Discretion of Court to dispense with, English and Indian Law—Difference, D, 103
- Delay, no ground to dispense with, F, G, 103.
- Applications to dispense with, Practice as to, H, 103.
- Affidavit in support of motion to dispense with, I, J, 103.
- Right to be heard in appeal, M, 104.
- Petitioner knowing the name of adulterer even when wife is leading the life of a prostitute, T, U, 104.
- Death of, whilst suit is pending—Practice, F, F, 106
- Condonation of wife's adultery—Effect on husband's claim for damages against, F, G, 116.
- Death of respondent and, Z, 156
- Damages and costs against adulterer, 262—271
- Damages against adulterer—Measure of damages, 263—271; Circumstances which tend to reduce, 267, Those which tend to enhance them, 268.
- Order as to the payment and disposition of damages against adulterer, 268—270.
- Practice in claiming damages against adulterer, 270
- Amendment of petition as to claim for damages—Addition of, C, D, 270.
- Claim for damages against adulterer without claiming dissolution or judicial separation, F—I, 270
- Correction*, of entry in register of births or deaths, S 28, 713.
- Correction of errors*, S. 78, 620, 621.
- under Act VI of 1886, 713.
- Costs*, See APPENDIX IV, 913—935
- Contents of decree nisi for dissolution of marriage—Custody of children, L—P, 175, 176
- Intervenor when condemned in, Q, R, 176.
- District Judge passing decree for dissolution of marriage, subject to confirmation, with against respondent—Power to execute decree as to before confirmation, L, 180.
- Damages and, against adulterer, 262—271.
- Power to order adulterer to pay, S. 35, 271.
- Alimony, W, 296.
- of adjournment, W, 379.
- Suit for divorce husband habilitate for wife's Rule of English Law applicable to Parsis, C—H, 514.
- Counter affidavits*, time for filing, J, 373
- Counter Charges*, Pleading, V, W, 121.
- Duty of Court before pronouncing decree nisi, A, 121
- Against petitioner, if barred by condonation, F 133

*Counter—(Concluded).*

Counter claim of adultery—Alleged adulterer may intervene, *D*, 182

Suppression of facts not sufficient to establish, may be collusion, *K*, 175.

*Court*, S. 3, 43.

S. 2, 497.

Of Faujdari Adalat may pass sentence of death in certain cases under Sati Regulation, S. 5, 837.

*Court-fee*, Petition for divorce, *Q*, 59.*Court seal*, under Parsi Marriage Act, S. 20, 510

*Covenant*, in marriage settlement—Effect of, *F*, 219.

Effect of, in separation deeds, 261, 262.

*Covenant not to sue*, Effect under the Indian Law, *W—Y*, 260

Separation deed containing a, for restitution of conjugal rights—Effect, *Z—A*, 260, 261

*Criminal conversation*, Bar of suit for, under Divorce Act, S. 61, 398*Cross-prayer*, Cases where affirmative relief was allowed on, *U—Y* 151, 152

for judicial separation, *X*, *Y*, 152

Cases where affirmative relief was not afforded on, *Z—A*, 152

for affirmative relief—Petitioner not allowed to withdraw petition, *F*, 153.

Notice of withdrawal of petition no bar to affirmative relief being prayed for by respondent, *F*, 153

Amendment of answer by adding a, *G*, *H*, 153

*Cross-suits*, Conduct of suit to whom given, *P*, 151*Cruelty*, Decree of judicial separation granted on ground of, Divorce on ground of subsequent adultery, *C*, 59.

Decree for judicial separation granted on ground of husband's adultery—Divorce on ground of subsequent, *V*, 59

Conduct short of rape may amount, to, *B*, 66

What is, *N*, 67.

What constitutes legal, *O*, 67

What constitutes legal.—Case-law reviewed, *I—R*, 67—69.

See 67—80.

Tests to determine what is legal, *I—H*, 69, 70

Ground of interference by Court in cases of, *D*, 70.

Text of, Acts must be such as to render further co-habitation unsafe, *X*, 70.

In determining whether an act constitutes, regard must be had to the status of the parties, *Z—C*, 70.

Committed by an insane person, *H—H*, 70, 71

Is a question of fact, *K*, 71

On the part of the wife—Protection of husband, *L*, *M*, 71.

Evidence of, *W—Y*, 72, 73

Acts amounting to legal, 73—76

To children, if, to wife, *X*, 75 76.

Acts not amounting to legal, 76—78.

To child, if cruelty to mother, *R*, 78.

Acts that amount to, under special circumstances, 78—80.

Revival of condoned by subsequent, *B*, 80

Harsh treatment revives condoned, *F* 80.

Revival of former acts of by subsequent threats, *F*, 80.

Habitual unkindness revives condoned, *G*, 80

*Cruelty*—(Concluded).

- Revival of condoned by adultery and condoned adultery by subsequent, *Z*, 80.  
 Condoned revival of, *W*, 118  
 And adultery—Revival of one by the other, *X*, 118  
 Of petitioner as a bar to relief in suits for dissolution of marriage, 141, 142  
 Condoned—Effect, *D, E*, 141, 142  
 What amounts to, *F, G*, 142  
 Pleading, *H, I*, 142  
 Wife's drunken habits being the cause of husband's, *J*, 142  
 Adultery and, 152, 153  
 Degree of judicial separation obtained for, Evidence of *I*, 209.  
 Judicial separation on ground of wife's,—Alimony, *C*, 308.  
 Competence of husband and wife to give evidence as to, or desertion, *S* 52, 376  
 What is legal, among Parsis—English Law how far helpful, *V—Y* 517, 518.  
 Petitioner's, or adultery to bar suit under Act XXI of 1866, *S*, 25, 653
- Culpable homicide*, Person abetting sacrifice guilty of, *S*, 1, 837.
- Custody*, Power to make orders as to, of children in suit for separation, *S* 11, 337,  
 Power to make such orders after decree, *S* 12, 337, 338.  
 Power to make orders as to, of children in suits for dissolution of nullity, *S*, 43,  
 338—Power to make such orders after decree or confirmation, *S* 11, 338  
 Who may intervene in petition for, of children, *D—L*, 340, 341  
 of register-book, *S*, 55, 606.
- Custody of children*, Prayer for, of void marriage *M*, 191.  
 Interest of children primarily cared for in making orders as to, *M—O*, 341  
 Innocent party *prima facie* entitled to, 341—344.  
 Principles on which Courts Act in making orders as to, 341—348  
 337—359.  
 Guilty party generally not given—Generally guilty party not to be given—  
 Exceptions to the above rule, 345—347  
 Case where both parents are unfit—Custody given to a third person, 347  
 Impartial custodians preferred in making orders as to, 347  
 Subsequent variation of order as to, *T*, 348  
 Interim orders regarding, and access to children, 348—350.  
 Practice and procedure in making orders as to, and access to children, 352—359  
*pendente lite* under Parsi Marriage Act—Orders as to, after final decree, *S* 11,  
 529.
- Custody of wife*, Conduct of husband—Discretion of Court, *Q—S*, 254, 255.
- Custom*, Re-marriage according to, and independently—Act XV of 1856—Applicability  
 of Act, *R*, 453  
 Validity of widow re-marriage—Question to be decided not by, but by the Act,  
*Q*, 457.  
 Against re-marriage of widow—Concurrent finding of lower Courts—Finding  
 cannot be questioned in second appeal, *W* 458  
 Hindu widow re-marrying according to,—Right to succeed to her son's estate,  
*J*, *K*, 464.  
 Widow re-marrying according to her caste if forfeits her estate, 465—470.  
 Customs as to widow marriages in the several Provinces of India, 477—492;  
 General, 477—478, Borar 478—479, Northern India Bengal, 479—480,  
 Bihar, 480, Bombay, 481—484, Burma 484, Central Provinces, 484, 485;  
 Madras 485—487, N.W.P. 487, Rajaputana, 487, 488, Punjab, 488—492.

- Damages*, Condonation of wife's adultery—Effect on husband's claim for, against co-respondent, *F, G*, 116.  
 Husband may claim, from adulterer, *S*, 34, 262.  
 and costs against adulterer, 262—271  
 against adulterer—Measure of, 263—271, Circumstances which tend to reduce, 267. Those which tend to enhance them, 268.  
 Order as to the payment and disposition of, against adulterer, 268—270.  
 Practice in claiming, against adulterer, 270.  
 Amendment of petition as to claim for, addition of co-respondent, *C, D*, 270.  
 Claim for, against adulterer without claiming dissolution or judicial separation, *F—I*, 270.  
 Settlement of, *S*, 39, 312  
 Variation of order regarding apportionment of, *T*, 313  
 General principles as to apportionment of, *U—B*, 313, 314.
- Deaf and dumb deponent*, affidavit of, *B, C*, 376
- Death*, of co-respondent whilst suit is pending—Practice, *E, F*, 106.  
 Delay in expectation of respondent's, is reasonable *T*, 141  
 respondent and co-respondent, *Z*, 156.  
 Of either party while protection order or judicial separation order is in force—  
 Effects on rights of succession of the other party, *M—Q*, 220.  
 Of innocent party pending suit—Effect, *E, F*, 318.  
 Of guilty party—Effect, *G*, 318.  
 General registry offices of births, and marriages, 703—705.  
 Persons whose births and, are registrable, *S* 11, 705, 706  
 Registration of births and, 705—713.  
 Duty of Registrar to register births and of which notice is given, *S*, 19, 709.  
 Persons authorized to give notice of *S*, 21, 710.  
 Entry of birth or, to be signed by person giving notice, *S* 22, 710, 711.  
 Grant of certificate of registration of birth or, *S*, 23, 711.  
 Exceptional provision for registration of certain births and, *S*, 26, 712.  
 Correction of entry in register of birth or, *S*, 28, 713.  
 The Births, and Marriages Registration Act XVI of 1886, Amendment Act, 1890, 759, 760  
 The Births, and Marriages Registration (Amendment) Act, 1911, 761, 762.  
 Court of Faujdari Adalat may pass sentence of, in certain cases under Sati Regulation, *S* 5, 837.  
 Registration of Births, and Marriages Army Act, 1879, 843, 844.
- Debt*, Separation by husband because of wife running him to, Desertion,—*T*, 143.  
 Wife's liability for post-nuptial, *S*, 8, 671.  
 Husband's liability for wife's, 679, 680.
- Deceased wife's sister*, Marriage with—Roman Catholic Christian of Indian domicile—  
 Marriage valid, when, *C*, 200.  
 Marriage with, or half sister—English Law, *V—B*, 200.
- Declaration*, by parties and witnesses under Special Marriage Act, *S*, 10, 849.
- Decree*, Enforcement of and appeals from orders and, under the Divorce Act, *S*, 55, 381.  
 Meaning, *N—Q*, 381.
- Decree absolute*, See DECREE nisi.  
 Petitioner not applying to make, Effect, *A*, 156.  
 Effect of, on the status of wife *C, D*, 156.  
 effect of—It operates as decree *in rem*, 156—158.  
 Time from which, takes effect, *O, P*, 158.

*Decree absolute—(Concluded)*

Who can apply for, **159**

Time for making, **159—162**.

Practice in applying for, **162—164**

Confirmation of decree for dissolution by District Judge, S. 17, **176, 177**.

Application to make, —Arrears of alimony, B, **279**

*Decree for dissolution of marriage*, See DISSOLUTION OF MARRIAGE

Court may attach conditions to making of a, X, Y, **128, 129**

Form of, Z, **129**

Cases where, was granted, **131, 132**

Cases where they were not granted, **132**

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, **134—136**.

Where the adultery is committed in consequence of the violence and threats of the husband, petitioner's adultery is excused and decree passed for dissolution, R, S, **135**.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, **135, 136**.

Decree for dissolution were granted to the husband, cases where, **136**.

Decrees for dissolution were refused to the husband, cases where, **136, 137**.

Decrees for dissolution were granted to the wife, cases where, **138**.

Decrees for dissolution were refused to wife, cases where, **138**.

*Decree for judicial separation*, See JUDICIAL SEPARATION

Final, contents of, Z, **212**.

Resumption of cohabitation after effect, Y, **228**.

Effect of, in previous suit, A, **212**.

Reveral of, **228**

Petition for reversal of, contents of, I, **228**

*Decree for restitution of conjugal rights*, See RESTITUTION OF CONJUGAL RIGHTS*Decree in rem*, Decree absolute, effect of—It operates as, **156—158***Decree nisi*, See DECREE ABSOLUTE

Counter charges—Duty of Court pronouncing, X, **121**

Decrees for dissolution to be nisi—Collusion, S. 16, **153, 154**.

effect of on suit, J, **155**

Its effect on the marriage, M—O, **155**

Continuance of marriage between, and decree absolute, P—R, **155**

Does not confer liberty to remarry, S, **155**

not a decree as defined in Civ. Pro. Code, P, **155**

effect of on husband and wife, T, **155**

Appeal from, provisions as to, U—V, **155**.

Effect of, being rescinded, V, **156 & Q, 158**.

Death of petitioner after, and before decree absolute, X, Y, **156**.

Time for making decree absolute, **159—162**

Confirmation of decree for dissolution by District Judge, S. 17, **176, 177**.

effect of, T, **177**.

Re-marriage just after a fortnight after, for nullity, U, V, **177, 178**.

Confirmation of decree by High Court—Effect, W, **178**.

Necessity for a motion for High Court to make absolute, M—P, **180, 181**.

Original summons personally served on the respondent, passed, *ex parte*—

Application for making the decree absolute, Q, **181**.



*Decree nisi*—(Concluded)

Contents of, for nullity of marriage, *L*, 188.

for dissolution and of nullity—Difference, *A*, 204.

Alimony *pendente lite*—Jurisdiction—Application after, *C—E*, 273.

for dissolution, no bar to ordering alimony *pendente lite*, *X*, 275.

*Decrees of Indian Courts*, if can be recognized by English Courts, *Z*, 41.

*Decree of nullity of marriage*, Petition for, *S* 1<sup>o</sup>, 181.

Grounds of, *S* 19, 189.

The party who is disqualified may also apply under certain circumstances for—

Other cases where the party who is not fit can apply for, *B—E*, 190.

Cases where decrees for nullity of marriage have been granted to the husband, 191—193.

Cases where—have been refused to the husband, *Z—C*, 193

Cases where decrees for nullity were granted to the wife, 193 194

Cases where—were refused to the wife, *J—L*, 194

Confirmation of District Judge's, *S* 20, 203

Children of annulled marriage, status of, *S* 21, 204

Power may be barred by a declaration in a —, *S* 6, 422—Or by a declaration in the husband's will, *S* 7, 422

*Defence*, Suits for dissolution of marriage in, *D*, 57

Wife's anti-nuptial incontinence cannot be pleaded in, of wife's adultery, *G*, 58.

*Deprivation*, effect of, among Hindus prior to the passing of the *Ler loci* Act, *V*, 431,

*Deprivation of caste*, No ground of exclusion from inheritance, *K*, 445

*Delay*, in bringing suit to be explained by petitioner, *X*, 99

No ground to dispense with co respondent, *F*, *G*, 103.

As bar to relief—Reason of the rule, *W—B*, 138, 139

Effect of, on suit for dissolution of marriage, 138—141.

Nature of the, contemplated as being bar to relief, *C—G*, 139.

Must be after knowledge of offence, *H*, *I*, 139

Bars relief only when it is unreasonable, *I—J*, 139, 140.

Void marriage, Effect of, in case of—Suits for nullity of marriage, *M*, *N*, 140

Want of means will excuse, *O—Q*, 140

Insanity will excuse, *R*, 140.

Cases where, was held to be reasonable in suits for dissolution of marriage, 140, 141.

to avoid public scandal is reasonable, *S*, 141.

in expectation of respondent's death is reasonable, *T*, 141.

Suit must be instituted with reasonable promptness—Effect of, *F*, *G—I*, 191.

Appeal filed after time—Cause of, *X—B*, 382.

*Delegates*, Appointment of, under Parsi Marriage Act, *S* 21, 510.

Power to appoint new, under Parsi Marriage Act—Deemed public servants—

Selection of, under *Ss* 16 and 17 from those appointed under *S*. 21, *Ss*. 22, 23, 24, 511.

*Delegation of authority*, Power to delegate functions under Act XV of 1872 of Governor General in Council, *S* 86, 624.

*Demand*, Previous, in writing necessary before restitution can be claimed in Court—English Law—Form of, *R—T*, 235, 236.

*Deserted wife*, may apply to Court for protection, *S* 27, 228.

*Desertion*, *S*. 3, 44.

Condoned adultery and—Revival of, *A*, 80.

What constitutes, *G—X*, 80—82.

implies abandonment and want of consent, *E*, *F*, 82.

*Desertion*—(Concluded).

English decisions to be referred to in deciding whether an act constitutes, *Y-C*, 82.

commencement of, *H-K*, 83.

implies a prior living together, *L*, 83.

once began not stopped by subsequent imprisonment, *N*, 83.

What is, in one may not be, in another, *O-R*, 83.

Proof of, *T, U*, 83, 84.

Acts amounting to, 84.

Acts not amounting to, 86-89

Elements of, 89-96

Want of reasonable excuse is necessary to constitute, 93-96

Offer to return—Effect of on, 96-98

Abandonment must continue for two years or upwards to constitute, *M-O*, 98.

Pleading,—Practice as to, *Z*, 99

Condoned, revival of, *Y*, 118

Separation being common to both parties—*if, M*, 142

Mixed question of law and fact, *V*, 142

Evidence of, *U*, 142

Reason of the rule as to, being a discretionary bar to relief, *P-R*, 142, 143.

Petitioner's, a bar to relief in suits for dissolution of marriage, 142-145

Conduct of petitioner conducing to adultery—Just and reasonable cause for,

Drunkenness of wife, *S*, 143

Separation by husband because of wife running to debt, *T*, 143

Plea of, in defence, *U*, 143

Cases where, was held to be reasonable, 143, 144

Cases where, was held to be not reasonable, 144, 145

Where, is not proved to have been for two years or upwards—Practice—Adjournment and withdrawal of suit, *T-J*, 209.

Deserted wife may apply to Court for protection, *S*, 27, 228

Absence on business is no, *F*, 230.

Legacy bequeathed to wife after, and previous to protection order, *M*, 234.

Competence of husband and wife to give evidence as to cruelty or, *S*, 52, 376.

Position of the wife who lawfully deserts or is deserted by her husband, *L, M*, 434, 435.

When convert deserted by his wife may sue for conjugal society—Act XXI of 1860, *S*, 4, 647, When convert deserted by her husband may sue, *S*, 5, 647

Court in which suit shall be brought, *S*, 6, 647, 648.

Proof of marriage and, or repudiation of petitioner in consequence of conversion, *S*, 21, 652, 653.

*Destroying or falsifying register-books*, Penalty, *S*, 75, 620

*Devise*, of real estate to the widow shall bar her dower, *S*, 9, 422.

*Discharge of protection order*, Effect, *C*, 233.

English Law and Practice, *D-F*, 233.

Discharge or variation of protection orders, *S*, 29, 232

*Discretion of Court*, to dispense with co-respondent—English and Indian Law—Difference, *D*, 103.

in cases of dissolution, how to be exercised, *B-C*, 129, 130

Discretion in suits for dissolution of marriage not exercised so as to injure public morality, *H*, 130

*Discretion of Court*—(Concluded)

Duty of Court exercising jurisdiction under Divorce Act, *I*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *I—E*, 132.

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband of, petitioner's adultery is excused and decree passed for dissolution *R, S*, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Grant of alimony discretionary with Court, *B*, 273

to make provision for a guilty wife, *Q—T*, 306.

Consideration for Court in matters of variation of settlements, *N—P*, 332.

to admit to bail or not persons charged under Sati Regulation, *S* 1, 837

*Dismissal of petition*, for dissolution on ground of collusion, etc., *S* 13, 121.

*Dismissal of suit*, if either party under age required by the Act, or if parties cohabiting, or respondent willing to co-habit, *S*, 23, 653. Revival of suit after such dismissal, *S*, 21, 653.

*Disposition of damages*, Order as to the payment and against adulterer, 268—270.

*Dissolution of Marriage*, See DIVORCE.

See DECREE FOR DISSOLUTION OF MARRIAGE

When husband may petition for, *S* 10, 54.

Contents of petition for dissolution, *S* 10, 55.

Reasons why divorce cannot be granted for simple adultery of husband, *T—W*, 56

Suit by minors for, *I*, 56.

Suits for, defences in, *D*, 57.

Compounding of suits for, *H, I*, 58.

Agreement to compromise suits for, *J*, 58.

Abatement of suit for, *K—M*, 58.

Judicial separation may be granted in a suit for, *R—T*, 59.

Adulterer to be co-respondent in suits for, *S* 11, 99.

Burden of proof in suits for, *V*, 99.

In suit for dissolution, Court to be satisfied of absence of collusion, connivance etc., *S*, 12, 106.

Dismissal of petition for dissolution on ground of collusion, etc., *S* 13, 121.

Power to Court to pronounce decree for dissolving marriage, *S* 14, 126.

Decree for dissolution not to be made on mere admissions, *P*, 127.

Amendment of petition for dissolution into one for judicial separation, *T, U*, 128.

Power to grant judicial separation where, is prayed for, *W*, 128.

Discretion of Court in cases of dissolution how to be exercised, *B—G*, 129, 130.

Discretion in suits for not exercised so as to injure public morality, *H*, 130.

Duty of Court exercising jurisdiction under the Divorce Act, *I*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *I—E*, 132.

*Compensatio criminum*, doctrine of—Canon Law—Above doctrine not applicable under Indian Divorce Act, *H—J*, 133.

*Dissolution of Marriage—(Continued)*

- Cases where petitioner's adultery was excused and decree made in petitioner's favour Where the adultery is committed in ignorance of fact—Where the adultery is committed in ignorance of law, **134—136.**
- Where the adultery is committed in consequence of the violence and threats of the husband, petitioner's adultery is excused and decree passed for dissolution, *L.S.*, **135.**
- When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, **135, 136.**
- Decrees for dissolution were granted to the husband, cases where, **136.**
- Decrees for dissolution were refused to the husband, cases where, **136, 137.**
- Decrees for dissolution were granted to the wife, cases where, **138.**
- Decrees for dissolution were refused to wife, cases where, **138.**
- Delay, effect of, on suit for, **138—141.**
- Cases where delay was held to be reasonable in suits for, **140, 141.**
- Cruelty of petitioner as a bar to relief in suits for, **141, 142.**
- Petitioner's desertion a bar to relief in suits for, **142—145**
- Wilful neglect of petitioner a bar to relief in suits for, **145**
- Misconduct of petitioner a bar to relief in suits for, **146—149.**
- Decrees for dissolution to be  *nisi* Collusion *S. 16*, **153, 154**
- Confirmation of decree for dissolution by District Judge *S. 17*, **176—177**
- Effect of Divorce on widow's right to a husband's estate, *Y.*, **178**
- District Judge passing decree for subject to confirmation, with cost against respondent—Power to execute decree as to costs before confirmation, *L.*, **180**
- Decree  *nisi* for dissolution and decree  *nisi* of nullity—Difference *A.*, **204**
- Distinction between suits for judicial separation and suits for, *T—W.*, **207**
- Suit for, if decree for judicial separation can be passed on *X.*, **207.**
- Petitioner for, can ask for judicial separation only, *Y.*, **207**
- Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution or nullity or judicial separation, *W—Z.*, **255**
- Claim for damages against adulterer without claiming dissolution or judicial separation, *R—I.*, **270**
- Decree  *nisi* for dissolution, no bar to ordering alimony *pendente lite*, *X1*, **275**
- Does not *per se* create forfeiture *C.*, **320**
- Court cannot vary settlements after, *amoud*, *W.*, **328**
- Power to make order as to custody of children in suits for dissolution or nullity, *S. 12*, **338**—Power to make such orders after decree or confirmation, *S. 11*, **338**
- Suit for, **2.** Affidavit—Practice, *M, N.*, **371**
- Liberty to parties to marry again after Divorce, *S. 57*, **394**
- English clergyman not compelled to solemnize marriages of persons divorced for adultery, *S. 58*, **395**
- English Minister refusing to perform ceremony of second marriage to permit use of his church, *S. 59*, **396**
- Rules for confirmation of decrees for, *O.*, **399**
- Suit for a decree of dissolution *in case of absence among Parsis*—In case of absence for seven years, *S. 29*, **513.**
- Native Converts' Marriage Dissolution Act, 1866, **645—659**
- Liberty to marry again after dissolution of marriage under Act XXI of 1886, *S. 19*, **652.**
- Not to affect status or right of children under Act XXI of 1866, *S. 27*, **654.**

*Dissolution of Marriage—(Concluded).*

No appeal under Act XXI of 1866, but Judge may state case raising question whether conversion has dissolved marriage, S 29, 655, Case to state necessary facts and documents, and suit to be stayed, S. 30, 655, Case to be decided by three Judges, S 31, 655

Petition for,—Malabar Marriage Act, S 19, 823, 824.

Petition for, under Malabar Marriage Act—Notice to be given to other party, if petition is not joint, S 20, 825, Court to declare marriage dissolved on motion made within a specified period, S 21, 825.

*Distress*, present of wife no ground for urgency in granting alimony, W, X, 279

Levy of fines by, under Parsi Marriage Act, S 48, 530, Procedure until return made to, warrant, S 49, 530, Imprisonment if no sufficient, S 50, 531.

*District*, S. 2, 772.

*District Court*, S 3, 43.

Reason why, was given jurisdiction in matrimonial causes, V, 51.

*District Judge*, S 3, 43.

Confirmation of District Judge's decree of nullity, S. 20, 203.

Confirmation of decree for dissolution by, S 17, 176, 177.

Passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, L, 180.

Power to declare who shall be, for purposes of Act XV of 1872, S 85, 624.

*District Matrimonial Court*, Parsee, S 17, 509.

*District Registrar*, Muhammeden Registrars to be subject to control of, S 17, 776, 777.

Copies of entries under Bengal Act I of 1876 to be sent monthly to Registrar of district, S 22, 777.

*Divorce*, See DISSOLUTION OF MARRIAGE

in Hindu Law, E-I—I, 27.

Admission of Petition for, Jurisdiction of High Court, K, 50

English Law, on what grounds obtainable, R, 55.

Effect of, on domicile, G—A, 179.

Difference between alimony granted after judicial separation or after, K—N, 298, 299.

Suits for, or judicial separation among Parsees, S 32, 519.

The Bengal Muhammeden Marriages and, Registration Act I of 1873, 769—792.

Register of marriages as prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammeden marriages and, 779, 780.

Register of, other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammeden marriages and, 780.

Register of, of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammeden marriages and, 781.

No, among Nambudris, I, 809.

under Malabar Marriage Act. 823—829.

Bills Evidence Act, 1820, 839, 840.

Statute law relating to India concerning the subject of marriage and, 839—853.

*Divorce Act*, Indian, to apply to persons marrying under Special Marriage Act, S. 17, 552.

*Divorce a mensa et toro*, Bar to decree for, S. 22, 206.

*Divorce Bills Evidence Act*, 1820, St. I, Geo. IV, ch 101, 839, 840

*Divorce Court Rules*, under England, 855—878.

- Domicile*, Jurisdiction of Court to grant divorce — not test of jurisdiction, *Q—T*, 28, 29.  
 Jurisdiction of English Courts to pronounce decree of divorce if based on, English law, *V*, *F*, 34.  
 Rules for determining the, of a person *W, X*, 34.  
 Wife's, dependent on that of her husband — Succession Act, *V, Z*, 34.  
 Residence falling short of will not confer jurisdiction under English Law, *B*, 35.  
 Where, is established other considerations are immaterial, *O—F*, 35.  
 Matrimonial, same as ordinary, *G*, 35.  
 of wife follows that of husband, *H*, 35,  
 of parties when wife is deserted by husband — Domicile at the moment of desertion is alone considered, *I*, 36.  
 Marriage celebrated in accordance with the law of the, of the parties, *I* & *B*, 41.  
 Effect of divorce on, *G—K*, 179.  
 Suit for nullity of marriage — First wife being the uterine half sister of second wife, *V*, 197.  
 Law governing validity of marriage, *W, X*, 197, 198.  
 Question of, being in dispute if a bar to grant of alimony, *I*, 278.
- Dower*, Act XXIX of 1839, 410—424.  
 English Law of, recognized in this country from very early times, *N, O*, 413, 414.  
 Law of, part of the law of inheritance, *P, Q*, 414.  
 Dower Act XXIX of 1839—what is, *T, U*, 414, 415.  
 Early history of the Law of, *V*, 415.  
 In England previously to the passing of the Dower Act, 3 and 4 Will, IV, c 105, 415—417.  
 Under the Dower Act, 3 and 4 Will, IV, c 105 Jointure, *X*, 417.  
 Assignment of, *G—I*, 418.  
 Right of, how defeated under the Dower Act 3 and 4 Will, IV, c 105, *M—Q*, 419.  
 Right of, how defeated • Jointure, *R—T*, 420.  
 Equitable bar to dower by contract, *U, V*, 420.  
 Effect of incontinence or second marriage on right to, *X, Y*, 420.  
 Widows to be entitled to out of equitable estates, *S 2*, 421.  
 Seisin shall not be necessary to give title to, *S 3*, 421.  
 No, out of estates disposed of, *S 4*, 421.  
 May be barred by a declaration in a deed, *S 6*, 422—or by a declaration in the husband's will, *S 7*, 422.  
 Shall be subject to restrictions, *S 8*, 422.  
 Devise of real estate to the widow shall bar her, *S 9*, 422.  
 Request of personal estate to the widow shall not bar her, *S 10*, 423.  
 Agreement not to bar, may be enforced, *S 11*, 423.  
 Legacies in bar of, still entitled to preference *S 12*, 423.
- Dower Act XXIX of 1839*, 410—424.  
*Dower Act*, Applicability of the, to Armenians—English Law of dower if introduced in this country, *C—M*, 412, 413.
- Drunken habits*, Wife's, being the cause of husband's cruelty, *J*, 142.  
*Druplenness*, if cruelty, *B—E*, 76.  
 Conduct of petitioner conducing to adultery—Just and reasonable cause for desertion, of wife, *S*, 143.
- Dum casta clause*, in variation of settlements, *F*, 326.  
*Duress*, Threat or, effect of, on marriage, *M—P*, 202, *Q*, 203.  
 Or fraud, effect of, on marriage, *D*, 573.
- Duty of Judge*, to satisfy himself that petitioner is not necessary, *K*, 107.

## E

*Earnings*, Married women's, to be their separate property, S. 4, 664.

Married Women's Wages and, 664—666.

*Ecclesiastical Courts*, Alimony *pendente lite*, when payable—practice of, J, 274

Facts to be established before alimony *pendente lite* can be granted—Practice of,

J—T, 274, 275.

*Ecclesiastical law*, Parsis not subject to, E, F, 494.

*Enforcement of decrees*, or orders made heretofore by Supreme or High Court, S. 5, 51.

*Enforcement of order*, for alimony *pendente lite*, 289, 290.

*Enforcement*, of and appeals from orders and decrees under the Divorce Act, S. 55, 381.

*English authorities*, value of, in interpreting Indian Acts, V—X, 8.

*English Courts*, Decrees of Indian Courts, if can be recognized by, Z, 41.

*English Divorce Court Rules*, Divorce Court Rules under England, 855—878.

*English Law*, Jurisdiction of English Courts to pronounce decree of divorce is based on domicile, U, V, 34.

Residence falling short of domicile will not confer jurisdiction under, B, 35.

Divorce on what grounds obtainable, B, 55.

English decision to be referred in deciding whether an act constitutes desertion, V—C, 82.

Administration to wife dying after a judicial separation or protection order, Z—D, 178, 179.

Voidable marriage and void marriage—Difference, D—F, 182.

Essentials of a valid marriage, H, H-1, 183.

Suits for nullity. Test of jurisdiction, G—I, 186.

When marriage is voidable for impotence, N, 189.

Marriage with deceased wife's sister or half sister, V—B, 200.

Previous demand in writing necessary before restitution can be claimed in Court—Form of demand, R—T, 235, 236.

Refusal to comply with decree of restitution of conjugal rights—Effect, E—I, 239.

Construction of Parsi Marriage Act—how far helpful, G—J, 494, 495.

Parsi Marriage Act is based on, M, 495.

Rule as to introduction of, in a conquered country, N, 495.

Suit by wife for nullity—General and relative impotency—Impotency *quoad hanc*, W—Z, 512.

Suit for divorce—Husband's liability for wife's costs—Rule of, applicable to Parsis, C—H, 514.

What is legal cruelty among Parsis—how far helpful, V—Y, 517, 518.

Deeds of separation—Agreement to live separate, if good defence in suit for restitution among Parsis—Principles of, on the above subject applicable to Parsis, N—S, 523, 524

Regarding solemnization of marriage, 570—579.

Marriage Acts in England, P—T, 575, 576.

Special license—Where granted, C, 577.

Ordinary's license, who may grant, D, 577.

Marriage without license or banns, E, 577.

Form and ceremony of marriage, F, 577.

Marriage in the vestry, I—L, 577.

Presence of priest, if necessary for marriage, M—W, 577, 578.

British subjects abroad marriage of, X—1, 578, 579.

Marriages *per verba de present*, C, 579

*English marriage*, validity of marriages of Jews and Quakers, Y—D, 198

*Equity*, See JUSTICE, EQUITY AND GOOD CONSCIENCE.

Where an enactment has no express provisions, Court to act according to justice and good conscience, *H*, 5.

*Erasures*, Interlineations alterations, or, in body of affidavit, *Z*, 375

*Erroneous belief*, as to nature of marriage ceremony—Effect of, on marriage, *S, T*, 203.

*Error of judgment*, Want of prudence—not connivance, *V*, 108.

*Errors*, Correction of, under Act VI of 1886, 713.

*Evidence*, See APP. V, 937—951, of ADULTERY, 60—62.

Petitioner being unable to obtain against adulterer, *A—C*, 105.

*Evidence*, of condonation, *B—D*, 116.

Parties concurring to get up, of the case, if collusion, *L, M*, 123.

Of marriage, *N, O*, 127

Uncorroborated testimony of wife, *Q*, 128

Of adultery, *G*, 133

Of desertion, *O*, 142

Decree of judicial separation obtained for cruelty—of cruelty, *I*, 209

Of adultery, *R—T*, 277

Mode of taking, in cases under the Divorce Act, S. 51, 371.

Competence of husband and wife to give, as to cruelty or desertion, S. 52, 376.

Adoption among Parsis—Will, *X—Z*, 496

Certified copy of entry in marriage register, etc., to be, S. 80, 621.

Copies of entries to be admissible in, S. 9, 705.

Registration of Muhammadan Marriages—Copy of entry in Register, *F*, 773.

The Divorce Bills Act, 1920, 839, 840.

*Examination of witnesses*, Mode of taking evidence in cases under the Divorce Act, S. 51, 371.

Judge to order commission to issue for examination of exempted persons, S. 20, 652.

*Exclusion from inheritance*, Degradation of caste—No ground of, *X*, 445.

*Excommunication* See CASTE, Act XXI of 1850 applicable to all, from caste, Cause of, immaterial, *I, J*, 445.

Widow re marriage—Exclusion from temple—Jurisdiction, *O*, 449.

*Execution of decree*, See ENFORCEMENT OF DECREES

District Judge passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, *L*, 180.

Decree for restitution, enforcement of, *Y—1*, 238.

Provisions of the Code of Civil Procedure as to enforcement of decrees for restitution of conjugal rights, *B—D*, 238, 239.

Enforcing order for alimony *pendente lite*, 289, 290

Enforcement of and appeals from orders and decrees under the Divorce Act, S. 55, 381.

Wife's property seized in execution against husband—Right of wife to sue, *T—V*, 670, 671.

*Executors*, Non-survival of right to sue for divorce to, or administrators, *E, F*, 179.

*Extraordinary jurisdiction of High Court*, S. 8, 54

## F

*False certificate*, Penalty for making, &c., under Parsi Marriage Act, S. 12, 507.

*False charge*, Wife charging husband with, of unnatural offence, if cruelty, *W*, 73, of adultery, if cruelty, *M*, 77.

*False declaration*, What is, *W—Y*, 611.



*False information*, Penalty for, under Act VI of 1886, **713**.

Penalty for wilfully giving, under Act VI of 1886, S. 27, **713**.

*False personation*, Forbidding by, issue of certificate by Marriage Registrars—Penalty, S. 67, **612**.

*False report*, Where a husband spread a, about his wife, if cruelty, *T*, **75**.

*False statement*, Penalty for signing declarations or certificates containing, under Special Marriage Act, S. 21, **553**.

*Falsifying register-books*, Destroying or, Penalty, S. 75, **620**.

*Family*, Marumakkathayam Law and Aliyasanthana Law—Nature of, governed by 'such Law, Classes governed by Marumakkathayam Law, *D, H*, **799, 800**

*Father*, Hindu Law—Loss of caste—Effect on right of guardianship of, *B—I*, **447, 448**.  
Infant marriage amongst Parsis—Consent of or guardian—Consent may be implied, *F—G*, **500—502**.

*Faydan-i Adalat*, Court of, may pass sentence of death in certain cases under Sati Regulation, S. 5, **837**

*Fear*, Want of consent—Effect of force or on marriage, *F*, *F*, **574**

*Fees*, Under Special Marriage Act, S. 14, **551**

Local Government to prescribe, under Act XV of 1872, S. 82, **622**

Power to prescribe, and rules for Native States under Act XV of 1872, S. 84, **623**

Payable to Registrar under Malabar Marriage Act, S. 14, **820**

*Felony*, wife's conviction for, no bar to granting alimony *pendente lite*, *A*, **275**

And imprisonment if bar to an application for alimony, *B—D*, **275**

*Fever*, Violence committed under the influence of an acute disorder, such as brain, *I*, **71**.

*Fines*, Levy of, by distress under Parsi Marriage Act, S. 48, **530**, Procedure until return made to distress warrant, S. 49, **530**, Imprisonment if no sufficient distress, S. 50, **531**.

*First trial*, Applicant (wife) found guilty in Alimony in second trial, *U, V*, **277**.

*Forbidding*, by false personation issue of certificate by marriage Registrar—Penalty, S. 67, **612**.

*Force*, Want of consent—Effect of, or fear on marriage, *F*, *F*, **574**.

*Foreign decrees*, of divorce when recognized by English Courts, *A—G*, **38**.

*Foreigners*, Where marriage was contracted in England by, with the object of evading the laws of their own country, *B, C*, **185**.

Where, marry in England within prohibited degrees of relationship of their country, *D—F*, **186**.

*Foreign Marriage Act*, XIV of 1903, **763—766**.

St. 55 and 56, Vic. Ch. 23, **845—852**.

*Forfeiture*, Law or usage which inflicts, of, or affects, rights on change of religion or loss of caste to cease to be enforced, S. 1, **441**.

Act XXI of 1850 intended to prevent the, of rights of others than those who are put out of caste on account of their renouncing or being excluded from religion—Case-law on the point reviewed, *V, W*, **443, 444**.

Hindu widow—Excommunication for unchastity causes no, of her rights, *L*, **446**.

Of right which widow had not at time of re-marriage, if contemplated by section, *O, P*, **461**.

Practice in Deccan—Sudra castes—Of husband's estate on re-marriage of widow, *N*, **464**.

Widow re-marrying according to custom of her caste, if forfeits her estate, **463—470**.

*Forms*, of petitions and statements, S. 46, **360**.

In the Divorce Act not intended to be literally followed, *P, Q*, **360**.

*Fraud*, Fraudulent misrepresentation—Effect of on marriage—English Law, *K*, 202.

Plot to procure a marriage with an unworthy person—Effect of, on marriage, *Y*, 203.

Duress or, effect of, on marriage, *D*, 573.

*Free-hold estates*, Estates in this country held by British subject under the name of, of inheritance, nature and incidents of, *R*, *S*, 414.

## G

*Gallig words*, if cruelty, *A*, 76.

*Gazette*, Rules under Bengal Act I of 1876 to be approved by Lieutenant-Governor and published in, *S* 19, 777.

*Gotra*, of the widow re-marrying, *J*, *K*, 475, 476.

*Government*, to provide seal and books under Bengal Act I of 1876, *S*, 5, 773.

*Governor General in Council*, Power to delegate functions under Act XV of 1872 of, *S* 86, 624.

Power for, to appoint Registrars for Native States, *S* 13, 707.

*Gratuity*, Muhammadan Registrar may receive, *S*, 10, 774.

*Guardian*, Suit by, of lunatic, *H*, 201.

Infant marriage amongst Parsis—Consent of father or, consent may be implied, *I*—*G*, 500—502.

Minority—Practice and procedure under Parsi Marriage Act, *I*—*L*, 529.

*Guardian ad litem*, Petitioner or respondent being minor or lunatic—English law and practice, *D*, 208.

not liable for alimony, *A*, 279.

*Guardianship*, Right of, if within purview of Act XXI of 1850, *A*, 447.

Hindu Law—Loss of caste—Effect on right of father, *B*—*I*, 447, 448.

Hindu Law—Loss of caste—Right of mother, *J*—*L*, 448, 449.

of children of deceased husband on the re-marriage of his widow, *S*, 3, 470.

of minor wife and children, *S* 18, 823.

provision as to, under Malabar Marriage Act, 823.

*Guilt*, Wife's, how affects her right to alimony *pendente lite*, 275—277.

*Guilty husband*, Cases where husband was found guilty—Settlement how varied, *R*—*X*, 324, 325.

*Guilty party*, Death of, Effect, *G*, 318.

how affected in cases of variation of settlement, *G*—*J*, 320.

generally not given custody of children—Generally, not to be given custody of children—Exception to the above rule 345—347

*Guilty wife*, Permanent alimony for a, 306—308.

Amount of permanent alimony ordered to a, *Y*—*A*, 307, 308.

Compassionate allowance to, *B*, 308.

Permanent alimony to, Indian law, *B*, 308.

Cases where wife was found guilty—Settlement how varied, *F*—*Q*, 322—324.

## H

*Half blood*, Relationship by, effect of on marriage, *O*, 199.

*Half sister*, Marriage with deceased wife's sister or, —English Law, *V*—*B*, 200.

*Headings*, if guide in construction, *G*, *H*, 7.

*High Court*, *S* 3, 42.

Extraordinary jurisdiction of, *S* 8, 54.

Reference to, *S* 9, 54.

Confirmation of decree by, effect, *W*, 178.

Appeal to, under Parsi Marriage Act, *S*, 12, 528.

Rules of procedure of Parsi Matrimonial Courts to be made by, *S* 51, 531.

*High Court, confirmation of decree by*, See CONFIRMATION.

*High Court, jurisdiction of*, Jurisdiction of High Court to deal with matrimonial causes among Parsis, *U*, 508, 509.

High Court may refer case to Judge for additions or alterations—Act XXI of 1866, *Ss.* 32, 655, High Court may decide question raised, and Judge shall dispose of case accordingly, *S* 33, 655.

*Hindu convert*, See CONVERT.

See CONVERSION.

To Christianity—Application of the Act—Conflict of rulings between Madras and Calcutta High Courts, *S—W*, 26

*Hindu family*, Suit by person born a Mahomedan claiming right as reversioner in, *D, E*, 444, 445.

*Hindu Law*,—General, Divorce in, *E-1—I*, 27

“Provisions of the, as to the effect of conversion of the status of marriage, *W, X*, 430, 431.

Provisions of Hindus Smritis relating to the effect of degradation as causing forfeiture of right of inheritance, *Z—F*, 431, 432

Act XXI of 1850 how far has affected rules of, *Q*, 441, 442.

Effect of conversion on relationship of parties, *C*, 442

Applicability of *Lex Loci* Act—Disqualification to inheritance resulting from unchastity—Effect, *M, N*, 446.

Effect of conversion under, prior to Act XXI of 1850, *W*, 447.

Loss of caste—Effect on right of guardianship of father, *B—I*, 447, 448

Loss of caste—Right of guardianship of mother, *J—L*, 448, 449.

*Hindu law—Adoption*, See ADOPTION.

Power of re-married widow to give in adoption—Son by former husband, *L*, 464.

Operation of section—Power of re-married widow to give in adoption, son by former husband, validity of, *C*, 474

Re-married mother—Power to give in adoption son by former husband, *D, E*, 474.

*Hindu Law—Alienation*, No analogy between alienation by widow before adoption and alienation before re-marriage, *U—W*, 462

Alienation by widow not binding on reversioners—Validity during widow-hood—

Effect of re-marriage on alienee's rights, *A*, 463

*Hindu law—Custom*, Widow re-marrying according to custom, of her caste if forfeits her estate, 465 - 470.

as to Widow Marriages in the several Provinces of India, 477—492; General, 477, 478; Bera, 478—479; Northern India—Bengal, 479, 480; Behar 480; Bombay, 481—484; Burma, 484; Central Provinces, 485—488; Madras, 485—487; N.W.P. 487; Rajaputana, 487, 488; Punjab, 488—492.

Effect of Hindu customs on Parsi Law of Marriage, *O*, 495.

*Hindu Law—Restitution of conjugal rights*, Provisions relating to suits for restitution of conjugal rights among Hindus, 241—249.

*Hindu Law—Reversioners*. Arrangement between re-married widow and next reversioner—Whether heirs of such reversioner bound by such arrangement, *M*, 464.

*Hindu Law—Widow*, Rights of widow and mother compared, *B*, 463.

Excommunication for unchastity causes no forfeiture of her rights, *L*, 446.

*Hindu marriage*, nature of, *K—N*, 25

*Hindu temple*, Act XXI of 1850 not to affect usage of, or other religious institutions, *M, N*, 449.

*Hindu Widows' Re-marriage Act XV of 1856*, 451, 492.

*His or her absence*, meaning of, *Z*, 228.

*Husband*, When, may petition for dissolution of marriage, *S* 10, 54.

What is cruelty in, is cruelty in wife, *T*, 69.

Conduct of, held to constitute connivance 110 - 112.

Conduct of, held not to constitute connivance, 112, 113.

Condonation by wife, and condonation by, difference, *V-Z*, 115, 116.

Where the adultery is committed in consequence of the violence and threats of the, petitioner's adultery is excused and decree passed for dissolution, *R*, *S*, 135.

Decrees for dissolution were granted to the, cases where, 136.

Decrees for dissolution were refused to the, cases where, 136, 137.

What is misconduct in the, 148, 149.

What is not misconduct in the, 149, 150.

Cases where decrees for nullity of marriage have been granted to the, 191-193.

Cases where decrees of nullity of marriage have been refused to the, *Z-C*, 193.

Affinity between kindred of, and kindred of wife, *T*, 200

when liable for necessaries of wife, 222 224

What is compliance by, with decree for restitution of conjugal rights, *J-L*, 239.

Refusal to comply with decree for restitution of conjugal rights by,—Effect, *O*, 240.

may claim damages from adulterer, *S* 31, 262

Power to order settlement of wife's property for benefit of, and children, *S*. 39, 311, 312.

When convert deserted by his wife may sue for conjugal society—Act XXI of 1860, *S* 4, 647, When convert deserted by her, may sue, *S* 5, 647, Court in which suit shall be brought, *S* 6, 647, 648.

Insurances by wives and, 667 670.

Insurance by, for benefit of wife, *S* 6, 668, 669

Suit against a married woman Not necessary party, *G*, *H*, 673.

Not liable for wife's ante-nuptial debts, *S* 9, 679

Husband's liability for wife's debts, 679, 680.

*Husband and wife*, Wife's domicile dependent on that of her husband—Succession Act, *V*, *Z*, 34.

Competence of, to give evidence as to cruelty or desertion, *S*. 52, 376.

*S*. 2, 496.

*Husband's means*, Mode of determining, for the purpose of awarding alimony *pendente lite*, 256 - 289.

*Idiot*, Grounds of decree of nullity of marriage, *S* 19, 189.

*Idiot*, Marriage with an, validity of, *B-D*, 204.

*Ignorance of fact*, Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in, or in ignorance of law, 134-136.

*Ignorance of law*, Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in, ignorance of fact—Where the adultery is committed in, 134-136.

*Illegitimate relationship*, effect of, on marriage, *P*, 199.

*Illiterate person*, Affidavit by blind or illiterate deponents, 1, 375, 376.

*Illustrations*, how far guide in construction of statutes, *I-U*, 7, 8.

*Impartial custodians*, preferred in making orders as to custody of children, 347.

*Impotency*, See *L*, *M*, 574.

When marriage is voidable for,—English law, *N*, 189.

Practice in case of alleged, medical examination as to alleged impotency, 194, 195.

Grounds of decree of nullity of marriage, *S*, 19, 189.

Proof of, *H*, *I*, 191.

Suit for a decree of nullity of marriage among Parsis, 511, 512, In case of lunacy or mental unsoundness, *S* 27, 511, In case of, *S* 28, 512.

Suit by wife for nullity—General and relative,—*quoad hanc*—English Law, *W*—*Z*, 512.

*Imprisonment* Felony and, if bar to an application for alimony, *B*—*D*, 275.

*Incapacity of mind*, Effect, *Z*, 572, 573.

*Incest*, Charge of having committed, if cruelty, *P*, *Q*, 77.

*Incestuous adultery*, *S*, 3, 44.

How defined in the English statute, *D*, 63

Condoned, revival of, *V*, 118

*Incurable malformation*, effect of, on marriage, *I*, 189.

*Indecent assault*, Conviction for, no bar to suit for dissolution on ground of rape, *D*, 66.

*Indemnity*, Decree for separation or protection-order valid as to persons dealing with wife before reversal—of persons making payment to wife without notice of reversal of decree or protection order, *S* 60 397

*Indentity*, Where adulterer's, is lost through neglect, *D*, 106

See APP. V, PROOF OF 927—951

*Indexes*, To be kept at general registry office, *S* 7, 705

To be open to inspection, *S* 8, 705

Copies of entry to be given to parties, *S* 12, 775,—to be kept under Bengal Act I of 1876, *S* 13, 775, 776.

Particulars to be shown in, under Bengal Act I of 1865, *S* 11, 776

under Bengal Act I of 1876 may be inspected and copies of entries in registers taken, *S* 15, 776.

*Indian Marriage Act*, 1865, Act V of 1865, 893—908

*Infant*, Necessaries, *R*—*U*, 227.

Interest of, children protected in matters of variation of settlements—Interests of children, sometimes adversely affected unborn children's interests, *Q*—*V*, 333.

*Infant marriage*, Among Parsis, *D*, 499, 500

Amongst Parsis—Consent of father or guardian—Consent may be implied, *E*—*G*, 500—502.

*Inheritance*, Law of dower, part of the law of, *P*, *Q*, 414

Effect of conversion on right of, under Mahomedan Law—Act XXI of 1850, *N*, 435, 436.

Degradation of caste—No ground of exclusion from, *K*, 445

Hindu widow remarrying after she ceases to be a Hindu—Effect on her rights of, *T*, 447.

*Injunction*, To restrain husband from making away with property—Alimony, *I*, *J*, 305.

To restrain husband from receiving legacy—Alimony, *K*, *L*, 305.

*Innocent party*, Death of, pending suit—Effect, *E*, *F*, 318

How affected in cases of variation of settlement, *D*—*F*, 320.

*Prima facie*, entitled to custody of children, 341—344.

*Insane person*, Cruelty committed by an, *E*—*H*, 70, 71.

*Insanity*, of respondent if ground for staying proceedings, *N*—*P*, 58, 59.

Will excuse delay, *R*, 140.

*Insanity*—(Concluded).

and want of consent, effect of, on marriage, *M*, *N*, 199.

Reason of the rules as to, being a ground for a suit for nullity, *F*, 201.

Doubt as to alleged, Effect, *I*, 201.

if bar to marriage, *X*, *Y*, 572.\*

*Inspection*, Refusal to submit to,—Effect, *K*, 191.

Marriage-register to be open for public, under Parsi Marriage Act, *S* 8, 505.

Indexes to be open to, *S* 9, 705.

Index under Bengal Act I of 1876 may be inspected and copies of entries in registers taken, *S* 15, 776

*Inspector-General of Registration*, *S*. 2, 772

to exercise general superintendence, *S* 18, 777

*Insult*, Neglect, coldness and, producing an attack of melancholia, if cruelty, *M*, *N*, 74.*Insurance*, Married woman may effect policy of, *S* 5, 667

by wives and husbands, 667—670.

by husband for benefit of wife, *S* 6, 668 669

Policy for "wife and children"—Joint tenancy, *M* *Q* 669

*Intention of Intestature*, Courts are bound to give effect to expressed intention, *O—T*, 13

Statement of Objects and Reasons, how far guide to the, *U—V*, 13.

*Interventions*, alterations or erasures in body of affidavit, *Z* 375.*Interim orders*, regarding custody of children and access to children, 348—350.*Interrogation*, First of respondent under Act XXI of 1866—*S* 15, 649, how Judge may be public or private, *S* 11, 649

Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—Adjournment for a year—Interview, *S* 15, 650, Procedure on expiration of adjournment—of respondent—Decree, *S* 16, 650.

*Intervenor*, when condemned in costs, *Q*, *R*, 176*Intervention*, See 165—175.

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene, *A*, *B*, 102

Persons implicated by petitioner may intervene—*S—Z*, 102.

General principles as to, 165, 166.

Who can intervene, 165 174.

by Queens's Proctor, 166—170.

by private persons, 170—174

Grounds for, 174, 175.

who may intervene in petition for custody of children, *D*, *E*, 340 341

of third parties allowed in matters of application for custody and access to children *Q*, 353, 354

*Interview*, Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—Adjournment for a year—*S* 15 650,—Procedure on expiration of adjournment—Interrogation of respondent—Decree, *S* 16, 650*Intoxication*, effect of, on marriage contracted during, *R*, 203*Irregularities*, in solemnization, effect of, on marriage, *J*, 183.

Irregularities which have been held not to invalidate the marriage, 184, 185.

Marriage not invalid by reason of, procedure, *S* 16 821.

*Irregular marriages*, Validation of records of, *S* 4, 643.

Penalty for solemnizing Act II of 1892, *S*. 6 644.

## J

*Jactitation of marriage*, Meaning of, *Q*, 23

Suit for, *R—U*, 23.

Suit for, defences in, *X*, 23.

*Jews*, English marriages, validity of Marriages of and Quakers, *Y—D*, 193.

*Joint tenancy* Policy for "Wife and children," *M—Q*, 669

*Jointure*, Dower under the Dower Act, 3 and 4 Will, IV, *C*, 105, *X*, 417

Right of dower, how defeated, *R—T*, 420

*Judge*, Functions of, and legislator, *E—G*, 4

*Judicial separation*, See DECREE FOR JUDICIAL SEPARATION.

See also 206—228.

Suit for,—Pleader's foe, *P*, 53

"May be granted in a suit for divorce, *R—T*, 59.

Decree of, granted on ground of cruelty—Divorce on ground of subsequent adultery, *U*, 59

Decree for, granted on ground of husband's adultery—Divorce on ground of subsequent cruelty, *V*, 59

Amendment of petition for dissolution into one for, *T*, *U*, 128.

Power to grant, where dissolution of marriage is prayed for, *W*, 128.

Cross-player, *X*, *Y*, 152

Administration to wife dying after a, or protection order—English law, *Z D*, 178, 179

Decree of separation, how far bars relief on ground of nullity of marriage, *C*, 821.

Bar to decree for divorce *a mensa et toro*, *S* 22, 206.

Distinction between suits for, and suits for dissolution of marriage, *T—W*, 207.

Suit for dissolution of marriage, if decree for, can be passed in, *X*, 207.

Petitioner for dissolution of marriage can ask for only, *Y*, 207.

Molestation of petitioner by respondent after decree for, *C*, 208.

Decree for, Effect, *F*, 208

Respondent in suit for restitution of conjugal rights may ask for, *Z*, 208.

Decree of, obtained for cruelty—Evidence of cruelty, *I*, 209.

Where desertion is not proved to have been for two years or upwards—Practice—

Adjournment and withdrawal of suit, *J—L*, 209

Application for separation made by petition, *S* 23, 210

Effect of decree of, in previous suit, *A*, 212

Final decree for, contents of, *Z*, 212

Legal ground why the application for, should not be granted—What are such legal grounds, 212—215, What are not such legal grounds, 216, 217

Separated wife deemed spinster with respect to after-acquired property, *S*, 24, 217, 218

Decree of separation removes restraint on anticipation, *G*, 219.

Decree for, and protection order—Difference, *J*, 219.

Death of either party while protection order or, order is in force—Effects on rights of succession of the other party, *M—Q*, 220

Separated wife deemed spinster for purposes of contract and suing, *S*, 25, 220, 221.

Reversal of decree of, 228.

Decree of separation obtained during absence of husband or wife may be reversed, *S*, 26, 228

Petition for reversal of decree of judicial separation, contents of, *A*, 228.

*Judicial separation—(Concluded).*

Resumption of co-habitation after decree for, —Effect, *I*, 228.

Decree of, and protection order—Difference—English Law, *N—P*, 234.

Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution of nullity or, *W—Z*, 255.

Claim for damages against adulterer without claiming dissolution or, *P—I*, 270.

Difference between alimony granted after, or after divorce, *A—N*, 298, 299.

Court cannot vary settlements after, *U*, 327.

Power to make orders as to custody of children in suit for separation, *S* 11, 337—

Power to make such orders after decree, *S* 12, 337, 338

Decree for separation or protection-order valid as to persons dealing with wife before reversal—Indemnity of persons making payment to wife without notice of reversal of decree or protection order, *S* 60, 397

Suit for divorce or, among Parsis—On ground of wife's adultery—On ground of husband's adultery, &c., *S* 30, 513—522.

Grounds of, among Parsis, *S* 31, 518

Suits for divorce or, among Parsis, *S* 32, 519

*Jurisdiction*, See Matrimonial jurisdiction.

Object of the legislature in fixing residence as the test of, under the Act, *I*, *V*, 29.

History of this bill as to, leased on residence, *C*, 32

Consent of parties cannot confer, *A*, 35.

Residence falling short of domicile will not confer, under English Law, *it*, 35.

Under Divorce Act, 49—54

Reason why District Courts were given, in matrimonial causes, *V*, 51.

Suits for nullity, Test of, —English Law, *it—I*, 186.

Plea as to, no bar to grant of alimony *pendente lite*, *W*, 275.

Questioned, no bar to grant of alimony, *G*, *H*, 278.

Court in which suits to be brought under Parsi Marriage Act—When defendant has left British India, *S* 26, 511.

To grant divorce—Domicile not test of jurisdiction, *Q—T*, 28, 29.

*Jurisdiction of District Courts*, Power to alter territorial *S* 18, 510

*Jurisdiction of English Courts*, To pronounce decree of divorce is based on domicile—English Law, *U*, *V*, 34.

To decree divorce to wife domiciled in England at time of marriage *J*, 36.

To adjudicate on the validity of marriages celebrated in England, *II*, *I*, 38.

*Jurisdiction of High Court*, Admission of petition for divorce, *K*, 50.

*Just*, Lawful—Meaning of the expressions, *K—M—I*, 523.

*Justice, equity and good conscience*, See EQUITY.

Rule of, when to be applied to Parsis, *P*, 495.

Where an enactment has no express provisions, Court to act according to equity, and good conscience, *II*, 5.

K

*Kali*, Naib, *S* 3, 689.

Nothing in the, Act to confer judicial or administrative power, or to render the presence of, necessary or to prevent any one acting as—, *S* 4, 689, 690.

Right of stranger to officiate as,—Suit by, for remuneration received by such stranger, *K*, *I*, 690

Rules made under the, Act, *P* 690—693, *Bombay*, 693—694.

*Kazi's* Act XII of 1880 681—696

*Karewa*, Marriage in, form, *T*, 457.



*Kazi*, Reasons for the passing of the Kazis Act—History of Indian Legislation relating to, *D*, 681—683.

Who can appoint, under Muhammadan Law, *F—N*, 683, 684.

Nature of office of, *O—Z*, 684, 685

Office of, ancient nature of, *A*, 685

Muhammadan Law Appointment of—Qualifications—Reg XXVI of 1827—Act XI of 1864—Office of, not hereditary, *B—E*, 685.

Powers of,—Muhammadan Law, *F—M*, 685, 686.

Functions of,—Bom. Reg XXVI of 1827, *N—S* 686, 687.

Remuneration of—Law before the passing of the Kazi Act, *T—J*, 687, 688.

Power to appoint, for any local area, *S*, 2, 689.

*Khatrani*, Marriage by *chadar andazi* between a Khatri and a widow—Legitimacy of children of such marriage, *S* 457.

*Khatri*, Marriage by *chadar andazi* between a, and a Khatri widow—Legitimacy of children of such marriage, *S*, 457.

*Khula*, Register of divorcees other than those of the kind known as, prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorcees, 780.

Register of Divorcees of the kind known as, prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorcees, 781.

*Kinred*, Affinity between, of husband and of wife, *T*, 200.

## L

*Land*, *S*, 1, 411.

*Lapse of time*, Void marriages, effect of, on, *X, Z*, 182.

Effect of, on suit for nullity of marriage *P—K* 188.

*Law*, to apply to issue of marriages under Special Marriage Act *S* 18, 552.

*Lawful*, "Just"—meaning of the expressions, *K—M* 1, 523.

*Legacy*, bequeathed to wife after desertion and previous to protection order, *M*, 234.

In bar of dower still entitled to preference, *S* 12, 423.

*Legal Practitioner*, Practitioners in Matrimonial Courts under Parsi Marriage Act, *S* 25, 511.

*Legal proceedings*, Married women may take, *S* 7, 670.

by and against married women, 670—678.

*Legal questions*, Determination of questions of law and fact—Procedure under Parsi Marriage Act, *S* 41, 528.

*Legislation*, principles of, in Native States, 47—22.

*Legislator*, Functions of Judge and, *E—G*, 4

*Letters of Administration*, Protection order, *W*, 232.

*Libel*, Action for, by wife obtaining protection order, *J*, 234.

*License*, Special,—Where granted—English Law, *C*, 577.

Marriage without, or banns—English Law, *E*, 577.

Grant and revocation of, to solemnize marriages under Christian Marriage Act, *S* 6, 579.

of persons to grant certificates of marriage between Native Christians under Christians Marriage Act, *S* 9, 581.

Unlicensed person granting certificate pretending to be, licensed,—Penalty, *S* 74, 619, 620.

Lieutenant-Governor may grant, to register marriages under Act I of 1876, *S* 3, 772.

*Lieutenant-Governor*, may grant licenses to register marriages under Act I of 1876, *S* 3, 772.

*Limitation*, in case of withdrawal of suits, *O*, 210.

*Las pendens*, *I*, 329.

*Local Government*, Power to invest chief executive officer with powers of, under Parsi Marriage Act S 52, 531.

to prescribe fees under Act XV of 1972, S 82, 622.

Power for, to appoint Registrars for its territories, S 12, 706

*Lucid interval*, Marriage of a lunatic during a —, *A*, 573.

Burden of proof as to, —Opinion of Lord Thurlow, *B*, 573.

*Lunacy*, Grounds of decree of nullity of marriage, S 19, 189.

Suit for a decree of nullity of marriage among Parsis, 511, 512; in case of, or mental unsoundness, S 27, 511; in case of imbecility, S 28, 512.

*Lunatic*, Suits on behalf of —, *Z*, 57.

cruelly committed by an insane person, *E—H*, 70, 71.

Suit by guardian of —, *H*, 201.

Petitioner or respondent being minor or, Guardian *ad litem*—English law and practice, *D*, 208.

Suits on behalf of, under Divorce Act, S 48, 361.

Provision of the Civil Procedure Code with regard to suits by or against minors and persons of unsound mind, 363 366

Marriage of a, during a lucid interval, *I*, 573

*Luxuries*, What, are necessary—*K*, 226.

## M

*Magistrate*, When to be Marriage Registrar under Christian Marriage Act, S 7, 580.

how to proceed against parties concerned in suit, S 4, 837.

*Maintenance*, See ALIMONY

See ALIMONY, *pendente lite*

See ALIMONY PERMANENT.

Use of the above word —*R*, 272.

Permanent, not alienable, *G* 311.

Right of, of a woman whose marriage has been dissolved under S 18, of Act XXI of 1860, *I—K*, 651, 652.

Pin-money—Separate, settled on wife, *G*, 667

under Malabar Marriage Act, 821, 822.

of wife and children—Malabar Marriage Act, S. 17, 821, 822

when claimable by divorced wife under Malabar Marriage Act, S. 22, 825, 826.

*Maintenance of child*, Necessaries procured for —, *M—Q*, 226, 227.

*Majority*, Marriage among Parsis —Suit for declaration of validity of marriage during infancy —Effect of custom validating such marriage —Age of, among Parsis for purpose of marriage, *M—Q*, 502, 503.

*Major widow*, Consent to re marriage of —, S 7, 477

*Mah'athayam Law*, Classes governed by, *G* 800.

*Malabar family*, Marumakkathayam Law and Aliyasanthana Law—Nature of family governed by such Law,—Classes governed by Marumakkathayam Law, *D*, *E*, 799, 800.

*Malabar Law*, See ALIYASANTHANA LAW

See MARUMAKKATHAYAM LAW

Adoption different forms of, in Malabar —*K—P*, 810.

*Malabar Marriage*, See ALIYASANTHANA MARRIAGE

History of the Malabar Marriage Act—Marriage Law in Malabar prior to the passing of the Act —Nature and scope of the Act, 793 798.

Act IV of 1896 (Madras), 793 830.

Nature and effects of marital relationship among Nairs, *J—M*, 800, 801.

*Malabar Marriage*—(Concluded).

Marriage is optional with women in Malabar—Its nature and incidents, *N—Q*, **801—803**.

Tali Kattu-Kalyanam—Its nature and incidents, *R—Y*, **803—806**.

Ceremonies among Nambudri Brahmins, *F*, **809**.

Widow marriage in Malabar, *G*, **809**.

Widow marriage among Nambudris, *H*, **809**.

Registration of marriages under, Act, **815—821**.

Registrar to file such notices and to maintain the "Marriage Notice Book" under Malabar Marriage Act, S. 6, **816**, copies of notice to be served on interested parties—Withdrawal of notice, S. 7, **816**.

*Malformation*, Incurable, effect of on marriage, *U*, **189**.

*Mania*, Fits of, if cruelty, *S*, **78**.

*Marginal notes*, How far guide in construction, *Z—D*, **6, 7**.

*Marital reliefs*, Relief which may be granted by English Courts in their matrimonial jurisdiction, *N, O*, **122**.

Reliefs provided for by the Divorce Act, *P*, **23**

*Marriage*, See MAHOMEDAN MARRIAGE

See MARUMAKKATAYAM MARRIAGE.

See PARSI MARRIAGE

See RE-MARRIAGE.

See WIDOW RE-MARRIAGE.

How differs from other contracts, *J—N*, **38, 39**

Refers to Christian marriages, *O, P*, **39**

What, is recognized as valid in English Courts—It must be monogamous, *J—M*, **42**.

There must be some proof of, in Matrimonial suits, *V*, **99**

Statutes relating to, construction of, *W, X*, **181, 182**

Law governing validity of,—Domicile, *W, X*, **197, 198**.

English, validity of, of Jews and Quakers, *Y—D*, **198**

With deceased wife's sister or half sister—English Law, *V—B*, **200**

Proof of, necessary before restitution can be decreed, *I*, **237**

Proof of, *R, S*, **296**.

Communications during, Privileged, *F*, **377**

Degradation by apostasy does not dissolve, tie among Hindus, *R—V*, **420**.

Provisions of the Hindu Law as to the effect of conversion on the status of, *W, X*, **430, 431**.

Provisions of Mahomedan Law as to the effect of change of religion on the status of, *O—G*, **436—439**.

Effect of conversion on the status of, according to the Mahomedan Law—Extract from the writings of Muslim jurists, *H, I*, **439, 440**.

of Hindu widows legalized, S. 1, **457**

Customs as to widow, in the several Provinces of India, **477—492**; General, **477, 478**; Berar, **478, 479**; Northern India-Bengal, **479, 480**; Behar, **480**, Bombay, **481—484**; Burma, **484**; Central Provinces, **484—485**; Madras, **485—487**; N.W.P. **487**; Rajaputana, **487—488**; Punjab, **488—492**.

S. 2, **496**.

Indian Christian, Act 1872, **561—640**.

Statutes relating to—How interpreted, *L, M*, **568**.

Presumption in favour of, *R, S*, **572**.

what is, *T*, **572**.

Parties, *U, V*, **572**.

*Marriage—(Concluded).*

of a lunatic during a lucid interval, *A*, 573.

When, not had within two months after notice, new notice required, *S* 52, 605

The native Converts' Marriage Dissolution Act, 1866, 645—659.

The births, deaths and, Registration Act, 1886, 695—756.

General registry offices of births, deaths and, 703—705

The Births, Deaths and, Registration Act XVI of 1886, Amendment Act, 1890, 759, 760

The Births, Deaths and, Registration (Amendment) Act, 1911, 761, 762.

Foreign, Act XIV of 1903, 763—766.

Foreign, Act, 1892, 845—852.

Notice of, intended to be solemnized under 55 and 56 Vict., c. 23, *S* 2, 765, 766.

Exemption of certain, from Act VII of 1909, *S* 3, 767.

Anand, Act, 1909, 767, 768

The Bengal Muhammadan, and Divorce, Registration Act, I of 1876, 769—792.

Register of marriages as prescribed by *S*. 6 of Bengal Act I of 1876 for voluntary registration of Muhammadan, and divorces, 779, 780

Register of divorces other than those of the kind known as *K'ula* prescribed by *S*. 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, 780.

*S*. 2, 810

Conditions subject to which a sambandam may be registered as a, *S*. 3, 811, 812.

English Statute law relating to India concerning the subject of, and divorce, 839—853.

The Consular, Act, (1868), *St*. 31 and 32, *Vic* Ch. 61, 841.

Registration of Births, Deaths and, Army Act, 1879, 843, 844

By Registrars Act, *V*. of 1852, 879—886

Of Christians Act, XXV of 1864, 887—892

The Indian, Act V of 1865, 893—908

*Marriage Act*, in England, *P—T*, 575, 576

Amendment of, 713, 714.

*Marriage certificate book*, Transmission of certified copies of entries in, to the Registrar-General of Births, Deaths and Marriages under Special Marriage Act, *S*, 13-A, 551.

Transmission of certified copies of entries in, to the Registrar General of Births, Deaths and Marriages, *S* 29, 713.

Registrar to enter certificate of marriage in, under Malabar Marriage Act, *S*. 12, 820

*Marriage Notice Book*, Registrar to file notices and to maintain the, under Malabar Marriage Act, *S*. 6, 816; Copies of notice to be served on interested parties—Withdrawal of notice, *S*. 7, 816.

*Marriage per verba de presenti*, English Law, *C*, 579.

*Marriage Register*, See REGISTER.

to be open for public inspection, under Parsee Marriage Act, *S*. 8, 505.

Transmission of certified copies of certificates in, to Registrar General of Births, Deaths and Marriages, *S*. 8-A, 505, *S*. 31, 714

Certified copy of entry in, etc., to be evidence, *S*. 80, 621.

*Marriage Registrar*, See REGISTRAR

Appointment of, under Special Marriage Act, *S*. 3, 547.

Magistrate when to be, under Christian Marriage Act, *S*. 7, 580.

under Christian Marriage Act, *S* 7, 580.

*Marriage Registrar—(Concluded)*

May ask for particulars to be registered, S 53, 605

Appointment of, under Malabar Marriage Act, S 4, 815

*Marriage Registrars in Native States*, under Christian Marriage Act, S 8, 580

*Marriage Validation*, Act, II of 1892, 641—644

*Marriage with another woman*, S 3, 44

*Married man*, Succession to separate property of a, dying intestate—Malabar Marriage Act, S 23, 826

*Married woman*, Will of—U, 232

Action of tort by—, V, 232.

Wife's legal position during continuance of protection order, S 31, 234

Women's earnings to be her separate property, S 1, 664

Women's wages and earning, 664—666

Savings from separate estate of—, C, D, 666

may effect policy of insurance, S 5, 667

Insurances by wives and husbands, 667—670

may take legal proceedings, S 7, 670

Legal proceedings by and against, 670—678

Suit against a, —Husband not necessary party, G, H, 673

Application of S 8 of Act III of 1871 to separate property of, subject to restraint upon anticipation, 673—678

Husband's liability for wife's debts, 679, 680.

Succession to separate property of a, dying intestate—Malabar Marriage Act, S. 24, 828.

*Married woman's property*, Separated wife deemed spinster with respect to after-acquired property, S. 24, 217, 218.

Proprietary rights of woman, how affected by her marriage—English Law—History of the Law, U—E, 221, 222.

Liability of husband seizing wife's property after notice of protection order, S 30, 233.

Married Women's Property, Act III of 1871, 661—680.

*Marumakkhatayam Law* See MALABAR LAW

See ALIYASANTHANA LAW

And Aliyasanthana Law—Nature of family governed by such Law Classes governed by, D, E, 799, 800

*Marumakkhatayam Marriage*, See MARRIAGE

Aliyasantana marriage, how differs from, H, I, 800

*Matrimonial causes*, Reason why District Courts were given jurisdiction in, V, 51

Jurisdiction of High Court to deal with, among Parsis, 508, 509.

*Matrimonial Courts*, Of Parsee—, 508—511

Practitioners in, under Parsi Marriage Act, S, 25, 511

*Matrimonial domicile*, same as ordinary domicile, G, 35

*Matrimonial jurisdiction*, of High Courts to be exercised subject to Divorce Act, S. 4, 49.

*Matrimonial relief*, See RELIEF

*Matrimonial Suits*, under Parsi Marriage Act, 511—528.

*May*, Meaning, Y—F, 11, 12

*Meaning of words*, See WORDS AND PHRASES Construction of words defined by the Legislature, E—O, 9, 10

Undefined words, construction of, P—T, 10

Judicially interpreted words occurring in enactments, construction of, U, 10.

"Or"—"And"—Meaning, V—X, 10, 11

"May"—"Shall"—Meaning, Y—F, 11, 12.

- Means of husband*, Mode of determining husband's means for the purpose of awarding alimony *pendente lite*, **286—289**
- Medical examination*, Practice in case of alleged impotence—As to alleged impotency, **194, 195.**
- Merchant Shipping Act, 1894*, St. 57 & 58 Vic., Ch. 60, **853.**
- Minister of religion*, English refusing to perform ceremony of second marriage to permit use of his church, S. 59, **396.**
- Minor*, Suit by, for dissolution of marriage, Y, **56**  
     • Marriage of, not null and void, I, **183**  
     Petitioner or respondent being, or lunatic—Guardian *ad litem*—English law and practice, D, **208.**  
     Suits by, under Divorce Act, S. 49, **362**  
     Provisions of Civil Procedure Code with regard to suits by or against, and persons of unsound mind, **363—366**  
     • S. 3, **570.**  
     Marriage of, English Law, K, **574**  
     Solemnizing without notice or within fourteen days after notice marriage with—Penalty, S. 70, **617**  
     Solemnizing marriage with, within fourteen days without authority of Court, or without sending copy of notice—Penalty, S. 71, **618**  
     Issuing certificate after expiry of notice, or in case of within fourteen days, after notice, or against authorized prohibition—Penalty, S. 72, **618**
- Minor children*, S. 3, **43**
- Minority*, Guardians—Practice and procedure under Parsi Marriage Act, I—L, **529,**
- Minor widow*, Consent to re-marriage of, S. 7, **476.**
- Minor wife*, Guardianship of, and children, S. 18, **823**
- Miscaduit*, Mere carelessness is not neglect M, R, **145**  
     of petitioner a bar to relief in suits for dissolution of marriage, **146—150**  
     What is, in the husband, **148, 149**  
     What is, in the wife, **149**  
     What is not, in the husband, **149, 150**  
     What is not, in the wife, **150**
- Misrepresentation*, Fraudulent,—Effect of on marriage—English Law, K, **202**
- Missing person*, Presumption as to death of a, A, B, **513**
- Month*, S. 3, **647.**
- Mother*, Hindu Law—Loss of caste—Right of guardianship of, J—L, **448, 449.**  
     Rights of widow and, compared, B, **463**  
     Right of re-married, to succeed to son by former husband, C—I, **463, 464**  
     Re-married—Power to give in adoption son by former husband, D, E, **474.**
- Motue*, For condonation, U, **115**  
     Of petitioner in asking for restitution, not material, G H, **237.**
- Motives of parties*, Reasons for enacting law, C, **14**
- Muhamedan*, Suit by person born a, claiming right as reversioner in Hindu family, D, E, **444, 445**  
     The Bengal, Marriages and Divorces Registration Act, I of 1876, **769—792**
- Muhamadan*, Registrar to keep registers, S. 6, **773**
- Muhamedanism*, Loss of caste—Hindu convert to, Succession, V, **447**
- Muhamedan Law*, Effect of conversion on right of inheritance under, Act XXI of 1850, N, **435, 436**  
     Provisions of, as to the effect of change of religion on the status of marriage, O—Q, **436—439**  
     Effect of conversion on the status of marriage according to the—Extracts from the writings of Muslem jurists, H, I, **439, 440.**

*Muhomedan Law*—(Concluded).

Divorce Act, IV of 1869 not applicable to Mahomedan converts to Christianity, *J*, 440.

Suits for restitution of conjugal rights by a Mahomedan convert to Christianity, *K*, 440.

Effect of change of religion on the obligation to maintain relatives under the, *L*, 440.

Who can appoint Kazi under, *F—N*, 683, 684.

Appointment of Kazi—Qualifications—Reg. XXVI of 1827—Act XI of 1864—Office of Kazi not hereditary, *B—E*, 688.

Powers of Kazi, *F—M*, 685, 686.

Provisions of Muhammadan Law relating to suits for restitution of conjugal rights, 249--253.

*Muhomedan marriage*, Divorce Act, does not apply to polygamous marriages, *H—J*, 2, 28.

Conversion, effect of, on—, *A, B*, 27.

Jurisdiction to dissolve, *Q*, 39.

Registration of,—Copy of entry in Register—Evidence, *F*, 773

Register of marriages as prescribed by S. 6 of Bengal Act I of 1876 for the voluntary registration of, and divorces, 779, 780.

Register of divorces other than those of the kind known as Khula prescribed by S. 6 of Bengal Act I of 1876 for the voluntary registration of, and divorces, 780, 781.

*Muhomedan Registrar*, S. 2, 772.

Duties of, on application, S. 9, 774

may receive gratuity, S. 10, 774.

to be subject to control of District Registrar, S. 17, 776, 777.

a public officer, S. 25, 778.

**N**

*Narb Kazis*, S. 3, 689

*Nambudri Brahmins*, Marriage, Ceremonies among, *F*, 809.

Widow marriage among, *H*, 809

*Name*, Divorced wife may retain the, of her first husband, *P—V*, 158, 159.

*Native Christians*, See CHRISTIANS.

S. 3, 571.

Licensing of persons to grant certificates of marriage between, under Christian Marriage Act, S. 9, 581.

Registrars to ascertain that notice and certificate are understood by, S. 57, 606.

to be made to understand declarations, S. 58, 607.

Registration of marriages between, S. 59, 607.

On what conditions marriages of, may be certified, S. 60, 607.

Marriage of, 607—611.

Books in which marriages of, under Part I or Part III of Act XV of 1872 are registered, S. 64, 610.

S. 2, 642.

*Native Converts' Marriage Dissolution*, Act XXI of 1866, 645—659.

*Native husband*, S. 3, 647.

*Native law*, S. 3, 647.

*Native State*, S. 3, 570.

Marriage Registrars in Native States under Christian Marriage Act, S. 8, 580

Officers to whom Registrars in, shall send certificates, S. 56, 606.

Power to prescribe fees and rules for, under Act XV of 1872, S. 84, 623.

*Native State*—(Concluded)

- Power for Governor General in Council to appoint Registrars for, S. 13, **707**.
- Native wife*, S. 3, **647**
- Naturalization Act, 1870*, St. 33 & 34 Vic., Ch. 14, **842**.
- Natural or legal*, Meaning of the terms, *D, E*, **201**
- Nayars*, Nature and effects of marital relationship among, *J—M*, **800, 801**.
- Necessaries*, Husband when liable for, of wife, **222—224**
  - What are, **224—227**
  - What luxuries are—, *K*, **226**
  - Procured for maintenance of child, *M—Q*, **226, 227**
- Neglect*, Coldness and insult producing an attack of melancholia, if cruelty, *M, N*, **74**.
  - Wilful, of petitioner a bar to relief in suit for dissolution of marriage, **145**.
  - Mere carelessness is not, or misconduct, *R*, **145**
  - Neglecting to apply promptly for alimony *pendente lite*—Effect, *E*, **275**.
  - Extreme, may amount to connivance, *C*, **108**
  - Negligence, See **NEGLECT**.
- New trial*, Order for,—Effect, *B*, **156**
- Not being brought before the Court*, meaning of the expression, *K—L*, **175**.
- Notice*, One of the parties to intended marriage to give, to Registrar under Special Marriage Act, S. 4, **547**, to be filed and copy entered in the Marriage Book, S. 5, **547**, Objection to marriage, S. 6, **548**, Procedure on receipt of objection, Objector may file suit, S. 7, **548**, Certificate of filing of suit to be lodged with Registrar, S. 8, **548** Court may fine when objection not reasonable, S. 9, **549**. When marriage not had within two months after, new, required, S. 52, **605**. Registrar to ascertain that, and certificate are understood by Native Christians, S. 57, **606**. Solemnizing, without or within fourteen days after, marriage with minor—Penalty, S. 70, **617** Issuing certificate, or marrying without publication of,—Penalty, S. 71, **617** Marrying after expiry of,—Penalty, S. 71, **617** Solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of,—Penalty, S. 71, **618**. Issuing certificate after expiry of or, in case of minor, within fourteen days, after, or against undissolved prohibition—Penalty, S. 72, **612**. Duty of Registrar to register births and deaths of which, is given, S. 19, **709**. Persons authorized to give, of birth, S. 20, **709, 710** Persons authorized to give, of death, S. 21, **710** Entry of birth or death to be signed by person giving, S. 22, **710, 711**. Of marriage intended to be solemnized under 55 and 56 Vic., C. 23, S. 2, **765, 766**. Of intention to register a Sumbulam to be given to the Registrar, S. 5, **815**. Petition for dissolution of marriage under Malabar Marriage Act—to be given to other party if petition is not joint, S. 20, **825**, Court to declare marriage dissolved within a specified period, S. 21, **825**. Service of, under Malabar Marriage Act, S. 25, **829**.
- Nullity of marriage*, See **DECREE FOR NULLITY OF MARRIAGE**.
  - See **VOIDABLE MARRIAGE**.
  - See **VOID MARRIAGE**.
  - See pp. **181—206**
  - Void marriage—Effect of delay in case of—Suits for, *M, N*, **140**.
  - Petition for decree of nullity, S. 18, **181**
  - Decree for,—Confirmation by High Court—Practice—Procedure, *R*, **181**.
- Nullity*, Suits for,—Prayer for restitution—English practice *S*, **151**.
  - Age of parties—How affects right to relief, *A, B*, **192**.



*Nullity—(Concluded).*

Decree of separation, how far bars relief on ground of, *C*, 182.

Burden of proof in suits for, *G*, 182.

Suits for nullity, test of jurisdiction—English Law, *G-1*, 186.

Grounds for a petition to declare marriage null and void, *J, K*, 186

Who can commence proceedings for,—English Law, 186—188

Lapse of time, effect of, on suit for, *F-K*, 188

Contents of decree nisi for, *L*, 188.

Grounds of decree of, *S*, 19, 189.

The party who is disqualified may also apply under certain circumstances for decree of nullity—Other cases where the party who is not fit can apply for decree of nullity, *D-E*, 190.

Suit must be instituted with reasonable promptness—Effect of delay, *F, G-1*, 191.

Suit for restitution of conjugal rights—Right to declaration of, *L*, 191

Cases where decrees for, have been granted to the husband, 191—193.

Cases where decrees of, have been refused to the husband, *Z-C'*, 193.

Cases where decrees for nullity were granted to the wife, 193, 194

Cases where decrees of nullity were refused to the wife, *J-L*, 194

Suit for,—First wife being the uterine half-sister of second wife—Domestic, *V*, 197.

Reason of the rule as to insanity being a ground for a suit for nullity, *F*, 201.

Confirmation of District Judge's decree of nullity, *S*, 20, 203

Children of annulled marriage, status of, *S* 21, 204

Decree nisi for dissolution and decree nisi of nullity—Difference, *d*, 204.

Nullity suit—Provision for child—English law and practice, *L-O*, 206.

Respondent in suit for restitution can also ask for, *d*, 203

Suit for restitution of conjugal rights instituted pending suit by respondent for dissolution or nullity or judicial separation, *W-Z*, 255

Variation of settlements in cases of, *X, Y*, 328

Power to make orders as to custody of children in suits for dissolution or nullity,

*S* 43, 338. Power to make such orders after decree or confirmation, *S* 41, 338.

Suit for a decree of, among Parsis, 511, 512. In case of lunacy or mental unsoundness, *S* 27, 511, in case of impotency, *S* 28, 512

Suit by wife for nullity—General and relative impotency—Impotency, *quoad hanc*—English Law, *W-Z*, 512

## O

*Object of legislature*, In fixing residence as the test of jurisdiction under the Divorce Act, *V, F*, 29.

*Offence*, Cognizance of, under Parsi Marriage Act, *S* 16, 530

*Offer to return*, Effect of on desertion, 96-98.

*On*, Meaning of the word, *V*, 297

*Or*, Meaning of, *V-X*, 10, 11.

Case where "And" is to be read as, *B*, 152.

*Orders*, Enforcement of and appeals from, and decrees under the Divorce Act, *S*, 55, 381.

Rules and, under Act XV of 1865 (Parsi Marriage and Divorce) in force in Bombay, 533—536.

Rules and, made under Act III of 1872 (Special Marriage)—General, 556; Bengal, 557, Bombay, 557—559, U P, 559, 560, Punjab, 560.

Rules and, made under Act XV of 1872, Christian Marriage. Bengal, 630—633, Bombay, 634, 635, U P, 635—638, Punjab, 639, 640.

*Orders—(Concluded).*

Rules and, made under Act VI of 1886—(General, **719–730**, Bengal, **730–745**; Bombay, **745–751** Punjab, **752, 753**, Madras, **754, 755**; U.P., **756, 757**.

*Order for alimony*, Entering, *pendente lite*, **289, 290**

*Oudh Estates Act*, Loss of estate—Succession under, I of 1869, N, **441**.

*Parda-nashin*, S. 2, **772**

*Parents*, Case where both, the unit—Custody given to a third person, **347**.

*Parsees*, Not subject to Ecclesiastical Law, *E. F.*, **494**

Construction of Parsi Marriage Act—English Law how far helpful, *W–L*, **493, 495**

Parsi Marriage Act is based on English Law, *M*, **495**

Effect of Hindu customs on, Law of marriage, *O*, **495**

- Rule of justice, equity and good conscience when to be applied to, *P*, **495**

Who are—Zoroastrians—Conversion, *S–W*, **495, 496**

Adoption among,—Will—Evidence, *X–Z*, **496**

Of marriages between, **497–503**

Infant marriages among, *P*, **499, 500**

Infant marriage amongst,—Consent of father or guardian—Consent may be implied, *E–G*, **500–502**

Punishment of bigamy among, S. 5, **503**

Re-marriage by a Parsee save after divorce unlawful during lifetime of first wife or husband, S. 1, **503**

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsi Marriage Act not punishable, *R*, **504**

Jurisdiction of High Court to deal with matrimonial causes among, *U*, **508, 509**

Suit for a decree of nullity of marriage among, **511, 512**, In case of insanity or mental unsoundness, S. 24, **511**, In case of impotency, S. 28, **512**

Suit for a decree of dissolution in case of absence, among,—In case of absence for seven years, S. 29, **513**

- Suit for divorce—Husband's liability for wife's costs—Rule of English Law applicable to, *C–H*, **514**

Second marriage contracted by a Parsi husband while first wife was living, prior to the passing of this Act, *N–L*, **516, 517**

What is legal cruelty among,—English Law how far helpful, *V–Y*, **517, 518**

Adultery of Parsi prisoner—Effect *Z–B*, **519–520**

Payment of alimony to wife or her trustee among, S. 35, **522**

Decree for restitution among, how far enforceable, *T–Z*, **524–526**.

No suit to enforce marriage or contract arising out of marriage when husband under 16, or wife under 14 years, Parsi Marriage Act, S. 37, **527**.

Minority—Guardians—Practice and procedure under Parsi Marriage Act, *I–L*, **529**.

Cognizance of offences under Parsi Marriage Act, S. 45, **530**.

*Parsee Chief Matrimonial Courts*, S. 16, **509**.

• *Parsee District Matrimonial Court*, S. 17, **509**

*Parsi Marriage*, See MARRIAGE

Act is based on English Law, *M*, **495**

Requisites to validity of, S. 3, **497**

Table of prohibited degrees of consanguinity or affinity framed by the Governor General in Council, *A, B*, **498, 499**.

Marriage among Parsees—Suit for declaration of invalidity of marriage during infancy—Effect of custom validating such marriage—Age of majority among

*Parsi Marriage*—(Concluded).

Parsis for purposes of marriage, *M—O*, 502, 503.

Penalty for solemnizing marriage contrary to section 4 of, Act, S. 9, 506.  
and Divorce Act XV of 1865—Alimony—Charge on husband's immovable property—Widow—Distributive share, *I, J*, 522.

Rules and orders under Act XV of 1865 (*Parsi Marriage and Divorce*) in force in Bombay, 533—536

*Parsee Marriage and Divorce Act XV of 1865*, 493—536.

*Parsee Matrimonial Courts*, *O*, 508—511.

Rules of procedure of, to be made by High Court, S. 51, 531.

*Parsees*, Provisions relating to suits for restitution of conjugal rights among Parsees, 253, 254.

*Parsi widow*, *Parsi Marriage and Divorce Act XV of 1865*—Alimony—Charge on husband's immovable property—Widow—Distributive share, *I, J*, 522.

*Parties to marriage*, *U, V*, 572.

*Parties to suit*, Suit against a married woman—Husband not necessary party, *G, H*, 673.

*Payment*, Order as to the, and disposition of damages against adulterer, 268—270.

*Penal servitude*, Alimony where wife undergoes sentence of, *Q*, 296

*Penalty*, Punishment for abetting marriage made contrary to S. 7 of the Hindu Widows' Re-marriage Act—Effect of such marriage—Proviso, S. 7, 476, 477.

Punishment of bigamy among Parsis, S. 5, 503.

for solemnizing marriage contrary to S. 4 of *Parsi Marriage Act*, S. 9, 506

for priest's neglect of requirements of S. 6 of *Parsi Marriage Act*, S. 10, 506

for omitting to subscribe and attest certificate under *Parsi Marriage Act*, S. 11, 507.

for making, &c., false certificate under *Parsi Marriage Act*, S. 12, 507.

for not registering certificate under *Parsi Marriage Act*, S. 13, 507

Punishment of offences under *Parsi Marriage Act* committed within local limits of High Court, S. 47, 530

on married person marrying again under *Special Marriage Act*, S. 15, 552

Punishment of bigamy under *Special Marriage Act*, S. 16, 552.

for signing declarations or certificates containing false statements under *Special Marriage Act*, S. 21, 553.

under Act XV of 1872, 611—620.

for solemnizing irregular marriages—Act II of 1892, S. 6, 644

on respondent not obeying citation under Act XXI of 1866, S. 11, 649

for false information under Act VI of 1886, 713

for wilfully giving false information under Act VI of 1886, S. 27, 713.

Zamindars, etc., responsible for immediate communication to police of intended sacrifice—in case of neglect, S. 3, 832.

In case of neglect to communicate about *Sati*, S. 3, 836

*Pending suits*, when *Divorce Act* came into force, S. 6, 52.

*Permanent Alimony*, See ALIMONY, PERMANENT

*Petition*, Forms of, and statements, S. 46, 360.

Stamp on, under *Divorce Act*—to state absence of collusion or connivance—Statements to be verified, S. 47, 360.

*Pm-money*, Separate maintenance settled on wife, *G*, 667.

*Pleader's fee*, Suit for judicial separation, *P*, 53

*Pleading*, counter charges, *V, W*, 121.

Cruelty, *H, I*, 142.

*Police*, Zamindars, etc., responsible for immediate communication to, of intended sacrifice—Penalty in case of neglect, S. 3, 832.

*Police—(Concluded).*

how to act on receiving intelligence of intended sacrifice, S 3, 832, 833.

how to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, 833.

Zemindars, &c, responsible for immediate communication to, of intended sacrifice, S 3, 835, 836.

how to act on receiving intelligence of intended sacrifice—How to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, 836

*Polygamous marriages*, Registration of Muhammedan Marriages Act, does not apply to, H—J, 2, 25.

Courts, whether can grant relief in case of, L—O, 53.

*Post-nuptial debts*, Wife's liability for, S 8, 671

*Post-nuptial settlement*, Inquiry into existence of ante nuptial or, S. 10, 314.

• What is, B—I—D, 328 •

Variation of, E, 329

*Powers of appointment*, Variation of, X, Y, 330

Varying joint, B, 331.

Guilty party's, variation of, C, D, 331

*Power to transfer suits*, S 8, 54.

*Practice and Procedure*, See pp 152, 153

See App VI, pp 953—982.

As to filing written statements, J, 53

Alimony *pendente lite*—Absence of means—Reference to Registrar, H, 305

As to settlement of damages, R, 313.

Of English Courts as to affidavit, 373—376

Divergence between several High Courts—Course to be adopted by subordinate Courts, C, D, 9.

Stay of proceedings, practice as to, G, 32.

Adjournment, practice as to, H, 33.

Court in India to act on principles of English Divorce Court, S 7, 52

• Courts, whether can grant relief in case of polygamous marriage, L—O, 53.

Judicial separation may be granted in a suit for divorce, R—T, 59.

Decree based merely on admissions and without recording evidence, R—T, 98.

Adulterer to be co respondent in suits for dissolution of marriage, S 11, 99.

Charge of adultery with persons, of whom some are known and some unknown—

Practice, L, 101

Affidavit to dispense with co-respondent—Practice as to, P—R 101.

Intervening in a divorce suit—Allegation by the husband in his answer that the wife committed adultery—Application by the alleged adulterer to intervene, A, B, 102.

Person implicated by petitioner may intervene, S—Z, 102.

Applications to dispense with co-respondent—Practice as to, H, 103.

Affidavit in support of motion to dispense with co respondent, I, J, 103

Where adulterer is absent abroad—Practice, L, 103

Co-respondents' right to be heard in appeal, M, 104

Respondent leading the life of a prostitute - Effect—Practice, N, 104.

Where there are charges against unknown persons—Practice, X, Y, 105

Adulterer's name being known after filing petition—Practice, Z, 105.

Where adulterer's identity is lost through neglect, D, 106.

Death of co-respondent whilst suit is pending—Practice, E, F, 106.

In suit for dissolution, Court to be satisfied of absence of collusion, connivance, etc, S. 12, 106.

*Practice and Procedure—(Continued)*

Condonation need not be specially pleaded, *E*, 116.

Pleading counter charges, *V*, *W*, 121.

Counter charges—Duty of Court before pronouncing decree nisi, *X*, 121

Dismissal of petition for dissolution on ground of collusion, etc., *S*, 13, 121.

Power of Court to pronounce decree for dissolving marriage, *S*, 14, 126.

Decree for dissolution not to be made on mere admissions, *P*, 127.

Amendment of petition for dissolution into one for judicial separation, *T*, *U*, 128

Opportunity to be given to petitioner to amend petition in certain cases, *V*, 128.

Power to grant judicial separation where dissolution of marriage is prayed for, *W*, 128.

Court may attach conditions to making of a decree for dissolution of marriage, *X*, *Y*, 128, 129

Discretion of Court in cases of dissolution how to be exercised, *B—G*, 129, 130.

Duty of Court exercising jurisdiction under the Divorce Act, *L*, 130.

Court refusing relief on ground of petitioner's adultery—Such refusal no bar to Court's granting relief on subsequent proceeding, *M*, *N*, 130.

Discretion in case of petitioner's adultery—Cases where the discretion has been exercised in favour of the petitioner, *A—P*, 132.

*Compensatio criminum*, doctrine of—Canon Law—Above doctrine not applicable under Indian Divorce Act, *H—J*, 133.

Cases where petitioner's adultery was excused and decree made in petitioner's favour—Where the adultery is committed in ignorance of fact—or in ignorance of law, 134—136.

Where the adultery is committed in consequence of the violence and threats of the husband, petition adultery is excused and decree passed for dissolution, *R*, *S*, 135.

When the adultery is committed by petitioner to the knowledge of respondent, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, 135, 136.

Decrees for dissolution were granted to the husband, cases where, 136.

Decrees for dissolution were refused to the husband, cases where, 136, 137.

Decrees for dissolution were granted to the wife, cases where, 138.

Decrees for dissolution were refused to wife, cases where, 138.

Cruelty of petitioner as a bar to relief in suits for dissolution of marriage 141, 142.

Plea of desertion in defence, *U*, 143.

Wilful neglect of petitioner a bar to relief in suits for dissolution of marriage, 145.

Misconduct of petitioner a bar to relief in suits for dissolution of marriage, 146.

Relief to respondent in case of opposition on certain grounds, *S*, 15, 150

Cross-suits—Conduct of suit to whom given, *P*, 151.

Suits for nullity—Prayer for restitution—English practice, *S*, 151.

Cases where affirmative relief was allowed on cross-prayer, *U—V*, 151, 152.

Cases where affirmative relief was not afforded on cross-prayer, *Z*, *A*, 152.

Decrees for dissolution to be nisi—Collusion, *S*, 16, 153, 154.

Practice in applying for decree absolute, 162—164.

General principles as to intervention, 165, 166.

Intervention by Queen's Proctor, 166—170.

Who can intervene, 166—174.

Intervention by private persons, 170—174.

*Practice and Procedure—(Continued)*

Grounds for intervention, **174, 175**

Confirmation of decree for dissolution by District Judge, S. 17, **176, 177**

District Judge passing decree for dissolution of marriage, subject to confirmation, with costs against respondent—Power to execute decree as to costs before confirmation, *L*, **180**.

Necessity for a motion for High Court to make decree *nisi* absolute, *M—P*, **180, 181**

Under the Divorce Act IV of 1869, **339—394**.

Original summons personally served on the respondent—Decree *nisi* passed *ex parte*—Application for making the decree absolute, **181**.

Decree for nullity of marriage—Confirmation by High Court—Practice—Procedure, *R*, **181**

The party who is disqualified may also apply under certain circumstances for

• decree of nullity—Other cases where the party who is not fit can apply for decree of nullity, *B—E*, **190**

Suit for restitution of conjugal rights—Right for declaration of nullity of marriage, *L*, **191**

Cases where decrees for nullity of marriage have been granted to the husband, **191—193**

Cases where decrees of nullity of marriage have been refused to the husband, *Z—C*, **193**

Case where decrees for nullity were granted to the wife, **193, 194**

Case where decrees of nullity were refused to the wife, *J—L*, **194**.

Practice in case of alleged impotence—Medical examination, as to alleged impotence, **194, 195**

Confirmation of District Judge's decree of nullity, S. 20, **203**.

Decree *nisi* for dissolution and decree *nisi* of nullity—Difference, *A*, **204**.

Nullity suit—provision for child—English Law and Practice, *L—O*, **206**.

Petitioner or respondent being minor or lunatic—Guardian *ad litem*—English Law and practice, *P*, **206**.

Compromise of suit, practice as to, *G*, **208**.

Respondent in suit for restitution of conjugal rights may ask for judicial separation, *Z*, **208**.

Legal grounds why the application for judicial separation should not be granted—What are such legal grounds, **212—215**; What are not such legal grounds, **216, 217**.

Damages and costs against adulterer, **262—271**

Damages against adulterer—Measure of damages, **263—271**, circumstances which tend to reduce, **267**, those which tend to enhance them, **268**.

Order as to the payment and disposition of damages against adulterer, **268—270**.

Practice in claiming damages against adulterer, **270**

Claim for damages against adulterer without claiming dissolution or judicial separation, *P—T*, **270**.

Power to order adulterer to pay costs, S. 35, **271**

Alimony *pendente lite*—Jurisdiction—Application after decree *nisi*, *C—E*, **273**.

Alimony *pendente lite*, when payable—Ecclesiastical Courts, practice of, *J*, **274**

Facts to be established before alimony *pendente lite* can be granted—Practice of Ecclesiastical Courts, *L—T*, **274, 275**

Application to make decree absolute—Attends of alimony, *B*, **279**.

No application would lie for a small sum pending petition for alimony, *S*, **279**.

Mode of determining husband's means for the purpose of awarding alimony *pendente lite*, **286—289**

*Practice and Procedure*—(Concluded).

Enforcing order for alimony *pendente lite*, 289, 290.

Regarding the grant of alimony *pendente lite*, 290

In matters of variation of settlements, 333—337

In making orders as to custody of children and access to children, 352—359.

Power to close doors in proceedings under the Divorce Act, S. 53, 378.

Suits with closed doors under Parsi Marriage Act, S. 38, 527.

Power to adjourn cases under the Divorce Act, S. 54, 379.

Determination of questions of law, procedure and fact under Parsi Marriage Act, S. 41, 528.

Minority—Guardians—under Parsi Marriage Act, I—L, 529

Levy of fines by distress under Parsi Marriage Act, S. 48, 530, procedure until return made to distress warrant, S. 49, 530; imprisonment if no sufficient distress, S. 50, 531.

Rules of procedure of Parsi Matrimonial Courts to be made by High Court, S. 51, 531.

Procedure when female respondent refuses to cohabit with petitioner under Act XXI of 1866—Adjournment for a year—Interview, S. 15, 650, Procedure on expiration of adjournment—Interrogation of respondent—Decree, S. 16, 650.

Decree in case of male respondent refusing to cohabit on grounds of petitioner's change of religion—Act XXI of 1866, S. 17, 650, Decree if respondent so refuse in case of unconsummated marriage, either party being impubes at time of marriage, S. 18, 651

Person objecting to Registration of Sambandam may file a suit in a Civil Court, S. 9, 818. Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, 819.

*Preamble*, how far guide in construction of statutes, M—X, 5, 6.

Recitals in Act or, how far guide in construction, V, 6.

*Pregnancy*, concealment of—Effect of marriage contracted during such, V—X, 203.

*Prescribed*, S. 3, 703

*Presumption*, is in favour of validity of marriage, U, V, 181,

Marriage properly and duly performed—of validity, M, N, 196.

as to death of a missing person, A, B, 543

in favour of marriage, R, S, 572.

*Priest*, See CLERGYMAN

S. 2, 496.

Presence of, if necessary for marriage—English Law, M—W, 577, 578.

*Private persons*, Intervention by, 170—174.

*Private residence*, Registration at a, under Malabar Marriage Act, S. 13, 820.

*Privy Council*, Appeal to Queen in Council under Divorce Act, S. 56, 383.

Provisions of the Code of Civil Procedure relating to appeals to the King in Council and principles and practice governing the same, 383—394

*Privy Council*—*Practice of*, not disturbing concurrent findings when departed from, X, 178.

*Proceedings in Council*, If can be referred to in construing an Act, Z, 14.

*Procedure*, See PRACTICE AND PROCEDURE Marriage not invalid by reason of irregularity in, S. 16, 821.

*Prohibited Degrees*, See AFFINITY See CONSANGUINITY.

Of consanguinity or affinity contemplated by the law—English law and Indian, E—J, 63.

Where foreigners marry in England within the, of relationship of their own country, D—F, 186

*Prohibited degrees—(Concluded)*

Grounds of decree of nullity of marriage, S 19, **189.**

in this country not same as in England, *D—L*, **196**

*Proof.* See EVIDENCE

of desertion, *T*, *U*, **83, 84**

What matters need not be proved in respect of marriage in accordance with Act XV of 1872, S 77, **620.**

- Points to be proved on appearances of petitioner under Act XXI of 1866, S 12, **649.**

of marriage and desertion or repudiation of petitioner in consequence of conversion, S 21, **652, 653**

*Proof of adultery.* Reference to previous records in proof of petitioner's adultery, *O*, **131.***Proof of cohabitation.* *M—O*, **109, 110***Proof of marriage.* There must be some, in Matrimonial suits, *V*, **99**

necessary before restitution can be decreed, *I* **237**

*Property.* S 1, **44**

meaning of, *R*, **220.**

what is, *L*, **329.**

*Property settled, what is.* *M—O*, **329, 330***Proprietary rights.* Effect of marriage on,—Succession Act, S 4, *K, L*, **219, 220.**

of women, how affected by her marriage—English Law—History of the Law, *C—E*, **221, 222.**

*Prostitute* respondent leading the life of a,—Effect—Practice, *N*, **104.**

Suit for divorce—Cohabitation, *O—Q*, **104**

Petitioner knowing the name of the adulterer even when wife is leading the life of a,—Co respondent, *T—U*, **104**

*Protection order.* See **223—234.**

Administration to wife dying after a judicial separation or—English law, *Z—D*,

- **178, 179.**

Decree for judicial separation and,—Difference, *J*, **219**

Death of either party while,—judicial separation order is in force—Effects on rights of succession of the other party, *M—Q*, **220**

Deserted wife may apply to Court for protection, S 27, **228**

contents of, *H*, **230**

Effect of, **230** *T*, **232**

Liability of husband or creditor taking wife's property after *I*, **230**

Court may grant, S 28, **230**

Form of, *L*, *M*, **231**

Order should be in general terms—Effect of such order, *N—R*, **231, 232**

Alimony *pendente lite* effect of, upon, *S*, **232**

Letters of administration, *W*, **232**

Discharge or variation of, S 29, **232**

Liability of husband seizing wife's property after notice of, S 30, **233**

- is retrospective in its effect, *H*, *I*, **234.**

Action for libel by wife obtaining, *J* **234.**

No right of action for injury to property committed before date of, *L*, **234**

Legate bequeathed to wife after desertion and previous to, *M*, **234**

Degree of judicial separation and,—Difference—English Law, *N—P*, **234.**

Wife's legal position during continuance of, S 31, **234**

no bar to application for alimony *pendente lite*, *F*, **277.**



*Protection order*—(Concluded).

Decree for separation or, valid as to persons dealing with wife before reversal—  
Indemnity of persons making payment to wife without notice of reversal of  
decree or, S. 60, 397.

*Proviso*, Their effect on the section, *H—K*, 14, 15

*Prudence*, Want of,—Error of judgment not connivance, *V*, 108.

*Public Officer*, See PUBLIC SERVANT

Muhammadan Registrar, S. 25, 778

*Public servant*, See PUBLIC OFFICER.

Power to appoint new delegates under Parsi Marriage Act—Delegates deemed,—  
Selection of delegates under sections 16 and 17 from those appointed under  
section 21, Ss. 22, 23 24, 511

Registrar to be deemed a—, S. 14, 707.

*Pudumurti form*, Sambandam how contracted, *D, E*, 807, 808

*Punctuation*, if guide in construction, *E, F*, 7

## Q

*Quakers*, English marriages, validity of Marriages of Jews and, *Y—D*, 198

*Queen's Proctor*, Intervention by, 166—170

*Question of fact*, Condonation is a, *A*, 116

*Rape*, Definition of, *X*, 65

Proof of,—Proof of conviction for, not sufficient, *Z, A*, 66

Conduct short of, may amount to cruelty, *B*, 66

Wife's adultery no excuse for, by husband, *C*, 66

Conviction for indecent assault no bar to suit for dissolution on ground of, *D*, 66.

*Reasons for enacting law*, Motives of parties, *C*, 14

*Recital*, in Act or preamble, how far guide in construction, *I*, 6

*Records*, Register books to be supplied and preservation of, to be provided for, S. 18,  
709

*Reference*, to High Courts, S. 9, 54

High Court may refer case to Judge for additions or alterations—Act XXI of  
1866, S. 32, 655; High Court may decide question raised, and Judge shall  
dispose of case accordingly, S. 33, 655.

when Marriage Registrar in Native State doubts authority of person forbidding,  
S. 48, 603.

Procedure on, Act XV of 1872, S. 48, 604

*Register*, See MARRIAGE REGISTER

Marriage, to be open for public inspection under Parsee Marriage Act, S. 8, 505.

Appointment of Commissioners to examine,—Act VI of 1886, S. 34, 715; Duties  
of Commissioners, S. 34, 715, 716.

Muhammadan Registrar to keep, S. 6, 773.

Registration of Muhammadan marriages—Copy of entry in,—Evidence, *F*, 773.

Lady's name clandestinely published wrongly—Correct name entered in the,—  
Effect, S. 587.

*Register-book*, Custody of, S. 55, 606.

Keeping of, and deposit of extracts therefrom with Registrar-General, S. 62,  
609

Searches in, and copies of entries, S. 63, 610.

Destroying or falsifying—Penalty, S. 75, 620.

*Register-book*—(Concluded).

To be supplied and preservation of records to be provided for, S 18, **709**.

Duty of Registrars as to sending certified copies of entries in, to Registrar General, S 24, **711**.

Searches and copies of entries in, S. 25, **712**.

Custody and disposal of, S. 37, **596**.

*Register of divorces*, other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, **780**

Of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, **781**

*Register of marriages*, as prescribed by section 6 of the Bengal Act I of 1876 for the voluntary registration of Muhammadan marriages and divorces, **779, 780**

*Registrar*, See MAHOMEDAN REGISTRAR

See MARRIAGE REGISTRAR.

See REGISTRAR OF BIRTHS, DEATHS AND MARRIAGES.

See S 2, **772**

Appointment of, under Parsi Marriage Act, S 7, **504**.

One of the parties to intended marriage to give notice to, under Special Marriage Act, S 4, **547**, Notice to be filed and copy entered in the Marriage Notice Book, S 5, **547**, Objection to marriage, S 6, **548**, Procedure on receipt of objection, Objector may file suit, S 8, **548**, Certificate of filing of suit to be lodged with, S. 8, **548**, Court may fine when objection not reasonable, S 9, **549**, Officers to whom, in Native States shall send certificates, S 56, **606**

to ascertain that notice and certificate are understood by Native Christians, S. 57, **606**

Forbidding by false personation, issue of certificate by marriage,—Penalty, S 67, **612**

Superintendence of, by Registrar General, S 10, **705**.

Power for Local Government to appoint, for its territories, S 12, **706**.

Power for Governor General in Council to appoint, for Native States, S 13, **707**.

To be deemed a public servant, S. 14, **707**

Power to remove, S. 15, **707, 708**.

Office and attendance of, S. 16, **708**

Absence of, or vacancy in his office, S. 17, **708**.

Duty of, to register births and deaths of which notice is given, S. 19, **709**.

Duty of, as to sending certified copies of entries in register books to Registrar General, S 24, **711**

Muhammadian, to keep registers, S 6, **773**.

Notice of intention to register a Sambandam to be given to the, S. 5, **818**.

to file such notices and to maintain the "Marriage Notice Book" under Malabar Marriage Act, S. 6, **816**, Copies of notice to be served on interested parties—Withdrawal of notice, S. 7, **816**.

Person objecting to Registration of Sambandam may file a suit in a Civil Court, S. 9, **818**, Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with, S. 10, **819**.

to enter certificates of marriage in "The Marriage Certificate Book" under Malabar Marriage Act, S. 12, **820**.

Fees payable to, under Malabar Marriage Act, S. 14, **820**.

Marriage by, Act V of 1852, **878--886**.

Sending copy of notice to marriage, when one party is a minor—Procedure on receipt of notice—Issue of certificate of notice given and declaration made—Declaration before issue of certificate, Ss. 15—18, **890, 891**.

*Registrar—(Concluded).*

To add number of entry to certificate, and send to Registrar-General, S. 36, **596**.

Notice of intended marriage before Marriage, S. 38, **597**.

Petition when Marriage, refuses certificate, S. 46, **602**.

Petition when Marriage, in Native State refuses certificate, S. 47, **603**.

Petition when, doubts authority of person forbidding marriage, S. 48, **603**.

Reference when Marriage, in Native State doubts authority of person forbidding, S. 48, **603**

*Registrar-General, Certificates to be sent monthly to, S. 55, 606*

Keeping of register-book and deposit of extracts therefrom with, S. 62, **609**.

Establishment of general registry offices and appointment of, S. 6, **703**.

Superintendence of Registrars by, S. 10, **705**.

Duty of Registrars as to sending certified copies of entries in register books to, S. 24, **711**

Permission to persons having custody of certain records to send them within one year to, S. 32 **715**.

Certificate to be forwarded to Marriage Registrar, copied and sent to, S. 34, **595**

Registrar to add number of entry to certificate and send to, S. 36, **596**.

*Registrar General of Births Deaths and Marriages, S. 3, 571*

Transmission of certified copies of certificates in marriage register to, S. 8A **505**.

Transmission of certified copies of entries in marriage certificate book to, under Special Marriage Act, S. 13-A, **551**

Transmission of certified copies of entries in marriage certificate book to the, S. 29, **713**.

Transmission of certified copies of certificates in marriage register to, S. 31, **714**.

*Registrar of Births, Deaths and Marriages, See REGISTRAR*

S. 3, **703**.

*Registration, of marriage solemnized under Part V of Act XV of 1872, S. 54, 605.*

of marriages between Native Christians, S. 59, **607**.

Books in which marriages of Native Christians under Part I or Part III of Act XV of 1872 are registered, S. 61, **610**

The Births, Deaths and Marriages, Act, 1886, **695 - 756**

Mode of, **709-713**

Grant of certificate of, of birth or death, S. 23, **711**.

Exceptional provision for, of certain births and deaths, S. 26 **712**.

The Births, Deaths and Marriages, Act XVI of 1886, Amendment, Act, 1890, **759, 760**.

The Births, Deaths and Marriages, (Amendment) Act, 1911, **761, 762**.

The Bengal Muhammadan Marriages and Divorces, Act, I of 1876, **769-792**.

Lieutenant-Governor may grant licences to register under Act I of 1876, S. 3, **772**.

of Muhammadan marriages—Copy of entry in Register—Evidence, *F*, **773**.

Refusal to register to be recorded under Bengal Act I of 1876, S. 20, **777**, Appeal against refusal to register, S. 21, **777**.

Register of marriages as prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, **779, 780**.

Register of divorces other than those of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, **780**.

Register of divorces of the kind known as Khula prescribed by section 6 of Bengal Act I of 1876 for the voluntary, of Muhammadan marriages and divorces, **781**

Conditions subject to which a Sambandam may be registered as a marriage, S. 3, **811, 812**.

**Registration—(Concluded).**

at a private residence under Malabar Marriage Act, S. 13, **820**.

of Births, Deaths and Marriages Army Act, 1879, **843, 844**.

of Marriages solemnized by ministers of religion, **593—597**.

of marriages solemnized by Clergyman of Church of England, S. 28, **294**, Quarterly returns to Archdeaconry—Contents of returns, S. 29, **594**.

and returns of marriages solemnized by Clergymen of Church of Rome, S. 30, **594**.

and returns of marriages solemnized by Clergymen of Church of Scotland, S. 31, **595**.

Certain marriages to be registered in duplicate—Entries of such marriages to be signed and attested, Ss. 32, 33, **595**.

of marriages between Native Christians under Part I or III of Act XV of 1872, S. 37, **596**.

Proof of marriage—Non, effect of, K, **598**.

*Registration of births and deaths*, **705—713**.

See REGISTRATION.

*Registration of establishment*, **706—709**

*Registration of marriages*, under Malabar Marriage Act, **815—821**

*Registration of Sumbandiam*, Persons entitled to object to,—Grounds on which objection may be taken—Procedure of Registrar if objection is taken—Procedure if no objection is taken, S. 8, **817**.

Person objecting to, may file a suit in a Civil Court, S. 9, **818**; Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, **819**.

Declaration to be signed before registration, S. 11, **819**.

*Registry offices*, Establishment of general and appointment of Registrars General, S. 6, **703**

General, of births, deaths and marriages, **703—705**.

Indexes to be kept at general, S. 7, **705**.

*Registry of marriages*, certificate and, under Parsee Marriage Act, S. 6, **504**.

*Reg. XVII of 1829 (Bengal Sati)*, **831—833**.

*Reg. XXVI of 1827*, Muhammadan Law—Appointment of Kazi—Qualifications—Act XI of 1864—Office of Kazi not hereditary, B—E, **685**.

Functions of Kazi, N—S, **686, 687**

*Reg. I of 1830 (Madras Regulation)*, **835—837**.

*Relationship*, by half blood, effect of, on marriage, O, **199**.

Illegitimate, effect of, on marriage, P, **199**

by adoption, D, E, **201**

*Release*, Affairs of alimony, promise to, M, N, **309**

*Relief*, See MATRIMONIAL RELIEF.

to respondent in case of opposition on certain grounds, S. 15, **150**

Two modes in which respondent may obtain affirmative, P, **151**.

Cases where affirmative, was allowed on cross-prayer, U—V, **151, 152**

Cases where affirmative, was not afforded on cross-prayer, Z, A, **152**.

Cross-prayer for affirmative—Petitioner not allowed to withdraw petition, E, **153**.

Notice of withdrawal of petition no bar to affirmative, being prayed for by respondent, F, **153**.

Age of parties—How affects right to, A, B, **182**.

Provided for by Divorce Act only applies to Christian marriages Q—U, **197**.

*Religious institutions*, Act XXI of 1850 not to affect usage of Hindu temple or other, M, N, **449**.

Usages of, not affected by S. 5 of Act XV of 1856, G, H, **474**.

**Re-marriage, See SECOND MARRIAGE.**

See **WIDOW RE-MARRIAGE.**

Just after a fortnight after decree nisi a nullity, *U, V, 177, 178*

Liberty to parties to marry again after divorce, *S, 57, 394.*

Provision as to, under Divorce Act, *394—396.*

English clergyman not compelled to solemnize marriages of persons divorced for adultery, *S, 58, 395.*

English Minister refusing to perform ceremony of second marriage to permit use of his church, *S, 59, 396.*

Widow,—Exclusion from temple—Ex-communication—Jurisdiction, *O, 449.*

The Hindu Widows' Act, 1856, *451—492.*

According to custom and independently of Act XV of 1856—Applicability of that Act, *E, 453.*

Rights of widow in deceased husband's property to cease on her, *S, 2, 460*

Lost right of widow on, cannot revive, *G—K, 460, 461.*

By a Parsi save after divorce unlawful during life-time of first wife or husband, *S, 4, 503.*

Second marriage contracted by a Parsi husband while his first wife was living, prior to the passing of the Parsi Marriage Act, not punishable, *It, 504.*

Second Marriage contracted by a Parsi husband while first wife was living, prior to the passing of the Parsi Marriage Act, *N—U, 516, 517.*

Liberty to parties to marry again under Parsi Marriage Act, *S, 13, 528.*

Penalty on married person marrying again under Special Marriage Act, *S, 15, 552.*

Liberty to parties to marry again after dissolution of marriage under Act XXI of 1866, *S, 19, 652.*

**Repeal,** Of a statute, repealing another statute, *V, 16.*

By implication, *W, 16.*

Effect of, on right of action, *X, Y, 16.*

**Report of Select Committee,** Speech in Council, if can be referred to in construing an Act, *A, 14.*

**Residence,** Meaning of, *Q—T, 28, 29.*

In India necessary at time of presenting a petition under the Act, *28—38.*

Object of the legislature in fixing, as the text of jurisdiction under the Act, *U, V, 29.*

Meaning, *W—H, 29, 30.*

History of the Divorce bill as to jurisdiction based on, *C, 32.*

Falling short of domicile will not confer jurisdiction under English Law, *B, 35.*

Necessary to confer jurisdiction under Divorce Act, *R—U, 50*

**Respondent,** and co respondent—One may be found guilty of adultery and the other not, *A—C, 60.*

Leading the life of a prostitute—Effect—Practice, *N, 104.*

When the adultery is committed by petitioner to the knowledge of, and by him or her long since pardoned and condoned, petitioner's adultery is excused and a decree passed for dissolution, *135, 136.*

Relief to, in case of opposition on certain grounds, *S, 15, 150.*

Two modes in which, may obtain affirmative relief, *T, 151.*

Cases where affirmative relief was allowed on cross-prayer, *U—Y, 151, 152.*

Cases where affirmative relief was not afforded on cross-prayer, *Z, A, 152.*

Notice of withdrawal of petition no bar to affirmative relief being prayed for by, *F, 153.*

Death of, and co-respondent, *Z, 156.*

*Restitution of conjugal rights, See pp. 235—262.*

See DECREE FOR RESTITUTION OF CONJUGAL RIGHTS.

Disobedience of order for, *A*, 118.

Suits for nullity—Prayer for restitution—English practice, *S*, 151.

Suit for, —Right to declaration of nullity of marriage, *L*, 191

Respondent in suit for restitution can also ask for nullity of marriage, *A*, 208.

Failure to comply with decree for, —Effect—English and Indian Law—Difference, *B*, 208.

Respondent in suit for, may ask for judicial separation, *Z*, 208.

Petition for, *S* 32, 235.

Previous demand in writing necessary before restitution can be claimed in Court —English Law—Form of demand, *R—T*, 235, 236.

Motives of petitioner in asking for restitution are not material, *G, H*, 237.

Proof of marriage necessary before restitution can be decreed, *I*, 237.

Affidavit in support of the petition for, contents of—English Law and Practice, *T—W* 238

Provisions of the Code of Civil Procedure as to enforcement of decree for, *B—D*, 238, 239

Refusal to comply with decree of—Effect—English Law, *E—I*, 239.

What is compliance by husband with decree for, *J—L*, 239

Refusal to comply with decree for, by wife having separate estate—Effect, *M, N*, 239 240

Refusal to comply with decree for, by husband—Effect, *O*, 240

Decree for, contents of, *P*, 240

Form of decree for, *Q, R*, 240

Decree for restitution should not decree possession of the person of the wife to husband, *S—W*, 240, 241

Suit for, brought against a wife and certain persons said to be detaining her from her husband—Form of decree, *X*, 241

Provisions relating to suits for, among Hindus 241—249

Provisions of Muhammadan Law relating to suits for, 249—253

Provisions relating to suits for among Parsees, 253, 254

Provisions of Buddhist law relating to suits for, 254.

Answer to petition for, *S* 33, 254.

Right to begin in a suit for, *A*, 255.

Ground for a petition for, *T*, 255.

Object of petition for, *U, V*, 255.

Suit for, instituted pending suit by respondent for dissolution or nullity or judicial separation, *W—Z*, 255.

Answer to a petition for—What is good answer to a petition for restitution, 255—258; What is not good answer, 258—260

Separation deed containing a covenant not to sue for—Effect, *Z—A*, 260, 261.

Court cannot vary settlements after disobedience of order for, *V*, 327.

Decree for restitution, enforcement of, *V—A*, 338.

Effect of change of religion on the claim for, among Hindus—Act XXI of 1850, *G, H*, 432, 433.

Suits for, by a Mahomedan convert to Christianity, *K*, 440.

Suit for, among Parsis, *S*. 36, 522—527.

Decree for restitution among Parsis how enforceable, *T—Z*, 524—526.

Suits for restitution in several systems of law and the modes of enforcing decrees therein, *A—H*, 526, 527.

No suit to enforce marriage or contract arising out of marriage when husband under 16, or wife under 14 years—Parsi Marriage Act, *S*. 37, 527

*Restitution of conjugal rights*—(Concluded).

When convert deserted by his wife may sue for conjugal society—Act XXI of 1866, S. 4, **647**, When convert deserted by her husband may sue, S. 5, **647**, Court in which suit shall be brought, S. 6, **647, 648**

*Restraint on Anticipation*, Decree of separation removes, *G*, **219**

Application of S. 8 of Act III of 1874 to separate property of married woman subject to, **673—678**

*Resumption of co-habitation*, after decree for judicial separation—Effect, *I*, **228**.

*Retrospectivity of enactments*, Statutes, when retrospective, *L—Q*, **15**.

*Return*, Offer to—Effect of on desertion, **96—98**

Registration and, of marriages solemnized by Clergymen of Church of Rome, S. 30, **594**

Registration and, of marriages solemnized by Clergymen of Church of Scotland, S. 31, **595**

*Reversal*, Petition for, of decree of judicial separation, contents of, *A*, **228**

*Reversal of decree*, Petition for, of judicial separation, contents of, *A*, **228**

*Reversoner*, Suit by person born a Mahomedan claiming right as, in Hindu family, *D, E*, **444, 445**

*Review*, of order as to variation of settlements, *C, D*, **325**.

*Revision*, of order regarding variation of settlements, *E*, **325**

Court of, powers of, *L*, **380**

*Revival*, See **CONDONED OFFENCE**, **REVIVAL OF**.

See **REVIVAL OF CONDONED OFFENCE**

Condoned adultery and desertion of, *A*, **80**

Of condoned cruelty by subsequent cruelty, *B*, **80**.

Acts that would revive condoned offences, *C*, **80**.

Of former acts of cruelty by subsequent threats, *F*, **80**.

Of condoned cruelty by adultery and condoned adultery by subsequent cruelty, *Z*, **80**

Slight offence revives condoned offence, *M, N*, **117**.

Of condoned offence by subsequent offence, **117, 118**

Of condoned adultery, *O—U*, **117, 118**

Incestuous adultery condoned, of, *V*, **118**

Cruelty condoned, of, *W*, **118**.

Cruelty and adultery—of one by the other, *X*, **118**.

Condoned desertion, of, *Y*, **118**

Condoned bigamy, of, *Z*, **118**.

*Revival of condoned offence*, See **REVIVAL**.

*Revival of suit*, Dismissal of suit if either party under age required by Act, or parties co-habiting, or respondent willing to co-habit, S. 23, **653**, after such dismissal, S. 24, **653**

*Right of suit*, Separated wife deemed spinster for purposes of contract and suing, S. 25, **220, 221**.

No right of action for injury to property committed before date of protection order, *L*, **234**.

Suits on behalf of lunatics under Divorce Act, S. 48, **361**

Suits by minors under Divorce Act, S. 49, **362**.

Non-survival of, for divorce to executors or administrators, *E, F*, **179**.

Person objecting to registration of Sambandam may file a suit in a Civil Court, S. 9, **818**, Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S. 10, **819**.

*Right to begin*, in a suit for restitution of conjugal rights, *A*, **265**.

*Roman Catholic*, Marriage with deceased wife's sister—Christian of Indian domicile—Marriage valid, when, C, 200.

Part VI of Act XV of 1872 not to apply to,—Saving of certain marriages, S 65, 611.

*Roman Catholic marriages*, See 197

Dissolubility of, B, C, 24.

History of section 10, Divorce Act, with regard to, X, 56.

Saving of, from Act XXI of 1866, S 31, 656.

*Rites*, Power to make, under Divorce Act, S 62, 398.

Of procedure of Parsee Matrimonial Courts to be made by High Court, S. 51, 531

And orders under Act XV of 1865 (Parsee Marriage and Divorce) in force in Bombay, 533—536

And orders made under Act III of 1872 (Special Marriage)—General, 556, Bengal, 557, Bombay, 557—559, U P, 559, 560, Punjab, 560

Power to make, under Act XV of 1872, S. 83, 623.

Power to prescribe fees and for Native States under Act XV of 1872, S. 81, 623.

And orders made under Act XV of 1872 (Christian Marriage), Bengal, 630—633, Bombay, 634, 623 U P, 635—638, Punjab, 639, 640.

Made under the Kazis' Act, Bengal, 690—693, Bombay, 693, 694.

Act VI of 1886, 717—719.

And orders made under Act VI of 1890—General, 719—730, Bengal, 730—745, Bombay, 745—751, Punjab, 752, 753, Madras, 754, 755, U P., 756, 757.

Made under Act XIV of 1903, 766.

Under Bengal Act I of 1876 to be approved by Lieutenant Governor and published in Gazette, S. 19, 777.

Lieutenant-Governor may prescribe, under Bengal Act I of 1876, S. 24, 778.

Made under Bengal Act I of 1876, 781—792.

*Rules and principles*, Meaning of, H, I, 53.

*Rules and Regulations of the Divorce Court in England*, 856—878.

*Sambandam*, S. 2, 809.

Its nature and incidents, Z, A, 806.

how differs from tali-kattu-kalyanam, B, 806, 807

Ceremonies if essential in, C, 807.

how contracted, Pudumuri form, B, D, 807, 808.

Conditions subject to which a, may be registered as a marriage, S 3, 811, 812.

Notice of intention to register a, to be given to the Registrar, S. 5, 815.

Persons entitled to object to registration of a,—(Grounds on which objection may be taken—Procedure of Registrar if objection is taken—Procedure if no objection is taken, S 8, 817.

Person objecting to registration of, may file a suit in a Civil Court, S 9. 818—Registration to be delayed pending final disposal of suit, if certificate of institution is lodged with Registrar, S 10, 819.

Registration of,—Declaration to be signed before registration, S 11, 819.

*Sati*, The Bengal, Regulation, XVII of 1829, 831—833.

Declared illegal and punishable, S 2, 832.

Zamindars, etc., responsible for immediate communication to police of intended sacrifice—Penalty in case of neglect, S. 3, 832.



**Sati—(Concluded).**

- Police how to act on receiving intelligence of intended sacrifice, S. 3, **832, 833.**  
 Police how to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **833.**  
 Declared illegal and punishable, S. 2, **835.**  
 Zamindars, etc., responsible for immediate communication to police of intended sacrifice, S. 3, **835, 836.**  
 Madras Regulation I of 1830, **835—837.**  
 Penalty in case of neglect to communicate about, S. 3, **836.**  
 Police how to act on receiving intelligence of intended sacrifice—How to act when intelligence of sacrifice does not reach them until after it has taken place, S. 3, **836.**  
 Discretion of Judge to admit to bail, or not of persons charged under Sati Regulation, S. 4, **837.**  
 Magistrate how to proceed against parties concerned in, S. 4, **837.**  
 Court of Faujdari Adalat may pass sentence of death in certain cases under Sati Regulation, S. 5, **837.**
- Savna**, From separate estate of married woman, C, D, **666**  
 Bequest of, of alimony, J, **667**
- Saving clause**, how far guide in construing statute, U—G, **14**
- Scandal**, Delay to avoid public, is reasonable, S, **141**
- Seal**, Court, under Parsi Marriage Act, S, 20, **510.**  
 (Government to provide, and books under Bengal Act I of 1876, S, 5, **773**
- Searches**, in register-book and copies of entries, S. 63, **610**  
 and copies of entries—Act XV of 1872, S. 79, **621**  
 and copies of entries in register books S. 25, **712**  
 of lists prepared by Commissioners and grant of certified copies of entries, S. 35, **716**
- Fees for, and copies under Bengal Act I of 1876, S. 16, **776**
- Second appeal**, Custom against re-marriage of widow—Concurrent finding of lower Courts—Finding cannot be questioned in, W, **458**
- Second Marriage**, See RE-MARRIAGE.
- Effect of incontinency or, on right to dower, X, Y, **420**
- Second trial**, Applicant (wife) found guilty in first trial—Alimony in, I, Y, **277.**
- Secretary of State**, Certificates of certain marriages to be sent to, S. 81, **622.**
- Section**, S. 2, **496.**
- Secure**, Meaning of, Z, **297.**
- Security**, from husband for payment of permanent alimony, H, **308**
- Sessin**, shall not be necessary to give title to dower, S. 3, **421.**
- Select Committee**, Speeches in Council—Report of, it can be referred to in construing an Act, A, **15.**
- Senior Marriage Registrar**, Under Christian Marriage Act, S. 7, **580**
- Sentence**, Court of Faujdari Adalat may pass, of death in certain cases under Sati Regulation, S. 5, **837.**
- Separated wife**, deemed spinster with respect to after-acquired property, S. 24, **217, 218.**  
 deemed spinster for purposes of contract and suing, S. 25, **220, 221.**
- Separate estate**, Savings from, of married woman, C, D, **666.**
- Separate property**, Married women's earnings to be their, S. 4, **664.**  
 Application of S. 8 of Act III of 1874 to, of married woman subject to restraint upon anticipation, **673—678.**

*Separate property*—(Concluded). **4**

Succession to, of a married man dying intestate—Malabar Marriage Act, S 23, **826**.

Succession to, of a married woman dying intestate—Malabar Marriage Act, S. 24, **828**

*Separation*, Being common both parties, if desertion, *M*, **142**

*Separation deed*, See *H*, *I*, **311**. *G*, **331**. Deed of separation—Presumption of connivance, *L*, **109**.

Containing a covenant not to sue for restitution of conjugal rights—Effect, *Z*, *A*, **260, 261**.

Effect of, **260—262**.

What is, *B*, *C*, **261**.

Effect of covenants in, **261, 262**.

Deeds of separation, effect of, **310**.

Covenant in, to pay annuity, *A*, **310**

Deeds of separation—Agreement to live separate, if good defence in suit for restitution among Parsis—Principles of English law on the above subject applicable to Parsis, *N*—*S*, **523, 524**.

*Service*, Suit under Act XXI of 1866 to be commenced by verified petition, S 7, **648**,  
On, of petition, citation to respondent, S 8, **648** Form of citation, S 9, **648**,  
of citation, S. 10, **648**.

Of notices under Malabar Marriage Act, S 25, **829**

*Service of petition*, Under Divorce Act, S 50, **366, 367**.

*Settlement*, See VARIATION OF SETTLEMENTS

See **311-337**.

Covenant in marriage, Effect of, *F*, **219**

Varying marriage, *Z*, **310**

Power to order, of wife's property for benefit of husband and children, S 39, **311 312**

History of English as to variation of *D*—*F*, **315**

Who can apply for an order of variation of—Petitioner—Respondent to suit for dissolution—Respondent to nullity suit—Guilty party also may ask for variation—Guardian of petitioner's children—Petitioner's executor—Persons entitled to a benefit in remainder—Settlor—Guilty wife—Guilty husband—Trustee, when heard, *J*—*D*, **316, 317**

General principles as to variation of,—Examples of the same, *H*—*Y*, **318, 319**.  
what is, *A*—*I*, *B*, **328**.

Post-nuptial, what is, *B*—*D*, **328**.

of wife's property for benefit of children under Parsi Marriage Act, S 45, **530**.

*Settlement of damages*, S 39, **312**.

Practice as to, *H*, **313**

*Shall*, Meaning of, *Y*—*F*, **11, 12**

*Signature*, Entry of birth or death to be signed by person giving notice, S 22, **710, 711**.

*Signature*, Entries under Bengal Act I of 1876 by whom to be signed, S. 11, **774, 775**.

*Sister*, suit for nullity of marriage—First wife being the uterine half, of second wife—Domicile, *V*, **197**.

Marriage between two brothers and two, not void, *U*, **200**

*Sodomy*, Dissolution of marriage, *E*—*K*, **66**.

Proof of, *H*, *I*, **66**.

*Solemnization of marriage*, Irregularities in, effect of, on marriage, *J*, **183**.

Irregularities which have been held not to invalidate the marriage, **184, 185**.

*Solemnization of Marriage*—(Continued).

English clergyman not compelled to solemnize marriages of persons divorced for adultery, S. 54, **395**.

Penalty for solemnizing marriage contrary to section 4 of Parsi Marriage Act, S. 9, **506**.

Marriage how to be solemnized under Special Marriage Act—Place where marriage may be solemnized, Ss. 11, 12, **550**

Marriages under Christian Marriage Act to be solemnized according to Act, S. 4, **571**.

Persons by whom marriages may be solemnized under Christian Marriage Act, S. 5, **571**

The persons by whom marriages may be solemnized under the Christian Marriage Act, **571—581**

English Law regarding, **572—579**.

Requisites for a valid marriage when solemnized in England, N. C., **574, 575** must be in an established Church or public chapel or other registered building, unless by special license, I., **576**.

Modes in which marriages may be solemnized in England, I., **576**

Grant and revocation of licenses to solemnize marriages under Christian Marriage Act, S. 6, **579**.

Solemnizing marriage without due authority—Penalty, S. 68, **613**

under Hindoos between a Native Christian and a Hindu by a person not authorised to perform marriages under S. 5 of Act XV of 1872, N., **616**

Solemnizing marriage out of proper time, or without witnesses—Penalty, S. 69, **617**.

Solemnizing, without notice or within fourteen days after notice, marriage with minor—Penalty, S. 70, **617**.

Issuing certificate, or marrying, without publication of notice—Penalty, S. 71, **617**

Marrying after expiry of notice—Penalty, S. 71, **617**.

Solemnizing marriage with minor within fourteen days without authority of Court, or without sending copy of notice—Penalty, S. 71, **618**.

Persons authorized to solemnize marriage other than Clergy of Churches of England, Scotland, or Rome)—Issuing certificate, or marrying, without publishing notice, or after expiry of certificate—Issuing certificate for, or solemnizing marriage with minor within fourteen days after notice—Issuing certificate authorizedly forbidden—Solemnizing marriage authorizedly forbidden—Penalty, S. 73, **618, 619**.

Penalty for solemnizing irregular marriages—Act II of 1892, S. 6, **644**

Notice of marriage intended to be solemnized under 55 & 56 Vict., c. 23, S. 2, **765, 766**.

Time and place at which marriages may be solemnized, **581—583**

Marriages solemnized by Ministers of Religion licensed under Act XV of 1872, **583—593**.

S. 25, **592**.

Certificate void if marriage not solemnized within two months, S. 26, **593**.

Registration of marriages solemnized by ministers of religion, **593—597**

Registration of marriages solemnized by Clergymen of Church of England, S. 28, **594**, Quarterly returns to Archdeaconry—Contents of returns, S. 29, **594**.

Registration and returns of marriages solemnized by Clergymen of Church of Rome, S. 30, **594**.

*Solemnization of marriage—(Concluded).*

- Registration and returns of marriages solemnized by Clergymen of Church of Scotland, S. 31, **595**.
- Marriages solemnized by, or in the presence of, a Marriage-Registrar, **597—605**.
- After issue of certificate, S. 51, **604**.
- Saving under Act VII of 1909 of marriages solemnized according to other ceremonies, S. 4, **768**.
- Solemnize*, Meaning of, O—Q, **616**.
- Solicitor*, Order to pay alimony to, B—D, **311**.
- Special Courts*, Constitution of, under Parsi Marriage Act, S. 15, **508**.
- Specialty debts*, Priority to partial estates, charges and, S. 5, **422**.
- Special license*, Where granted—English Law, C, **577**.
- Special Marriage*, The, Act III of 1872, **537 560**.
- Conditions upon which marriages under, Act may be celebrated, S. 2, **546**.
- Specific performance*, of contract of betrothal, it can be granted, F, **459, 460**.
- Speech in Council*, Report of Select Committee, if can be referred to in construing an Act, A, **14**.
- Spinster*, Separated wife deemed, with respect to after acquired property, S. 24, **217, 218**.
- Separated wife deemed, for purposes of contract and suing, S. 25, **220, 221**.
- Sputting*, in the face, if cruelty, J, **74**.
- Stamp*, on petition under Divorce Act—Petition to state absence of collusion or connivance—Statements to be verified, S. 47, **360**.
- No, on affidavit, S, **372**.
- Statement*, Forms of petitions and, S. 46, **360**.
- Statement of Objects and Reasons*, how far guide to the intention of Legislature, U—Y, **13**.
- Statute* case to High Court, No appeal under Act XXI of 1866, but Judge may state case raising question whether conversion has dissolved marriage, S. 29, **655** ; Case to state necessary facts and documents, and suit to be stayed, S. 30, **655** ; Case to be decided by three Judges, S. 31, **655**.
- Statute*, Law relating to India concerning the subject of marriage and divorce, **839—853**.
- St. 3 d 4 Will. IV, C. 105*, Dower in England previously to the passing of the Dower Act, W, **415—417**.
- Dower under the Dower Act, Jointure, X, **417**.
- Provision of the Dower Act, Y—F, **418**.
- Right of dower how defeated under the Dower Act, M—Q, **419**.
- Effect of the Dower Act, W, **420**.
- St. 1, Geo. 4, c. 101 (Divorce Bills Evidence Act 1820)*, **839, 840**.
- St. 31 d 32 Vict., c. 61 (Consular Marriage Act, 1868)*, **841**.
- St. 33 d 34 Vict., c. 14 (Naturalization Act, 1870)*, **842**.
- St. 42 d 43 Vict., c. 8 (Registration of Births, Deaths and Marriages Army Act, 1879)*, **843, 844**.
- St. 55 d 56 Vict., c. 23 (Foreign Marriage Act, 1892)*, S. 2—Notice of marriage intended to be solemnized under, **765, 766**.
- See also, **845—852**.
- St. 57 d 58 Vict., c. 60 (Merchant Shipping Act, 1894)*, **853**.
- Statute, construction of*, See **3—16**.
- Court bound by the express provisions of the enactment, F—U, **3**.
- Construction of statutes—Effect to be given to every word, if possible, U—X, **3, 4**.

*Statute, construction of*—(Concluded).

Plain meaning of words used must guide the Court, *Y-D*, 4.

Where an enactment has no express provisions, Court to act according to justice, equity and good conscience, *H*, 5

Interpretation of doubtful language, *I-K*, 5.

Construction of statutes—Inaccuracy in Act, *L*, 5

Preamble how far guide in construction of statutes, *M-X*, 5, 6.

Recitals in Act or preamble, how far guide in construction, *Y*, 6.

Marginal notes—How far guide in construction, *Z-D*, 6, 7

Punctuation, if guide in construction, *E, F*, 7.

Headings, if guide in construction, *G, H*, 7

Illustrations, how far guide in construction of statutes, *I-U*, 7, 8

English authorities, value of, in interpreting Indian Acts, *V-X*, 8.

American authorities, value of, *Y-B*, 8, 9.

Divergence between several High Courts—Course to be adopted by subordinate Courts, *C, D*, 9.

Meaning of words—Construction of words defined by the Legislature, *E-O*, 9, 10.

Undefined words, construction of, *P-T*, 10

Judicially interpreted words occurring in enactments, construction of, *U*, 10.

"Or"—"And"—Meaning, *V-X*, 10, 11

"May"—"Shall"—Meaning, *Y-F*, 11, 12

Pre-existing state of the law, how far guide in construction, *G-K*, 12

Acts in *pari materia*, how far guide in construction, *L*, 12.

History of legislation on the subject how far guide in construction, *M, N*, 12

Statement of Objects and Reasons how far guide to the intention of Legislature, *U-Y*, 13.

Speeches in Council, Report of Select Committee, if can be referred to in construing an Act, *A*, 14.

Forms in which Bill came before Council, *B*, 14.

Reasons for enacting law—Motives of parties, *C*, 14.

Saving clause, how far guide in construing statute *D-G*, 14

Proceedings in Council, if can be referred to in construing an Act, *Z*, 14.

Privisos—Their effect on the section, *H-K*, 14, 15.

Statutes, when retrospective, *L-Q*, 15.

General later law, effect of, on earlier special one, *R-U*, 15.

Repeal of a statute repealing another statute, *V*, 16.

Repeal by implication, *W*, 16.

Repeal, effect of, on right of action, *X, Y*, 16.

Case where "and" is to be read as "or," *B*, 152.

Statutes relating to marriage construction of, *W, X*, 161, 162.

Construction of Parsi Marriage Act—English Law how far helpful, *G-L*, 494, 495.

Statutes relating to—How interpreted, *L, M*, 568.

*Stay of proceedings*, practice as to, *G*, 32.

Insanity of respondent, if ground for staying proceedings, *N-P*, 58, 59.

*Substituted service*, Service of demand—Practice of English Courts, *K-P*, 237.  
in matters under the Divorce Act, 369, 370.

*Succession*, Death of either party while protection order or judicial separation order is in force—Effects on rights of succession of the other party, *M-Q*, 220.

Loss of caste—Under Oudh Estates Act I of 1869, *N*, 441.

Widow's, principle of—Effect of her re-marriage, *Q*, 461, 462.

Act of re-married widow to succeed to son by former husband, *F*, 474.



*Statute, construction of*—(Concluded).

- Plain meaning of words used must guide the Court, *Y-D*, 4.
- Where an enactment has no express provisions, Court to act according to justice, equity and good conscience, *H*, 5
- Interpretation of doubtful language, *I-K*, 5.
- Construction of statutes—Inaccuracy in Act, *L*, 5.
- Preamble how far guide in construction of statutes, *M-X*, 5, 6.
- Recitals in Act or preamble, how far guide in construction, *Y*, 6
- Marginal notes—How far guide in construction, *Z-D*, 6, 7
- Punctuation, if guide in construction, *E, F*, 7.
- Headings, if guide in construction, *G, H*, 7
- Illustrations, how far guide in construction of statutes, *I-U*, 7, 8
- English authorities, value of, in interpreting Indian Acts, *V-X*, 8
- American authorities, value of, *Y-B*, 8, 9.
- Divergence between several High Courts—Course to be adopted by subordinate Courts, *C, D*, 9.
- Meaning of words—Construction of words defined by the Legislature, *E-O*, 9, 10.
- Undefined words, construction of, *P-T*, 10
- Judicially interpreted words occurring in enactments, construction of, *U*, 10.
- "Or"—"And"—Meaning, *V-X*, 10, 11
- "May"—"Shall"—Meaning, *Y-F*, 11, 12
- Pre-existing state of the law, how far guide in construction, *G-K*, 12
- Acts *in pari materia*, how far guide in construction, *L*, 12.
- History of legislation on the subject how far guide in construction, *M, N*, 12
- Statement of Objects and Reasons how far guide to the intention of Legislature, *U-Y*, 13.
- Speeches in Council, Report of Select Committee, if can be referred to in construing an Act, *A*, 14.
- Forms in which Bill came before Council, *B*, 14.
- Reasons for enacting law—Motives of parties, *C*, 14.
- Saving clause, how far guide in construing statute *D-G*, 14.
- Proceedings in Council, if can be referred to in construing an Act, *Z*, 14.
- Privisos—Their effect on the section, *H-K*, 14, 15.
- Statutes, when retrospective, *L-Q*, 15.
- General later law, effect of, on earlier special one, *R-U*, 15.
- Repeal of a statute repealing another statute, *V*, 16.
- Repeal by implication, *W*, 16.
- Repeal, effect of, on right of action, *X, Y*, 16.
- Case where "and" is to be read as "or," *B*, 152.
- Statutes relating to marriage construction of, *W, X*, 161, 162.
- Construction of Parsi Marriage Act—English Law how far helpful, *G-L*, 494, 495.
- Statutes relating to—How interpreted, *L, M*, 568.
- Stay of proceedings*, practice as to, *G*, 32.
- Insanity of respondent, if ground for staying proceedings, *N-P*, 58, 59.
- Substituted service*, Service of demand—Practice of English Courts, *K-P*, 237.
- in matters under the Divorce Act, 369, 370.
- Succession*, Death of either party while protection order or judicial separation order is in force—Effects on rights of succession of the other party, *M-Q*, 220.
- Loss of caste—Under Oudh Estates Act I of 1869, *N*, 441.
- Widow's, principle of—Effect of her re-marriage, *Q*, 461, 462.
- Act of re-married widow to succeed to son by former husband, *F*, 474.





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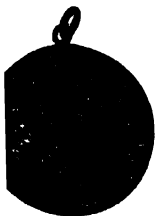
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